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"Dead Man's Statute and Other ~~Shape~~ Burden Shifters in Undue Influence and Breach of Fiduciary Duty Cases"

Ron Feinman, Esq.
Law Offices of Ron Feinman
801 Main Street, Suite 702
Lynchburg, VA 24504-1519
434-528-0696
rfeinman@oneworld.ws

Dead Man's Statue and Other Burden Shifters in Undue Influence Cases

Dead Man's Statute

A. The "Dead Man's Statute" (Va. Code Ann. § 8.01-397) applies whenever there is an action by or against a deceased person or other person incapable of testifying. Pursuant to the statute:
   a) Corroboration of the testimony in an ***adverse*** or ***interested*** party is required before a judgment can be rendered in favor of such party; and
   b) Any writing or declarations of the party incapable of testifying are admissible. (This is an exception to the hearsay rule)

B. Full Text:

"In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint."

C. Purpose of Law:
   - To prevent fraud (i.e. interested parties making things up about decedent that they never did or said); Timberlake's Adm'r v. Pugh, 1932, 158 Va. 397.

D. Admissible evidence of the deceased:
   - "All entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings…" (Va. Code Ann. § 8.01-397)

E. A few rules define the scope of admissibility of the testimony of interested parties:
   Note: very low burden

   1) Testimonial statements by an interested party will only be admissible if there is some independent evidence to corroborate it. Cooper v. Cooper, 1995, 249 Va. 516.

2) Corroboration need not independently establish fact but must itself tend in some degree to support an issue essential to the case which, if unsupported, would be fatal. Cooper v. Cooper, 1995, 249 Va. 511.
3) Corroboration may be established by circumstantial evidence; Cooper v. Cooper, 1995, 249 Va. 511. *See also* Vaughn v. Shank, 1994, 248 Va. 224.
4) Corroborating evidence necessary to fulfill mandate of dead man statute merely tends to confirm and strengthen testimony of witness, tends to show probability of its truth. Hereford v. Paytes, 1984, 226 Va. 604.
5) Confirmation is not necessary, for that removes all doubt, while corroboration only gives more strength than was had before. Timberlake's Adm'r v. Pugh, 1932, 158 Va. 397
6) Evidence need not corroborate testimony on all material points. Hereford v. Paytes, 1984, 226 Va. 604.
7) A higher degree of corroboration may be required in case involving parties between whom confidential relationship existed at time of transaction relied on. Vaughn v. Shank, 1994, 248 Va. 224.
8) There is no hard rule for establishing the sufficiency of corroborating evidence; each case must be decided on its own peculiar facts and circumstances. Timberlake's Adm'r v. Pugh, 1932, 158 Va. 397
9) In quantity, corroborative evidence must be more than a scintilla, but when it is, the issue is usually for the jury. Timberlake's Adm'r v. Pugh, 1932, 158 Va. 397

F. Examples of Corroborating Evidence under Dead Man's Statute:

1) Corroboration required under dead man's statute to admit widow's testimony, relating statements by deceased husband that business venture would be treated as joint tenancy with right of survivorship even though titled in his separate name, was established by bank documents showing that joint account was used for initial investment in business, for loan to corporation, and to deposit proceeds from venture. Cooper v. Cooper, 1995, 249 Va. 511.
2) Testimony of surviving driver in personal injury action resulting from head-on collision in which driver and passenger of other vehicle were killed was not sufficiently corroborated by evidence not dependent upon credibility of survivor to meet requirements of dead man statute, where survivor's explanation received no support from evidence of surrounding circumstances, or from any other source, and where it presented allegation which fact finder had to believe if survivor was to prevail. Hereford v. Paytes, 1984, 226 Va. 604.
3) Claimant did not produce sufficient corroboration of her claim that testatrix agreed orally to transfer real property to claimant in exchange for her services; claimant's daughter's testimony that testatrix said she would "give us [the] house," and testimony by tenant, who rented house, that testatrix stated that she purchased house for claimant and her daughter, did not show that testatrix and claimant entered into agreement that house would be transferred in consideration for services, and there was no evidence that testatrix planned or attempted to have deed drawn. Vaughn v. Shank, 1994, 248 Va. 224.
4) Mere fact that woman, alleging contract by intestate to will property to her in return for services, went to live with and served him, was insufficient to support her claim. Timberlake's Adm'r v. Pugh, 1932, 158 Va. 397

G. No hard rule applies to the standard for corroboration; it must be determined on a case-by-case basis.

Shifting of Burden for Undue Influence - Presumption Against Agents

When a fiduciary relationship is established and a benefit conferred, the burden of proof is shifted to the agent to rebut the presumption of undue influence.

A. Ordinarily, the Claimant's burden of proof in undue influence matters must be satisfied by "clear and convincing" evidence.

- The "Joint Accounts" statute is one application of this rule:
  - VA Code § 6.2-608. Right of survivorship.
  - "A. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

- Parties to joint accounts occupy the relation of principal and agent as to each other.
  - VA Code § 6.2-619. Certain duties of parties to joint accounts in financial institutions
  - "A. Parties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to his ownership interest in the joint account and as agent in regard to the ownership interest of the other party. The provisions of the Uniform Power of Attorney Act (§ 64.2-1600 et seq.) shall apply to such principal/agent relationships."

- Duties of Agents Under the Uniform Power of Attorney
  - § 64.2-1612. Agent's duties
  - Full Text:

  A. Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
  1. Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
  2. Act in good faith; and
  3. Act only within the scope of authority granted in the power of attorney.
  B. Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
  1. Act loyally for the principal's benefit;
  2. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
  3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
  4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

5. Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest; and
6. 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:
a. The value and nature of the principal's property;
b. The principal's foreseeable obligations and need for maintenance;
c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
d. Eligibility for a benefit, a program, or assistance under a statute or regulation.
C. An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.
D. An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.
E. If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.
F. Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
G. An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person; however, nothing herein is intended to abrogate any duty of the agent under the Uniform Prudent Investor Act (§ 64.2-780 et seq.).
H. Except as otherwise provided in the power of attorney, an agent shall disclose receipts, disbursements, or transactions conducted on behalf of the principal if requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.
I. Except as otherwise provided in the power of attorney, an agent shall, on reasonable request made by a person listed in subdivisions A 3 through A 9 of § 64.2-1614 who has a good faith belief that the principal suffers an incapacity or, if deceased, suffered incapacity at the time the agent acted, disclose to such person the extent to which he has chosen to act and the actions taken on behalf of the principal within the five years prior to either (i) the date of the request or (ii) the date of the death of the principal, if the principal is deceased at the time such request is made, and shall permit reasonable inspection of records pertaining to such actions by such person. In all cases where the principal is deceased at the time such request is made, such request shall be made within one year after the date of the death of the principal. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

- Uniform Power of Attorney Act applies principles of equity

- § 64.2-1619. Principles of law and equity
- Text: “Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.”

B. When a confidential relationship exists between the grantor and proponent of the instrument, a presumption of undue influence will arise when the fiduciary receives a personal benefit, and the burden *shifts* to the Defendant to *rebut* this presumption by clear and convincing evidence.

1. Ayers v. Shaffer, 122043, 2013 WL 4853311 (Va. Sept. 12, 2013)

- Creation of joint bank accounts with rights of survivorship entirely with testator's funds created confidential relationship as matter of law which gave rise to presumption of undue influence that joint account holders were required to rebut, in action brought by testator's legatees against joint account holders. VA Code § 6.2–619(A).
- When a joint account in a financial institution is established entirely with the assets of one party, it need not be alleged or proven that the other party procured the creation of the joint account by undue influence; rather, the existence of the account itself imposes a fiduciary duty on the other party and with regard to a subsequent transaction creates the presumption of undue influence which shifts to the other party the burden of proving the bona fides of the transaction. VA Code § 6.2–619(A).
- “It is not necessary that the transaction be accomplished directly as a result of the fiduciary relationship, but rather, it is the fact that “a confidential relationship existed between the parties at the time of the transaction” that gives rise to the presumption and the shifting of the burden of going forward with the evidence.”

2. Estate of Parfitt v. Parfitt, 277 Va. 339 (2009)

- [W]here one person stands in a relationship of special confidence towards another, so as to acquire an habitual influence over him, he cannot accept from such person a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained.
- “[T]he presumption of undue influence arises and the burden of going forward with the evidence shifts when weakness of mind *and* grossly inadequate consideration or suspicious circumstances are shown or when a confidential relationship is established.” *Friendly Ice Cream Corp.* 268 Va. at 33, 597 S.E.2d at 39 (emphases in original). This presumption will satisfy the plaintiff's burden of proving undue influence unless it is rebutted. The defendant therefore has the burden of producing evidence sufficient to rebut the presumption. These principles apply to gratuitous transfers as well as contracts.”

3. Grubb v. Grubb, 272 Va. 45 (2006)

- Joint account holder's statutory right of survivorship to sums remaining on deposit on the death of another joint account holder was inapplicable because presumption of fraud attached to account holder's actions as joint holder's fiduciary before joint holder's death.

4. Economopoulos v. Kolaitis, 259 Va. 812 (2000)

- "…whether the trial court erred in finding the existence of a confidential relationship between Andrew and Michael. The existence of such a relationship would give rise to a presumption of fraud and shift to Andrew the burden to prove the *bona fides* of the transactions at issue."

5. Higgins v. Bowdoin, 238 Va. 134 (1989)

- Estate executor had burden of proving by clear and convincing evidence that deceased did not intend that joint money market account have survivorship feature, without reference to account card indicating such feature. Code 1950, § 6.1-125.5, subd. A. (now § 6.2-608)

6. Nicholson v. Shockey, 192 Va. 277-78 (1951)

- "But the presumption of fraud or undue influence which casts the burden of proving the *bona fides* of the transaction upon the appellee, Harry A. Shockey, is not dependent upon the existence of the relation of attorney and client between him and his mother. The rule is not limited to attorneys at law. It springs from any fiduciary relationship, and when such relationship is found to exist, any transaction to the benefit of the dominant party and to the detriment of the other is presumptively fraudulent. The same high standard of good faith and loyalty is required of an agent to his principal as of an attorney to his client."

FULL CASES
Listed In Order of Appearance

158 Va. 397

*Supreme Court of Appeals of **Virginia***

DAVID EDWARD **TIMBERLAKE'S** ADMINISTRATOR

v.

KATE R. **PUGH**.

March 24, **1932**.

Action by Kate R. **Pugh** against David Edward **Timberlake's** administrator. Judgment for plaintiff, and defendant brings error.

Affirmed.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

1. WILLS - *Promise to Make a Will - Evidence Sufficient to Establish a Promise - Case at Bar.* - The instant case was an action against an administrator upon an alleged promise of the decedent to will his property to plaintiff. Plaintiff's testimony amply established the contract, but of course to sustain a recovery her evidence must be corroborated.

2. WITNESSES - *Transactions with Deceased Persons - Corroboration on Every Point.* - It is not necessary that an alleged promise by a decedent to plaintiff to will her his property should be corroborated on every point.

3. WITNESSES - *Transactions with Deceased Persons - Corroboration - Questions of Law and Fact - Case at Bar.* - In the instant case plaintiff was attempting to establish a promise to her by defendant's decedent to will her his property. There was some conflict between plaintiff's testimony in corroboration of the promise to her by the decedent and the evidence given by decedent's relatives.

Held: That a verdict of the jury in favor of plaintiff settled this conflict in favor of plaintiff.

4. WITNESSES - *Transactions with Deceased Persons - Corroboration.* - On the general subject of corroboration it may be said that when evidence introduced is of probative value, its sufficiency should be submitted to the jury. If it has none, it should be stricken out. If the testimony is relevant it must remain.

5. WITNESSES - *Transactions with Deceased Persons - Corroboration - Promise to Make a Will in Favor of Plaintiff - Case at Bar.* - In the instant case plaintiff was seeking to establish a promise to her by defendant's decedent to will her his property. Plaintiff had been living with decedent for about four years and left him for reasons satisfactory to herself, but in a short time returned and lived with him until he died. It is not unreasonable to assume that plaintiff's return was due to some added inducement. In this period she paid one year's taxes. Decedent approached two gentlemen and asked them to draw a will conveying this property to plaintiff. One of these gentlemen a justice of the peace, advised decedent that it would be wiser to have some lawyer do this work. Decedent went to

see a lawyer and made substantially the same request, but was put off, and died before the work was done.

Held: That this evidence was of some weight in confirmation of the alleged promise by decedent to plaintiff.

6. WITNESSES - *Corroboration - Transaction with Deceased Persons - Sufficiency of Corroborative Evidence.* - In determining the sufficiency of corroborative evidence it is not possible to formulate any hard and fast rule, but each case must be left to be decided on its own peculiar facts and circumstances.

7. WITNESSES - *Transactions with Deceased Persons - Corroboration - Confirmation Distinguished from Corroboration.* - Confirmation of a witness' testimony as to a transaction with a deceased person is not necessary, for confirmation removes all doubt, while corrobation only gives more strength.

8. WITNESSES - *Transactions with Deceased Persons - Corroboration - Circumstances as Corroboration.* - Circumstances alone are sometimes sufficient corroboration of the testimony of a witness as to a transaction with a deceased person.

9. WITNESSES - *Transactions with Deceased Persons - Corroborative Evidence Need not of Itself be Sufficient to Support a Verdict.* - It is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, for then there would be no need for the testimony sought to be corroborated.

10. WITNESSES - *Transactions with Deceased Persons - Corroboration - Definition of Corroborative Evidence.* - Corroborative evidence is such evidence as tends in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must, of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports, and such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or the point in issue.

11. WITNESSES - *Corroboration - Quantity of Corroborative Evidence - Questions of Law and Fact.* - In quantity the corroborative evidence must be more than a scintilla, but when it is, the issue is usually for the jury.

12. WITNESSES - *Transactions with Deceased Persons - Object of Statute.* - The statute, section 6209 of the Code of 1919, requiring the corroboration of a witness as to a transaction with a deceased person is a wise one, and is designed to prevent fraud, and for that reason may not be whittled away.

13. WILLS - *Promise to Make a Wll - Corroboration of Promisee.* - The mere fact that plaintiff went to live with decedent and served him will not, of itself, support her claim of a promise by decedent to make a will in her favor.

14. WILLS - *Promise to Make a Will - Instructions - Case at Bar.* - In the instant case, an action by plaintiff against an administrator on an alleged promise of the decedent to make a will in plaintiff's favor, the court instructed the jury to find for plaintiff if the decedent agreed with plaintiff that if she would serve him he would leave her his property at his death, and she did serve him. It was objected to this instruction that it did not refer to section 6209 of the Code of 1919 as to the necessary corroboration of plaintiff's testimony.

Held: That the instruction was not erroneous, as section 6209 of the Code of 1919 deals with evidence necessary to establish a contract and not with the contract itself, and the court in another instruction told the jury that plaintiff's testimony must be corroborated.

15. INSTRUCTIONS - *Repetition.* - It is not error to refuse an instruction not objectionable in itself, but which deals with matters already covered by another instruction.

Opinion

HOLT, J., delivered the opinion of the court.

This is an action for damages suffered through a broken contract, in which the plaintiff has recovered a verdict and judgment.

David Edward **Timberlake** was an old bachelor who lived in Norfolk county, and who was worth about $700.00. His estate consisted, in the main, of a house and lot. In 1925, being in poor health, he took to live with him Mrs. Kate R. **Pugh**, plaintiff in the court below, and her four *400 children. Mr. **Timberlake** was to give her and her children a home, in return for which she was to cook, wash for him, wait on him, look after his fowls and help him with a small garden. Under this agreement she moved into his home in 1925, and continued there until February, 1929, when, due to some disagreement, she left. On March 10, 1929, she returned to his home. As an inducement, **Timberlake** promised that if she would serve him as she had theretofore done, he would will her his house and lot. Pursuant thereto she did return, and continued to serve him until his death in August, 1929. **Timberlake** left no will, hence this motion.

1 The facts are not in dispute. It is certain that she went to live with him in 1925, left him in 1929, shortly thereafter returned, and continued to live there until his death, serving him faithfully. From her evidence these are the conditions under which she came back:

'**Timberlake** promised that if she would return to his home and serve him in her former capacity during the remainder of his life, he would will her his property, consisting of the house and lot in which the parties were to live, and that she should have the same at his death; that pursuant to said promise she did return on March 10, 1929, and continued in her former capacity until his death, about four months thereafter. The witness further testified that after her return to **Timberlake's** home he suffered from frequent attacks of asthma, and could do but very little work, and she cooked the meals, cleaned the house, tended the garden, served the deceased in his last illness, and paid one or two small grocery accounts, the cost of necessary medicine and one year's taxes out of monies which she earned from the sale of poultry raised on the place, and by certain housecleaning work performed by her in the community.' This evidence, narrative in form, amply establishes the contract, but to sustain a recovery it must be corroborated. Code, section 6209.

*401 2 Two facts, which are of some weight, immediately present themselves. Mrs. **Pugh** lived with Mr. **Timberlake** for about four years and left him for reasons satisfactory to herself, but in a short time returned. It is not unreasonable to assume that this was due to some added inducement. She did return and lived with him until he died the following August. In this period she paid one year's taxes. This she would probably not have done unless she believed that she had an interest in the real estate. It is true that she has here not been corroborated, but it is not necessary that she be corroborated on every point. *Burton's Ex'r v. Manson,* 142 **Va**. 500, 129 S.E. 356, 359; *Ratliff v. Jewell,* 153 **Va**. 315, 149 S.E. 409, 67 A.L.R. 1541.

R. A. Cordell was a neighbor and justice of the peace. He testified that 'some months prior to his death, the exact date of which the witness could not recall, **Timberlake** called at his office and stated that he would like to have a will drawn leaving all of his property to Mrs. **Pugh**; that he

advised deceased that he was not in a position to draw wills and suggested that an attorney be consulted.‘

W. H. Starkey, a Norfolk lawyer, said that in June, 1929, ‘**Timberlake** called upon him and stated that he would like to have a paper drawn conveying his property to Mrs. **Pugh**. That **Timberlake** was not very clear **404 as to whether he wished a will prepared or a deed drawn; that nothing was said about any obligation to convey or devise the property to Mrs. **Pugh**; that witness was under the impression that deceased was to see him further about the matter and had expected to prepare the document, and upon hearing of the death of deceased he felt badly about the matter. Witness further testified that the plaintiff, Mrs. **Pugh**, so far as he knew, served the deceased as housekeeper and cook, and attended him in his last illness.‘

S. S. Spires heard **Timberlake** say that he did not want his relatives to have any of his property. Decedent left a *402 brother and a nephew, Arthur Dowdy, son of a deceased sister. Their testimony is that they were on friendly terms with him, but their relationship did not seem to be particularly intimate. Mrs. Dowdy, wife of the nephew, said that decedent told her shortly before his death that he arranged to get a new housekeeper because he could not bear to have the **Pugh** children in the house any longer.

This conflict has been settled by the jury's verdict.

3 On the general subject of corroboration it may be said that when evidence introduced is of probative value, its sufficiency should be submitted to the jury. If it has none, it should be stricken out. *Riddleberger v. Commonwealth,* 124 **Va**. 783, 97 S.E. 310; *Varner v. White,* 149 **Va**. 177, 140 S.E. 128. If the testimony is relevant, it must remain.

Decedent approached two gentlemen, one of them a justice of the peace and neighbor, the other a Norfolk lawyer, and asked each of them to draw a will conveying his property to Mrs. **Pugh**. The justice of the peace advised him that it would be wiser to have some lawyer do this work. Acting on this advice, he went to see a lawyer, made of him substantially the same request, but was put off, and died before the work was done.

456 When we come to consider the sufficiency of such evidence, it is not possible to formulate any hard and fast rule, but must ‘leave each case to be decided on its own peculiar facts and circumstances.‘ *Burton's Ex'r v. Manson, supra. Davies v. Silvey,* 148 **Va**. 132, 138 S.E. 513; *Ratliff v. Jewell, supra.* Confirmation is not necessary for that removes all doubt, while corroboration only gives more strength than was had before. Crabb's English Synonyms. Circumstances alone are sometimes sufficient. *Rogers v. Rogers,* 89 N.J.Eq. 1, 104 Atl. 32.

‘7 Clearly, it is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, *403 for then there would be no need for the testimony sought to be corroborated.‘ *Burton's Ex'r v. Manson, supra. Davies v. Silvey, supra.*

‘8910 Corroborative evidence is such evidence as tends in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must, of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports, and such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or the point in issue. ‘ *Gildersleeve v. Atkinson,* 6 N.M. 250, 27 Pac. 477, 480, cited with approval in *Buton's Ex'r v. Manson, supra.*

1112 In quantity this corroborative evidence must be more than a scintilla, but when it is, the issue is usually for the jury. The statute, however, is a wise one, and is designed to prevent fraud, and for

that reason should not be whittled away. After all, as we have seen, each case must turn upon its own peculiar facts and circumstances.

13 The mere fact that Mrs. **Pugh** went to live with Mr. **Timberlake** and served him will not, of itself, support her claim. *Frizzell v. Frizzell,* 149 **Va**. 815, 141 S.E. 868; *Doughty v. Thornton,* 151 **Va**. 785, 145 S.E. 249. Her services may have been paid for as they were rendered, but it is a circumstance which, taken in connection with other evidence, may be of value. She had no other claim upon him, and his purpose, twice clearly made manifest, to will her his land would indicate that he was moved by some consideration, and fortifies and strengthens her evidence as to what that consideration was. The statements of Cordell and of Starkey in no wise emanate from her. Of course, *404 it may be said that he wanted to give her his property merely because of some transient whim, but such a conclusion would be guess-work, and would fit in with nothing. Her explanation is reasonable, and his conduct corroborates her statement.

14 The court in its instructions told the jury: 'If you believe from the evidence that David E. **Timberlake** agreed with plaintiff that if she would serve him he would leave her his property at his death, and pursuant to this agreement she did serve him, the jury should find for the plaintiff for the fair value of the property he promised to leave.'

Objection was made to this in that it did not refer to the corroboration made necessary by Code, section 6209. That section deals with evidence necessary to establish the contract and not with the contract itself. If it was made, plaintiff is entitled to recover. Proof of its execution is dealt with elsewhere.

405 15 In instruction 3, the court said: 'The court instructs the jury that the testimony of Kate R. **Pugh, as to any agreement or contract made by David Edward **Timberlake** upon which a recovery is sought herein, must be corroborated by other evidence from a disinterested party, before any recovery can be had hereon in this case; the court further instructs the jury that any statements made by the said David Edward **Timberlake** in his lifetime, as well as his actions, are to be received and considered by the jury in determining whether or not such a contract or agreement in fact existed.'

This instruction tendered on behalf of the defendant was refused: 'The court instructs the jury that unless they believe from the evidence that the contract with the deceased, testified to by Mrs. **Pugh**, has been established by a preponderance of the evidence by her testimony and the testimony of other witnesses corroborating her in this *405 particular, then they should find for the defendant. The court further instructs the jury that the testimony of Mrs. **Pugh's** standing alone and uncorroborated would not be sufficient to sustain a recovery.'

It is not objectionable, but deals with matters already covered. In instruction 2 the court told the jury that there could be no recovery here 'unless there was an express or implied contract, clearly proven in all its essential terms, providing for the compensation for which action is brought. ' Corroboration was covered by instruction 3.

We cannot say that the jury's verdict, confirmed by the court, was without evidence to support it, and so, for reasons stated, that judgment must be affirmed.

Affirmed.

248 Va. 224

Supreme Court of **Virginia**.

Helen **VAUGHN**

v.

Doc **SHANK**, Co-Executor of the Estate of Ruth M. Conner, et al.

Record No. 931034.

June 10, **1994**.

Report of assistant commissioner of accounts found that claimant failed to prove her claim that testatrix had orally agreed to transfer certain real property to claimant in exchange for her services. Claimant excepted to report. The Circuit Court, Shenandoah County, Perry W. Sarver, J., upheld report. Claimant appealed. The Supreme Court, Keenan, J., held that claim was not sufficiently corroborated.

Affirmed.

Opinion

KEENAN, Justice.

In this appeal, we consider whether the trial court erred in upholding the report of an assistant commissioner of accounts (the commissioner), who found that Helen **Vaughn** had failed to prove her claim against the estate of Ruth M. Conner. **Vaughn** alleged that Conner had agreed orally to transfer certain real property to her in exchange for **Vaughn's** services.

The record shows that, pursuant to a foster care agreement of the Shenandoah County Board of Public Welfare, **Vaughn** began *226 living in the Conner household in 1970 at age 12 and remained there until her marriage in 1976. The testimony given before the commissioner suggests that **Vaughn** maintained a close, filial relationship with Conner until Conner's death on September 23, 1990.

Conner was survived by her two daughters, Linda Himelright and Nancy L. Plaugher, and her son, William Conner, who were her sole heirs at law. Her last will, executed on October 18, 1988, was probated in the Circuit Court of Shenandoah County. In her will, Conner bequeathed $1,000 to her daughter, Linda, and devised and bequeathed the residue of her estate to the Brethren's Home of Indiana, Incorporated.

In March 1991, **Vaughn** filed a notice of claim against Conner's estate, for a debt based on an alleged oral contract for the conveyance of a house owned by Conner on Water Street in Woodstock. In her notice of claim, **Vaughn** stated:

I herewith make claim on the estate of Ruth M. Conner for services rendered and pursuant to the attached affidavit of indebtedness for the house and lot located at 301 North Water Street in Woodstock, **Virginia** or its value based on the purchase price of $31,000.

Thereafter, William B. Allen, III, Assistant Commissioner of Accounts for the Circuit Court of Shenandoah County, held a debts-and-demands hearing pursuant to Code §§ 64.1-171 to -180.1, at which **Vaughn** testified and presented other witnesses.

The evidence at the hearing showed that, at some time before 1986, Conner converted her residence into a nursing home that she operated as the Dutch Haven Home for Adults (Dutch Haven), and that **Vaughn** was employed at Dutch Haven from the time of its opening until Conner's death in 1990. In 1987, Conner purchased the house on Water Street referred to in **Vaughn's** notice of claim. **Vaughn** testified that Conner asked her to live in the Water Street house because it was closer to Dutch Haven than **Vaughn's** previous residence. **Vaughn** also stated that Conner told her that the house was purchased for **Vaughn** and **Vaughn's** daughter, and that if they liked the house, "it would be [theirs]."

129 **Vaughn testified that, after she and her daughter had lived in the Water Street house for a month and a half, Conner asked **Vaughn** to leave the house and move into Dutch Haven. According *227 to **Vaughn**, Conner "needed someone there with CPR" training and wanted **Vaughn** to be available to work "on call." **Vaughn** stated that, at that time, Conner "made me a promise, that if I moved in to Dutch Haven[,] she would see that we got the Water Street house. Me and my daughter." According to **Vaughn**, Conner agreed to fulfill this promise on her expected date of retirement, which was Christmas, 1991.

Vaughn testified that, in 1987, she moved into Dutch Haven, as Conner had requested, and assumed additional duties. Although her previous employment at Dutch Haven had involved a 40-hour week, she now began working 80 to 90 hours per week. She stated that, since she was the only employee qualified to administer cardiopulmonary resuscitation (CPR), she had to remain "on call" at Dutch Haven 24 hours per day, with the exception of a few hours each Friday and Sunday.

Vaughn asserted that, although she performed these additional duties, she continued to be paid for only 40 hours of work per week. She also stated that, once in residence at Dutch Haven, she continued to work the above-described schedule of hours until Conner's death.

Eilene McClelland, who rented the Water Street house from Conner after **Vaughn** moved to Dutch Haven, testified that Conner told her on two occasions that "the house was purchased for [Conner's] step daughter" and that "the house was bought for Helen and her daughter." **Vaughn's** daughter, Shannon, age 12, testified that Conner told her "that when she retires that we would be taken care of." According to Shannon, Conner also stated that she would give them the Water Street house, and "that we would have a roof over our head when she died or when she retired."

Finally, William Glenn Sweeney, a resident of Dutch Haven, testified that **Vaughn** worked in excess of 40 hours per week. Sweeney stated that no other employee worked as many hours as **Vaughn**, and that, because she lived on the premises, she was available at all times.

After hearing this testimony, the commissioner concluded that the evidence was insufficient to support **Vaughn's** claim. The trial court heard argument on **Vaughn's** exceptions, and then entered a decree confirming the commissioner's report.

1 On appeal, we review the trial court's decree confirming the report of a commissioner of accounts pursuant to the same standard *228 as that governing our review of a decree confirming the report of a commissioner in chancery. *Morris v. United* ***Virginia*** *Bank,* 237 **Va**. 331, 337-38, 377 S.E.2d 611, 614 (1989). "When a report of a commissioner in chancery who heard evidence ore tenus has

been fully approved by the trial court, the decree of the court confirming the report is presumed to be correct and will not be reversed on appeal unless plainly wrong." *Ward v. Harper,* 234 **Va**. 68, 70, 360 S.E.2d 179, 181 (1987); *see also Seemann v. Seemann,* 233 **Va**. 290, 293, 355 S.E.2d 884, 886 (1987); *Bailey v. Pioneer Sav. & Loan Ass'n,* 210 **Va**. 558, 562, 172 S.E.2d 730, 734 (1970).

Vaughn argues that the trial court erred in confirming the commissioner's report and raises three assignments of error. She argues that: (1) she produced sufficient corroboration of the alleged contract to meet the requirements of Code § 8.01-397; (2) her evidence of part performance was sufficient to take the alleged oral contract out of the statute of frauds; and (3) Conner's estate waived its statute of frauds defense by failing to raise it at or prior to the commissioner's hearing. Because we find that **Vaughn's** evidence provided insufficient corroboration to prove the existence of a contract, we do not reach her second and third assignments of errors.*

130 **Vaughn argues that the evidence presented at the debts-and-demands hearing provided the corroboration required by Code § 8.01-397 and proved an oral contract in which Conner agreed to "see that [**Vaughn**] got the Water Street house" in exchange for **Vaughn's** services. In response, the executor of Conner's estate contends that no evidence other than **Vaughn's** own testimony showed that such a contract was formed. We agree with the executor.

23 Since **Vaughn** seeks to enforce an oral contract allegedly made with a party who is now deceased, we must consider her evidence in accordance with the requirements of corroboration set *229 forth in Code § 8.01-397. As pertinent to this issue, Code § 8.01-397 provides that, in an action against the executor of an estate, no judgment or decree shall be rendered in favor of an adverse or interested party based on the uncorroborated testimony of such party. The purpose of the statute is to prevent the survivor from prevailing against the decedent's estate solely because the executor has been deprived of the decedent's version of the transaction. *Hereford v. Paytes,* 226 **Va**. 604, 607-08, 311 S.E.2d 790, 792 (1984); *Haynes v. Glenn,* 197 **Va**. 746, 752, 91 S.E.2d 433, 437 (1956). Thus, the statute substitutes a requirement that testimony be corroborated in place of the common law rule disqualifying a surviving witness for interest. *Hereford,* 226 **Va**. at 608, 311 S.E.2d at 792.

4 To be deemed sufficient under Code § 8.01-397, the corroboration "must at least tend, 'in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness ... which allegation or issue, if unsupported, *would be fatal to the case.*' " *Hereford,* 226 **Va**. at 608, 311 S.E.2d at 792 (alteration in original) (citation omitted). The corroborating evidence need not be provided by witnesses, but may be furnished by surrounding circumstances adequately established. *Penn v. Manns,* 221 **Va**. 88, 93, 267 S.E.2d 126, 130 (1980).

56 There is no hard and fast rule that determines whether the requirement of corroboration has been met, and each case must be decided upon its own facts and circumstances. *Id.* In a case involving parties between whom a confidential relationship existed at the time of the transaction relied on, a higher degree of corroboration may be required than in other transactions. *Everton v. Askew,* 199 **Va**. 778, 782, 102 S.E.2d 156, 158 (1958).

7 In the present case, Code § 8.01-397 requires corroboration of **Vaughn's** testimony that she entered into the alleged contract with Conner, because that is the sole essential allegation on which her claim is based. *See Hereford,* 226 **Va**. at 608, 311 S.E.2d at 792. However, upon reviewing the record, we observe that only **Vaughn's** testimony relates to the issue whether a contract was formed. Although Shannon **Vaughn** testified that Conner said she would "give us [the] house," and Eilene McClelland stated that Conner told her the Water Street house was purchased for **Vaughn** and her daughter, this testimony does not show that **Vaughn** and Conner entered into an agreement that the house *230 would be transferred in consideration for services, or that Conner recognized an obligation to convey the house to **Vaughn** pursuant to the terms of their agreement. The testimony

of these witnesses is equally consistent with an unenforceable promise on the part of Conner to make **Vaughn** a gift of the house.

Moreover, the surrounding circumstances do not corroborate the existence of a contract between **Vaughn** and Conner. While **Vaughn** asserts that Conner promised in 1987 to convey the house to her, there was no evidence that Conner planned or attempted to have a deed drawn. In addition, Conner's will, executed in 1988, shows that Conner contemplated another disposition of her property in the event of her death.

131 William Sweeney's testimony dealt only with the number of hours that **Vaughn worked at Dutch Haven. This testimony provides no corroboration of **Vaughn's** assertion that she performed the work at Dutch Haven in consideration for Conner's promise to give her the Water Street house.

In previous cases involving claims that a contract to convey real property was breached by a decedent, this Court has considered whether the corroborative evidence was sufficient, pursuant to Code § 8.01-397 and its predecessors, to prove that a binding contract had been formed. In each case where a plaintiff was held entitled to relief, the testimony and evidence of surrounding circumstances provided the kind of clear corroboration that **Vaughn's** evidence lacks.

For example, in *Timberlake v. Pugh,* 158 **Va**. 397, 163 S.E. 402 (1932), two witnesses testified that the decedent had asked them to prepare his will conveying certain property to the plaintiff, thus strengthening the plaintiff's testimony that the decedent had promised to will her the same property in return for her housekeeping services. *Id.* at 400-04, 163 S.E. at 403-04. In *Clark v. Atkins,* 188 **Va**. 668, 51 S.E.2d 222 (1949), Atkins's contention that Clark had promised to leave him all his property if Atkins would help run Clark's business was corroborated by “nine witnesses, most of whom [were] not interested or related to the parties, who testified that Clark had stated to them on various occasions that he expected to leave the meat market business” to Atkins. *Id.* at 673, 51 S.E.2d at **224**.

Similarly, in *Everton v. Askew,* 199 **Va**. at 782-83, 102 S.E.2d at 158-59, the decedent was shown to have told numerous persons that the plaintiff, her husband, had titled his real estate in the *231 decedent's name in return for her promise to make a will leaving the property to the plaintiff. In *Purcell v. Purcell,* 188 **Va**. 91, 49 S.E.2d 335 (1948), the plaintiff alleged that the decedent, his brother, had agreed to make monthly payments if the plaintiff would provide a home for their sister. This assertion was corroborated by evidence that the decedent sent payments to the plaintiff for several years, and by the decedent's statements and letters showing that the amounts were paid in return for the plaintiff's assistance. *Id.* at 93-95, 49 S.E.2d at 336-37.

In the present case, **Vaughn** failed to provide such corroborative evidence of the alleged oral contract; thus, the trial court properly denied her claim against Conner's estate. For these reasons, we will affirm the trial court's decree.

Affirmed.

Footnotes

* **Vaughn's** arguments before the commissioner and the trial court, as well as her second assignment of error before this Court, make clear that she seeks specific performance of the alleged contract for the conveyance of the Water Street house, rather than compensation for the value of her services. We note, however, that specific performance is purely an equitable remedy (*see* *Chattin v. Chattin,* 245 **Va**. 302, 306-07, 427 S.E.2d 347, 350 (1993); *Barrett v. Forney,* 82 **Va**. 269, 276 (1886)), and **Vaughn** did not file a bill of complaint in equity; instead, she filed a notice of claim pursuant to Code § 64.1-171. In light of our holding, we need not further address this issue.

249 Va. 511

Supreme Court of **Virginia**.

Gary Allen **COOPER**, Co-Executor of the Estate of Gary D. **Cooper**, Deceased

v.

Margaret A. **COOPER**, et al.

Record No. 941137.

April 21, **1995**.

Surviving wife filed bill of complaint against coexecutors of deceased husband's estate, seeking imposition of constructive trust on proceeds of promissory note from sale of business, even though deceased was sole payee of note. The Circuit Court, Louisa County, F.W. Harkrader, Jr., J., entered judgment in favor of wife. Estate appealed. The Supreme Court, Lacy, J., held that: (1) corroboration requirement of dead man's statute, for testimony to oral agreement that business would be owned jointly with right of survivorship, was satisfied, and (2) imposing constructive trust was not clearly erroneous.

Affirmed.

Opinion

LACY, Justice.

In this appeal, we consider whether the trial court erred in imposing a constructive trust on the proceeds of a promissory note for the benefit of the deceased noteholder's widow.

Margaret A. **Cooper** filed a bill of complaint against Gary Allen **Cooper** and Gary D. **Cooper**, II, co-executors of the estate of Gary D. **Cooper**, her deceased husband. She sought the imposition of a constructive or resulting trust in her favor on the proceeds of a promissory note on which her deceased husband was the payee. Margaret alleged that, in 1976, her husband used money from their joint bank account to purchase stock in a new business, Liberty Land, Ltd. (Liberty). Eight years later, her husband sold the stock, taking in exchange a promissory note from Liberty in the amount of $730,000 for the purchase price balance. Margaret contended that she was entitled to the proceeds of the note based on her husband's representation to her in 1976 that he would consider the proceeds from the business venture as the property of both spouses or the survivor of the two.

The trial court referred the matter to a commissioner in chancery. Following a hearing at which Margaret **Cooper** and Gary Allen **Cooper** testified, the commissioner issued his report recommending that the trial court impose a constructive trust in favor of Margaret on the proceeds of the promissory note. The commissioner based his recommendation on his finding that Margaret had

shown by clear and convincing evidence that the funds used to purchase the Liberty stock were taken from Margaret and Gary's joint bank account to which there was a right of survivorship and that Margaret and her husband had “entered into a joint venture with funds belonging to them both and that profits derived from the joint venture were to be held by the decedent **Cooper** for the benefit of both or the survivor of them.” The trial **90 court overruled the exceptions to the commissioner's report filed by Gary **Cooper's***514 estate and entered an order adopting the commissioner's report and imposing a constructive trust in favor of Margaret on the proceeds of the promissory note. We awarded Gary Allen **Cooper**, co-executor (the estate) an appeal.[1]

We recite the facts, as we must, in the light most favorable to Margaret, the prevailing party below. Margaret and Gary **Cooper** were married in 1964. At that time, they both worked for the same employer. Because their employer had a policy prohibiting employment of both a husband and wife, Margaret was forced to find other employment. After she worked for a group of physicians for approximately six months, Margaret and Gary went into business ventures making fiberglass bathtubs and dune buggies. This venture lasted for approximately four years. The couple then bought small farms, improved them, and resold them. The properties purchased were titled in Gary's name or jointly with a partner. Margaret assisted in the work on the properties, but was not otherwise employed.

In 1976, Gary told Margaret that he wanted to form a land development corporation. Margaret testified that Gary told her that, if she would agree to the use of joint funds for the initial investment, he would treat the proceeds from the venture as joint funds held for them both or the survivor of them. She agreed. A check was drawn on their joint account, Liberty was incorporated, and Gary purchased shares in the corporation. The stock was titled in Gary's name.

In the course of its operation, the corporation borrowed funds to support its activities. Margaret participated in securing these loans from the lending institutions. She agreed to unconditionally guarantee loans for $175,000 and $166,000 and to be obligated on a line of credit for $465,000. One of the loans was also secured by a second deed of trust on Margaret and Gary's home, which they held as tenants by the entirety. When Gary bought out Liberty's other stockholder, Harold G. Payne, Margaret executed an indemnification agreement in which she agreed to personally indemnify and hold Payne harmless from any obligations of Liberty. She also executed a joint and several payment guarantee for Liberty's *515 $50,000 bond to Payne. Throughout the course of Margaret's and Gary's involvement with Liberty, Margaret performed various functions in connection with the sale of the developed properties, such as preparing model homes and yards. She also was the secretary of the corporation for several years.

In 1984, Gary sold his stock back to Liberty for $730,230. Payment for the stock was in the form of a promissory note from Liberty, payable in installments from December 31, 1984 through December 31, 1994. The note was in Gary's name only.

In October 1990, Gary left the marital home and moved to Texas. He subsequently executed a will, leaving his property to his two sons. Four months later, on February 16, 1991, Gary died. Margaret testified that he had been planning to return home.

Following Gary's death, the estate inventory listed the note as an asset of his estate with a balance of $298,214.29. Gary Allen **Cooper**, as co-executor, testified that, at the time of the hearing, he had received over $10,000 in payments on this note which he had used to pay some of the expenses of the estate.

On appeal, the estate assigns nine errors, but notes that “Margaret bases her case in significant measure upon the statement which she claimed Gary made in 1976.” Thus, we first consider whether Margaret produced sufficient evidence to corroborate her testimony regarding the 1976 agreement under the requirements of **Code § 8.01-397**, the so-called “dead man's statute.”

**91 Margaret's claim for a constructive trust is based on her testimony that, in 1976, Gary told her that if she agreed to the use of joint funds for Gary's initial investment in Liberty, he would consider the proceeds from that investment as joint property held for both of them or the survivor of them. Because the estate is deprived of Gary's testimony on this issue due to his death, no judgment or decree can be entered in favor of Margaret "founded on [her] uncorroborated testimony." Code § 8.01-397. The estate argues that the record is "devoid of any corroborative evidence that is not perfectly consistent with Gary's sole ownership of both the stock and the note...."

*516 1 In applying Code § 8.01-397, we have said that each case must be decided upon its own facts and circumstances, that corroboration may be established by circumstantial evidence, and that the corroboration need not independently establish the fact but must itself tend in some degree to support an issue essential to the case which, if unsupported, would be fatal to the case. *Vaughn v. Shank,* 248 **Va**. 224, 229, 445 S.E.2d 127, 130 (1994). In this case, therefore, Margaret's testimony reciting Gary's statement is admissible only if there is some independent evidence which tends to show that Gary considered or treated proceeds from the Liberty venture as joint funds with a right of survivorship.

2 Margaret relies on a number of documents to corroborate her testimony. We need not review each of them, however, because sufficient corroboration, in our view, is established by those documents showing the activity of the bank account. These documents reflect Gary's treatment of the venture and its proceeds. Margaret introduced a check dated July 8, 1976, payable to "Liberty Land Ltd." for $350. The notation on the check stub stated "Capital Investment in Partnership Co." Liberty received its certificate of incorporation from the State Corporation Commission on July 9, 1976, the day after the check was written.

The documentary evidence pertaining to the bank account also includes two deposits in 1977 carrying the notation that they represented profits from Liberty. In addition, the record contains a check written on June 2, 1978 from the joint account to Liberty for $10,000 and containing the notation "loan" and "Loan to Corp." Another deposit to the account on December 22, 1978 for $10,561.64 contains the notation "Liberty Land note paid in full $10,000 princ, $561.64 interest earned." Margaret contended that this was a joint bank account with right of survivorship, introducing bank statements for the account which were addressed to both her and her husband. Her attempts to recover the actual bank signature card, Margaret testified, were unsuccessful.

These documents, independent of Margaret's testimony, tend to establish that this account was used by Gary for his initial investment in Liberty, for a loan to the corporation, and for deposit of proceeds from the venture, both profits and loan interest. Furthermore, these deposits were made in an account shown to be a joint account, which, because the depositors on the account were husband and wife, carried the presumption that it was a survivorship account. Former Code § 6.1-73 (Repl.Vol.1973). Depositing ***517** these proceeds into a joint account with right of survivorship is consistent with considering the proceeds of the venture as joint property with a right of survivorship and inconsistent with treating the proceeds of the venture as separately owned property. Therefore, we conclude that Margaret's testimony was sufficiently corroborated and properly admitted into evidence.

3 As recognized by the estate, the admissibility of Margaret's testimony regarding Gary's statement is "the real crux of this appeal." Margaret's entitlement to a constructive trust on the loan proceeds can only arise from the joint agreement evidenced by Gary's statement. When persons agree that the proceeds of a venture are to be joint property and one acquires an interest in the subject matter adverse to the other, "equity will regard him as a constructive trustee and ****92** compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom." ***Horne v. Holley,* 167** Va**. 234, 240, 188 S.E. 169, 172 (1936)**. ***See also H-B Ltd. Partnership v. Wimmer,* 220** Va**. 176, 180, 257 S.E.2d 770, 773 (1979)**. A constructive trust is appropriately imposed to avoid unjust enrichment of a party. *Leonard v. Counts,* 221 **Va**. 582, 589-

90, 272 S.E.2d 190, 195-96 (1980). In this case, the estate would be unjustly enriched in keeping the property if Gary had agreed that the proceeds from Liberty would be joint property with the right of survivorship.

4 The foundation of a constructive trust must be established by clear and convincing evidence. *Richardson v. Richardson,* 242 **Va**. 242, 246, 409 S.E.2d 148, 150 (1991). Margaret's testimony regarding the proceeds of the venture is positive, unequivocal support for her position which, once admitted into evidence, is subject only to the fact-finder's evaluation of credibility and probative effect. Here, the commissioner and the trial court, in ruling in favor of a constructive trust, found Margaret to be a credible witness and accorded her testimony significant probative value. Margaret's testimony, however, was not the only evidence that supported her claim.

In addition to the documents relating to the bank account discussed above, Margaret introduced other documents showing her close involvement in the financial arrangements of the corporation: (1) loan commitment letters bearing her unconditional guarantee of significant loan proceeds; (2) a second deed of trust on property held by her and her husband as tenants by the entireties; and (3) *518 the hold harmless and indemnity agreement and the payment guarantee executed in conjunction with the purchase of stock from Payne. Margaret notes that it is inconsistent with common experience to incur personal liability of this magnitude for a venture in which one has no interest or expectation of profit.

The evidence also includes a promissory note which she and Gary executed in 1985 for a $140,000 commercial loan which was secured by the promissory note from Liberty. This again, Margaret maintains, shows that Gary considered the note joint property even though he was the sole payee named in the note.

Margaret's documentary evidence is also consistent with her testimony describing prior joint ventures in which she and Gary had participated, consistent with the work she performed in each venture, including the Liberty venture, and, as discussed above, consistent with the instances in which she incurred personal liability for the debts of Liberty.

The only evidence relied on by the estate to counter Margaret's claim is the fact that the stock and note were in Gary's name alone.[3] Margaret testified that holding these items in his name was the result of an “ego problem” stemming from poverty during his childhood. There is no other evidence to contradict Margaret's assertions, such as a specific devise of the note in Gary's will.[4]

The principles of appellate review we apply in reviewing the trial court's decision in this case are well established. The factual findings of the commissioner confirmed by the trial court must be given “great weight.” It is not our province to assess the credibility of the witnesses or the probative value to be given to their testimony. *Richardson,* 242 **Va**. at 246, 409 S.E.2d at 151. Rather, our role is to determine whether the conclusions of the commissioner and trial court are plainly wrong or not supported by the evidence, taking into account the principle that the trial court's decision comes to us with a presumption of correctness. *Surf Realty Corp. v. Standing,* 195 **Va**. 431, 435, 78 S.E.2d 901, 904 (1953).

Having considered the witnesses' testimony and the documentary evidence, the commissioner **93 unequivocally found that *519 “[t]he evidence clearly and convincingly shows that the assets used to acquire the debt or the note were assets of both Margaret A. **Cooper** and the decedent **Cooper** and derived from the efforts of both over the years to build a successful development business.” He further stated that based on the evidence, it would be “unconscionable” not to impose a constructive trust on the note's proceeds. We cannot say, on this record, that the trial court's decision affirming the commissioner's findings and imposing a constructive trust on the proceeds of the promissory note in favor of Margaret was clearly erroneous or not supported by the record. Accordingly, we will affirm the judgment of the trial court.

Affirmed.

Footnotes

1 Both executors are sons of the decedent. Gary Allen **Cooper** is Margaret **Cooper's** stepson and Gary D. **Cooper**, II is her son. At trial, co-executor Gary D. **Cooper**, II, filed an answer to the bill of complaint in which he did not object to the relief sought by Margaret. He did not join in the appeal filed by co-executor Gary Allen **Cooper** but filed a brief adopting the position taken by Margaret.

2 The estate assigned as error the admission of a number of documents: Exhibits D, H, I, M, R, S, U, V, and X. All exhibits except V and X were minutes of the board of directors' meetings or other descriptions of board actions. We have not considered any of these in our decision, except Exhibit V. That exhibit is discussed in footnote 3, *infra.*

3 The estate's contention on appeal that Margaret did not establish that the promissory note represented proceeds of the Liberty venture is meritless. Gary Allen **Cooper** testified that the copy of the promissory note, admitted into evidence as Exhibit V, was the note listed in the estate inventory as “Liberty Land, Ltd. (payment on stock sold).”

4 The co-executors controlled the note as part of Gary's residual estate.

226 Va. 604

Supreme Court of **Virginia**.

Frank L. **HEREFORD**, Jr., Administrator of the Estate of Marguerite A. **Hereford**, Deceased

v.

Norman Ray **PAYTES**, Jr.

Record No. 810590.

Jan. 20, **1984**.

Surviving driver brought action against decedent's estate for personal injuries suffered in head-on automobile collision in which decedent driver was killed. The Circuit Court, Orange County, Vance M. Fry, J., entered judgment for surviving driver, and decedent's estate appealed. The Supreme Court, Russell, J., held that testimony of surviving driver was not sufficiently corroborated by evidence not dependent upon survivor's credibility to meet requirements of dead man statute, in light of facts that driver's explanation for driving on wrong side of road rested upon credibility alone, that it received no support from evidence of surrounding circumstances, or from any other source, and that it presented allegation which fact finder must believe if plaintiff was to prevail.

Reversed and final judgment entered for decedent's estate.

Compton, J., filed a dissenting opinion in which Stephenson, J., joined.

Opinion

*606 RUSSELL, Justice.

In this appeal from a judgment for the plaintiff in an action for personal injuries against a decedent's estate, we must determine whether the testimony of the surviving plaintiff was corroborated as required by Code § 8.01-397.

A collision occurred on Route 20 in Orange County, on January 1, 1980, between vehicles driven by Marguerite **Hereford** and by Norman Ray **Paytes**, Jr. Miss **Hereford** was killed and Mr. **Paytes** was seriously injured. **Paytes** brought an action for personal injuries against the administrator of the **Hereford** estate, who filed a counterclaim for wrongful death. At the conclusion of a bench trial, the court found for **Paytes** and dismissed the counterclaim. The administrator appeals, contending that the judgment was based upon **Paytes**' uncorroborated testimony.[1]

The evidence shows that Marguerite **Hereford**, 19 years of age, accompanied by another young woman, was driving a Datsun south on Route 20 between Unionville and Orange in the early morning hours of January 1, 1980. Norman **Paytes**, also 19, was driving a Pontiac north on the same section of road. He was alone in the car. The vehicles collided nearly head-on in the approximate center of the road. Route 20 is a two-lane highway at this point, straight and level, and

has a pavement width of about 23 feet. The lanes are divided by broken lines. There are shoulders of moderate width outside the pavement on both sides. The weather was clear, the pavement dry, and the visibility unobstructed.

Miss **Hereford** and her passenger, Suzanne Williams Smith, were killed instantly. Mr. **Paytes** suffered severe injuries and was removed to a hospital by the rescue squad. There, he was found to have a blood alcohol level of .14 percent two hours after the accident. A witness who qualified as an expert in internal medicine and toxicology testified that, based upon the generally accepted rate at which alcohol is absorbed and eliminated by the body, **Paytes**' blood alcohol level at the time of the accident would have been between .16 and .17 percent. This, in the opinion of the witness, would have had a "substantial measurable effect on reaction time, judgment, depth perception and general motor skills, coordination, etc." **Paytes** had attended several New Year's Eve parties.

*607 The damage to the vehicles indicated that the right front of each vehicle struck the right front of the other. The point of impact on each vehicle was to the right of center, on the passenger side. The right front wheel of the Datsun was driven back under the front seat. The metal of the Pontiac's right front fender was bent down onto the tire, immobilizing it. This caused the tire to leave a mark ten to fourteen feet long, which began at or within one foot of the centerline, and which crossed into the southbound lane at a forty-five degree angle to the centerline. The trial court found from the evidence that each vehicle was in the wrong lane of travel:

Now, I make this finding-I find that this collision occurred at a time when the front end of the **Paytes** vehicle was substantially across the center line with its right wheel either on the center line, or within a foot of it, a foot of it being to the right-hand side in the direction in which he was going. I further find, based upon the physical facts, the physical evidence, the pictures, that the **Hereford** vehicle was also partially across the center line at the point of impact to a lesser degree but certainly across the center line substantially, that the left front wheel of the **Hereford** vehicle must necessarily have been substantially across the center line.

Paytes was the only witness to the accident who survived to testify. He stated that he was driving northbound at a speed of fifty-five miles per hour and saw a car coming toward him around a curve ahead, **792 at a high rate of speed, with bright lights on. He said that as it approached him on the straight section of road, it came "way into the middle of the road, square into the middle of the road ... over the center line. It was more or less half the car was on my side and half the car was on the other side." He testified that he thought the movement of the oncoming car would bring it further into his lane and that he made a "split second" decision that his best chance of avoiding collision would be to swerve left rather than right. He said that he turned his wheel as far left as he could in the "split second" he had to react, but that he had no chance to remove his foot from the accelerator or to apply the brakes. "As soon as I swerved left the impact took place."

1 Code § 8.01-397, as pertinent here, provides that no judgment shall be rendered against the representative of a person incapable *608 of testifying if it is founded upon the uncorroborated testimony of an adverse party. It was enacted to prevent the survivor from having the benefit of his own testimony where, by reason of his adversary's death, the personal representative has been deprived of the decedent's version of the facts. *Haynes, Executrix v. Glenn,* 197 **Va**. 746, 91 S.E.2d 433 (1956). This statute is a substitute for the common-law disqualification of such a surviving witness for interest.

234 In *Brooks v. Worthington,* 206 **Va**. 352, 143 S.E.2d 841 (1965), we set forth the requirements necessary to fulfill the mandate of the "dead man" statute. Because each case must be decided on its own facts, it is impossible to formulate a fixed rule as to the corroboration necessary in every situation, but the general principles may be stated. It is not necessary that the corroborative evidence be sufficient by itself to support a verdict. " 'Confirmation is not necessary for that removes all doubt, while corroboration only gives more strength than was had before.' " *Id.* at 357, 143 S.E.2d

at 845 (quoting from *Timberlake's, Adm'r. v. Pugh,* 158 **Va**. at 397, 402, 163 S.E. at 402, 404 (1932)). Corroborating evidence tends to confirm and strengthen the testimony of the witness. It tends to show the probability of its truth. It need not come from other witnesses, but may be furnished by circumstantial evidence. Finally, if the survivor's testimony is corroborated to some degree, it is unnecessary that it receive corroboration on all material points. *Id.* 206 **Va**. at 357, 143 S.E.2d at 845. The corroboration, to be sufficient under the statute, however, must at least tend, "in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness ... which allegation or issue, if unsupported, *would be fatal to the case.*" *Burton's Ex'r. v. Manson,* 142 **Va**. 500, 508, 129 S.E. 356, 359 (1925) (emphasis added).

In *Penn v. Manns,* 221 **Va**. 88, 267 S.E.2d 126 (1980), we applied the "dead man" statute to the testimony of the survivor in a wrongful death case. Penn, suffering from a gunshot wound, was driven to the hospital by Manns at a high rate of speed. Manns lost control of the car, which left the road and turned over. Penn died as a result of the accident, not from the gunshot wound. When sued by Penn's administratrix, Manns testified that as he was negotiating a curve on the right, Penn, who was sitting in the front seat beside Manns, said, "Oh, I'm dying," and fell on Manns' arm, causing Manns to lose control of the car. Independent *609 medical testimony established that Penn's gunshot wound had penetrated his lung, causing severe bleeding and lung collapse. Expert testimony further affirmed that these conditions might have induced difficulty in breathing, elevated temperature, and, most significantly, fainting. We held that these attendant circumstances furnished sufficient corroboration for Manns' testimony, and we affirmed a judgment in his favor. 221 **Va**. at 93, 267 S.E.2d at 130. In *Penn,* a factual issue upon which the case turned, an allegation "fatal to the case," received support from evidence which was not dependent upon the credibility of Manns, the survivor.

The case before us is different. If neither party to the collision had been available **793 to testify, the action having been between their personal representatives, then neither representative could have recovered from the other. The evidence of attendant circumstances, in such a case, would have shown that the proximate cause of the collision was each driver's negligence in driving on the wrong side of the road in violation of Code § 46.1-203. Such a violation would have cast upon each driver the burden of producing evidence in explanation, *Fletcher, Adm'r v. Horn,* 197 **Va**. 317, 89 S.E.2d 89 (1955), but in such a case no explanation would have been available.

5 The sole feature distinguishing this case from the hypothetical posed above is the testimony of **Paytes** as to the *timing* of the departure of the two vehicles from their respective lawful lanes of travel. He testified that before he left the northbound lane, the **Hereford** car crossed the centerline, entered his lane, and confronted him with a sudden emergency in which the trier of fact might find that he was justified in crossing into the southbound lane. This testimony furnishes **Paytes** with the explanation required by *Fletcher* for his driving on the wrong side of the road. But it rests upon **Paytes**' credibility alone. It receives no support from the evidence of surrounding circumstances, or from any other source. It presents an allegation which the fact-finder must believe if **Paytes** is to prevail; therefore its absence would be "fatal to the case." This is precisely the kind of issue upon which the "dead man" statute wisely requires corroboration.

The trial court, after finding that each car was on the wrong side of the road, as quoted above, stated:

*610 Now, of course, that doesn't resolve the issue. The issue is, why was either vehicle across the center line. Now, it may well have been that Miss **Hereford**, going down the road saw this vehicle come over to her and she concluded she had better take action to the left-hand side of the road, we don't know that. If she was here today that may be her explanation. Mr. **Paytes** is here today and that's his explanation. Now, his explanation is consistent with certain physical facts. I don't mind saying that had she come in with the same explanation that that would have been consistent with the

physical facts but we don't have that explanation, we do have his explanation. Now, can we say the explanation given by **Paytes**, that is consistent with the physical facts, is to be rejected, I don't think we can. I don't think we can reject his testimony given here today in a forthright and forward manner judging him by his appearance on the witness stand, his manner while he was testifying, his behavior while testifying, ...

This statement makes it clear that the credibility of **Paytes**, unsupported by the ambivalent circumstantial evidence, was the sole factor determining his recovery.[2] It confirms our conclusion that this case represents the very situation the statute was designed to prevent: an opportunity for the survivor to prevail by relying on his own unsupported credibility, while his opponent, who alone might have contradicted him, is silenced by death.

For the reasons stated, the judgment appealed from will be reversed and final judgment entered here for the appellant.

Reversed and final judgment.

COMPTON, J., dissents.

STEPHENSON, J., joins in dissent.

COMPTON, Justice, dissenting.

The statement of facts contained in the majority opinion must be expanded, and corrected, so that the evidence will be viewed in the light most favorable to **Paytes**, the party who prevailed below and comes before us armed with a judgment of $50,000 as compensation *611 for severe injuries. The majority's recitation draws inferences **794 that are most favorable to the losing party in the trial court, contrary to established rules of appellate procedure.

This tragic accident occurred at approximately 2:25 a.m. **Paytes**, who had consumed no alcoholic beverages for about two and one-half hours, was travelling 55 miles per hour north on his proper side of the highway. He testified that he was “wide awake, stone sober,” and in “full control” of his automobile.[*]

As he reached a straight section of Route 20, **Paytes** observed the headlights of the **Hereford** car approaching from the opposite direction on its proper side of the two-lane highway. The oncoming vehicle was being driven “at a high rate of speed with the lights on bright.” During cross-examination, **Paytes** estimated the speed of the **Hereford** vehicle at “around seventy miles per hour.”

Paytes testified he continued “up the road” and that “a split second” before the accident happened the other car, without lowering its headlight beams, “came into the middle of the road, square into the middle of the road.” The **Hereford** vehicle continued so that one-half of the car was in **Paytes**' lane. At that instant, **Paytes** “swerved hard left to try to avoid the car.” As soon as **Paytes** swerved, the impact occurred. **Paytes** said that the **Hereford** vehicle seemed to remain under control in its proper lane of travel until the vehicles were approximately 15 feet apart; at that point the vehicle suddenly was driven “immediately in front of” **Paytes**' car.

At impact, the “bulk” or “majority” of the **Hereford** vehicle was in **Paytes**' lane, with the “middle section” of the front in the center of the road, according to **Paytes**. At the moment of impact, according to **Paytes**, the “majority” of his vehicle was on his proper side of the highway, with “[m]aybe the front part” of the car in the southbound lane.

Witnesses who arrived on the scene after the accident and before the vehicles had been moved testified that the **Hereford** vehicle came to rest entirely in the northbound lane, with its front pointing generally north. **Paytes**' vehicle was partially in the southbound lane, with its front in a northerly

direction. The vehicles were approximately 15 feet apart. This testimony is consistent with photographs of the accident scene.

*612 One of the investigating police officers testified that, after the accident, the **Hereford** vehicle was positioned with its left front wheel “on the center line.” **Paytes**' vehicle came to rest with its left front wheel three feet ten inches from the western edge of the pavement; the left rear wheel was five feet ten inches from that edge. The officer found a 14-foot “mark” that “started on the center line and ... led to the front wheel of” **Paytes**' vehicle. The mark was made by the right front of the vehicle. The officer also determined that metal from the body of the **Paytes**' vehicle had been “pushed against the right front wheel.”

Subsequent to the accident, the police examined the bulb from the left front parking lamp of **Paytes**' vehicle. Based on study of the bulb filaments, a police expert witness testified that the force of the impact on the **Paytes**' vehicle was from the right. The trial judge, however, gave “very little weight” to that testimony and said it failed to assist in locating the position of the vehicles in the road at impact.

In announcing his decision, the trial judge said he found **Paytes**' “testimony credible and in accordance with the physical facts, and to a certain extent corroborated by the physical facts.” In my opinion, the trial court was correct.

The majority has misapplied the so-called Dead Man's Statute. Drawing on an irrelevant hypothetical that internally is incorrect, as well as suggesting that **Paytes** was “driving on the wrong side of the road,” the majority confuses ultimate burden of proof **795 and overall sufficiency of the evidence with the corroboration necessary under the statute in question.

The majority dwells on the “*timing* of the departure of the two vehicles from their respective lawful lanes of travel.” That is a burden-of-proof and sufficiency-of-the-evidence consideration. The dispositive issue in this appeal is whether the physical evidence gives strength to **Paytes**' testimony; as the majority recognizes, the question is not whether such corroborative evidence is of itself sufficient to support the judgment. The issue is whether the physical facts tend to show the truth of **Paytes**' testimony, or the probability of its truth; as the majority recognizes, the question is not whether **Paytes**' testimony is corroborated on all material points.

This Court previously has endorsed a trial court's ruling that certain physical evidence, such as tire marks and debris, found at the accident scene constituted corroboration as a matter of law. **613 Whitmer v. Marcum,* 214 **Va**. 64, 69, 196 S.E.2d 907, 910-11 (1973). Yet, the majority in the present case decides that such physical evidence, some of which is consistent with **Paytes**' theory of the case, is not corroboration as a matter of law.

In my opinion, there is ample corroboration to support a judgment in **Paytes**' favor. In essence, he contends that while driving in a lawful manner on his proper side of the highway, a vehicle being driven at an excessive speed suddenly moved into his lane. At that instant, the vehicles were 15 feet apart, and were closing at a combined speed of approximately 125 miles per hour. The testimony that **Paytes** was in his proper lane and “swerved hard left” in an attempt to evade the other car is corroborated by the 14-foot mark that “started” at the center line of the roadway. This mark clearly was made after the impact, after the force of the collision caused the metal on the front of the **Paytes**' vehicle to be pushed against the right front wheel, and after **Paytes** moved from the proper lane of travel. The extent to which **Paytes** placed the **Hereford** vehicle on the wrong side of the highway at impact is corroborated by the damage to both vehicles shown in the photographs. That testimony is also borne out by the fact that the **Hereford** car was entirely in the northbound lane after the accident, facing in the direction from which it had come.

For these reasons, I would affirm the judgment below.

STEPHENSON, J., joins in dissent.

Footnotes

1 No appeal was taken as to the court's ruling on the counterclaim.

2 Although an explanation of the fact-finder's reasoning would have been lacking if the case had been decided by a jury's general verdict, the result here would necessarily be the same. It is dictated not by the reasons expressed for the court's ruling, but by the failure of corroboration of the surviving party's testimony on any issue “fatal to the case.”

* The trial court discredited portions of the expert testimony, highlighted by the majority, about **Paytes**' alleged blood alcohol level; the judge said he “couldn't get any sense from [that] testimony.”

286 Va. 212
Supreme Court of **Virginia**.
Shara **AYERS**, et al.
v.
Toni L. **SHAFFER**, et al.
Record No. **122043**.
Sept. 12, 2013.

Synopsis

Background: Testator's legatees filed amended complaint against executrix of testator's estate, who served as testator's attorney-in-fact during testator's life, testator's sister, and others, based on allegations that certain inter vivos transfers which significantly reduced a decedent's estate, were the result of undue influence. The Circuit Court, City of Bristol, Sage B. Johnson, J., sustained defendants' demurrer, and legatees appealed.

Holdings: The Supreme Court, Lawrence L. Koontz, Jr., Senior Justice, held that:

1 it was not necessary for attorney-in-fact to have been acting under durable power of attorney in order for legatees to demonstrate existence of confidential relationship between testator and attorney-in-fact that gave rise to presumption of undue influence;

2 creation of joint bank accounts with rights of survivorship entirely with testator's funds created confidential relationship as matter of law which gave rise to presumption of undue influence that defendants were required to rebut;

3 legatees adequately alleged existence of confidential relationship between testator and attorney-in-fact, independent of **one** created by establishment of joint bank accounts with attorney-in-fact and husband, which gave rise to presumption of undue influence; and

4 legatees adequately alleged existence of confidential relationship between testator and sister that gave rise to presumption of undue influence.

Affirmed in part; reversed in part; remanded.

Opinion

Opinion by Senior Justice LAWRENCE L. KOONTZ, JR.

*216 In this appeal, we consider whether the circuit court erred in sustaining a demurrer to an amended complaint alleging that certain inter vivos financial transfers, which significantly reduced a decedent's estate, were the result of undue influence exercised by persons in confidential relationships with the decedent during her lifetime.

STANDARD OF REVIEW

1234 Familiar principles of appellate review guide our resolution of this appeal. This case was decided on demurrer. “A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which *217 fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged.” *Rosillo v. Winters,* 235 **Va**. 268, 270, 367 S.E.2d 717, 717 (1988); *see also Runion v. Helvestine,* 256 **Va**. **1**, 7, 501 S.E.2d 411, 415 (1998). “A demurrer tests the legal sufficiency of facts alleged in the pleadings, but not the strength of proof. Because the decision whether to grant a demurrer is a question of law, we review the circuit court's decision de novo.” *Kaltman v. All Am. Pest Control, Inc.,* 281 **Va**. 483, 489, 706 S.E.2d 864, 867–868 (2011) (citation omitted). “Additionally, when, as here, a circuit court sustains a demurrer to an amended complaint that does not incorporate or refer to any of the allegations that were set forth in a prior complaint, ‘we will consider only the allegations contained in the amended pleading to which the demurrer was sustained.’ ”[1] *Lewis v. Kei,* 281 **Va**. 715, 719, 708 S.E.2d 884, 888 (2011) (quoting *Yuzefovsky v. St. John's Wood Apartments,* 261 **Va**. 97, 102, 540 S.E.2d 134, 136 (2001)).

PROCEDURAL BACKGROUND

The original complaint in this action was filed in the Circuit Court of the City of Bristol on November 7, 2011, and an amended complaint was filed by leave of court on February 27, 2012. We will consider the allegations in the amended complaint under the standard of review cited above.

When so viewed, the amended complaint established that the plaintiffs, Shara **Ayers** and Ryan Riley, are the great grandchildren of Elsie R. Smith (“Elsie”) and legatees to **one** half of her residuary estate under a will dated August 3, 2004. This will was admitted to probate following Elsie's death on March 22, 2010. The defendants are Audrey Wingo (“Audrey”), Elsie's sister and legatee to the remaining half of her residuary estate, Toni Lynn **Shaffer** (“Toni”), her husband Bruce **Shaffer** (“Bruce”), and their son Michael T. **Shaffer** (“Mike”). Elsie's will nominated Toni as executrix, and she qualified as executrix of Elsie's estate on April 14, 2010.

Ayers and Riley acknowledge that Elsie had become estranged from their mother, Elsie's only living grandchild and nearest living lineal descendent, and that they had lived with their mother in Colorado *218“for a number of years.” During this time, Elsie and her husband, Charles Smith (“Charles”), lived on their farm in Washington County. In 2004, both Elsie and Charles were in poor health and no longer able to care for themselves and manage their property and affairs without assistance. Beginning April **1**, 2004, Toni and Bruce, who lived nearby, began providing assistance to the Smiths.

Charles died on April 23, 2004. Elsie, who was then 80 years old and suffered from diabetes, dementia and other medical problems, suffered a rapid decline in her mental and physical health following Charles' death. The **Shaffers** continued providing care to Elsie, assisting her with the daily activities of living as well as managing her property and affairs.

On May 13, 2004, Elsie went to the office of attorney H.G. Peters where she executed a **87 durable power of attorney (“DPOA”) naming Toni as her agent and attorney-in-fact and Bruce as alternate agent and attorney-in-fact. The amended complaint expressly alleges that “at least [from] the time when Toni **Shaffer** became [Elsie]'s agent under the DPOA, and until her death, [Elsie] lacked the mental and physical capacity ... to seek and obtain independent advice on her own; to fully understand the complexities and effects of most financial transactions.” However, the amended complaint further alleges that this lack of capacity did not impair Elsie's ability “to decide whom she wished her assets to pass to upon her death, and to express those wishes in her Will.”

On August 3, 2004, Elsie, Toni, and Bruce returned to Peters' office where Elsie executed her last will and testament. Article VI of the will references a “contract with Toni **Shaffer** and her husband, Bruce **Shaffer**” which was executed in Peters' office that day. The contract stated that Toni and

Bruce would provide “needed care” for Elsie for which they would be paid $500 per week. Additionally, Toni and Bruce were to receive $8000 for the assistance given to Elsie and Charles since April 2004. The agreement further provided that Toni and Bruce would “be paid the monies owed by [Elsie] from [her] estate,” rather than during her lifetime. Likewise, the will directed “payment of any and all sums due pursuant to [this] contractual agreement,” but otherwise made no bequest to Toni or Bruce. The amended complaint expressly acknowledges that Toni and Bruce provided care under the agreement over the next three years, during which time Elsie became “increasingly disoriented, calling [Toni and Bruce] several times daily, and at nights.”

*219 On October 29, 2007, Elsie began residing in an assisted living facility in Bristol, Tennessee, where her daily needs became the responsibility of the staff. In July 2008, she was admitted to a local hospital and then moved to a nursing home, where she received round-the-clock care from the staff. During this time, under the authority of the DPOA, Toni sold Elsie's home and the farm. Accordingly, the amended complaint alleges that after October 2007 the need for any assistance from the **Shaffers** in caring for Elsie and managing her property and affairs was greatly diminished or eliminated entirely.

Following Elsie's death on March 22, 2010, an initial accounting of her estate filed by Toni in her capacity as executrix showed that at the time of her death Elsie had cash assets in excess of $1,000,000. However, as a result of certain inter vivos financial transactions which included survivorship or pay on death provisions, the probate estate was less than $600,000. The amended complaint alleges that these inter vivos transactions occurred after Toni was made Elsie's agent and attorney-in-fact under the DPOA, and were the result of Elsie's “complete dependence upon, and justified trust in Toni” and the “strong confidential relationship” that existed between Elsie and Toni and Bruce, under which they “owed [Elsie] the highest degree of fidelity.”

The general background allegations of the amended complaint conclude with the assertion that it “relates to activities and conduct by Toni **Shaffer**, after being appointed as agent for [Elsie] under the DPOA, and that of [Elsie]' s sister, Audrey Wingo, from 2004 until shortly after [Elsie]'s death in 2010.” Other than to reference her relationship to Elsie and identify her as a residuary legatee of Elsie's will, no other allegations concerning Audrey are found in the general allegations of the amended complaint.

The amended complaint then lists a series of “financial transactions involving Toni **Shaffer** while serving as [Elsie]'s agent under the durable power of attorney.” Despite this description, however, it is not alleged that any of the transactions were accomplished using the authority of the DPOA. These transactions may be summarized as follows:

• On May 21, 2004, Elsie signed a customer access agreement for an account at Wachovia Bank. Sometime prior to March 2009, the account was redesignated as “Elsie R. Smith and Toni **Shaffer**, POA.” Following Elsie's death, the final statement *220 of the account showed only Elsie as the owner and indicated that the balance of $83,467.89 was withdrawn from the account by a cashier's check **88 payable to Audrey directly, rather than to Elsie's estate.

• On June 22, 2004, Elsie, accompanied by Toni and Audrey, transferred the balance of an account at First Tennessee Bank titled solely in her name into a certificate of deposit of $80,500.00 titled jointly with Toni and Audrey with right of survivorship. Toni and Audrey received the proceeds from this account following Elsie's death.

• On November 23, 2004, Elsie, accompanied by Toni and Audrey, transferred the balance of a certificate of deposit at Highlands Union Bank titled solely in her name into a certificate of deposit of $75,018.13 titled jointly with Toni and Audrey with right of survivorship. When the certificate matured in November 2008, Toni, acting as a joint holder of the account, received a cashier's check for $87,769.85, with which she opened a certificate of deposit at Wachovia Bank in the name of Elsie,

herself, and Bruce and a pay on death designation in favor of Audrey and Benjamin **Shaffer** (“Benjamin”), the **Shaffers**' grandson. Following Elsie's death, Mike, Benjamin's father, received half the proceeds of the certificate as custodian for Benjamin, and Audrey received the remainder.

• On **September** 7, 2007, Toni redeemed certificates of deposit at TruPoint Bank and Wachovia Bank for $97,260.56 and $53,766.84 respectively and deposited these funds into an account at Wachovia Securities titled jointly with right of survivorship in Elsie's and her names. Following Elsie's death, Toni withdrew the account balance of $156,976.08 and deposited these funds into an account titled in her name only. This account was later retitled in the **Shaffers**' names jointly.

The amended complaint sets out 11 counts which can be summarized as follows: Counts **1**, 2 and 3 allege breach of a “duty as an agent on a joint bank account” by Audrey, Bruce and Toni respectively and seek to recover funds for inclusion in Elsie's estate. Counts 4, 5 and 6 seek to set aside all transactions that directly or indirectly benefited Toni, Bruce and Audrey respectively in that they were “procured by undue influence” and to recover those funds for *221 inclusion in Elsie's estate. Counts 7 and 8 seek to remove Toni as executrix of Elsie's estate and to assess damages against her for waste of the estate's assets. Counts 9 and 11 are alleged to be “against all defendants,” but make no express allegations against Mike, the **Shaffers**' son, and seek a declaratory judgment concerning Elsie's testamentary intent and establishing a constructive trust for any unjust enrichment of the defendants. Count 10 seeks a declaratory judgment against Toni and Bruce with respect to their contract for personal services with the Smiths to determine the amount of compensation, if any, they are due from the estate.

As relevant to this appeal, within the various counts the amended complaint repeatedly asserts that Toni, Bruce and Audrey each had a confidential relationship with Elsie and that “[w]here **one** standing in a confidential relationship to another person receives a benefit from that person without an exchange of full and fair compensation, a presumption arises that the benefit resulted from the exercise of undue influence. This presumption is sufficient to satisfy Plaintiffs' burden of establishing a prima facie case of undue influence.”

On March 19, 2012, the defendants jointly filed a demurrer to the amended complaint. The defendants alleged that the amended complaint as a whole fails to state any cause of action because it asserts that Elsie had testamentary capacity. They contended, therefore, that Elsie was likewise competent to undertake the financial transactions in which she personally participated. Moreover, they contended that since Elsie personally participated in these transactions, Toni's role as agent and attorney-in-fact are not relevant to establishing whether she had a confidential relationship with Elsie as to these transactions.

The defendants further contended that the amended complaint fails to allege “facts, as opposed to legal conclusions, sufficient to establish that the defendants abused their confidential relationship with Elsie Smith.” This was so, they contended, because **Ayers**89 and Riley are “rely[ing] upon an evidentiary presumption in order to ... circumvent their pleading requirements.” Finally, the defendants generally denied that the amended complaint adequately states grounds for the declaratory relief sought, for the establishment of a constructive trust, or for removing Toni as executrix of the estate and charging her with waste.

As relevant to this appeal, **Ayers** and Riley responded to the demurrer by asserting that Elsie's capacity to personally participate in some of the financial transactions did not negate the possibility that *222 she engaged in those transactions as a result of the undue influence of the defendants. Moreover, they contended that it was not necessary that Toni act directly in her capacity as Elsie's agent and attorney-in-fact for the confidential relationship implied by that role to give rise to an inference of undue influence, especially where she benefited disproportionately from the transactions. **Ayers** and Riley further responded that the facts alleged in the amended complaint support the evidentiary presumption, that the circuit court was required to accept these allegations

as true and, thus, also that the presumption would apply. Similarly, they contended that the allegations of the complaint as a whole support the claims for equitable relief to restore a portion of Elsie's estate.

The circuit court conducted a hearing on the demurrer to the amended complaint on July 25, 2012. The parties presented arguments in accord with their positions stated above. At the conclusion of the hearing, the court opined that the demurrer would be sustained because the amended complaint was "devoid of any allegation that [Toni] took any specific act under her Durable Power of Attorney to include herself on any account that [Elsie] had titled solely in her name." In the court's view, the existence of the DPOA was irrelevant to whether any action taken personally by Elsie was the result of undue influence, because the confidential relationship implied by the existence of a power of attorney was relevant only to transactions accomplished by virtue of a party acting as an attorney-in-fact.

In a final order entered August 21, 2012, the circuit court found that the Amended Complaint merely alleges that the defendant, Toni **Shaffer**, transported and accompanied [Elsie] when [Elsie] signed various documents including her will, general power of attorney, and various bank documents adding Ms. **Shaffer** and others as joint owners of various accounts. Significantly, the Amended Complaint fails to state facts that allege that Toni **Shaffer**, while acting as an agent under the power of attorney, arranged for [Elsie]'s assets to pass at death to Toni **Shaffer** or the other named defendants. To the contrary, the exhibits attached to plaintiffs' Amended Complaint indicate that the assets in question were retitled by [Elsie] personally.

The plaintiffs argued that the fact that [Elsie] executed a power of attorney naming Mrs. **Shaffer** as an agent calls into *223 question the validity of any subsequent transfer from the principal to the agent. The plaintiffs' assertion is not the law in **Virginia**. Additionally, plaintiffs continue to rely upon the evidentiary presumption that where an agent acts under a power of attorney to consummate a transaction to the benefit of the agent, the act is presumptively fraudulent.... [P]laintiffs' reliance is misplaced inasmuch as there is no allegation in the Amended Complaint that Mrs. **Shaffer** acted under the power of attorney to consummate any transaction to the benefit of the agent.

The circuit court further found that "the plaintiffs' remaining pleadings which attempt to set forth various theories of recovery against the defendants fail to allege facts sufficient to state a cause of action." The court neither addressed nor made any express ruling with regard to the defendants' argument that the amended complaint fails to adequately plead that Elsie could have been subject to undue influence by Toni or others because it also alleges that she had testamentary capacity to make her will. **Ayers** and Riley filed written exceptions to the court's judgment, and this appeal followed.**90

DISCUSSION

5 At the outset, we will clarify what aspects of the amended complaint are before us in this appeal. In their assignments of error addressing the sustaining of the demurrer, **Ayers** and Riley expressly identify Counts **1**, 2, 3, 4, 5 and 6 of the amended complaint as having been erroneously dismissed by the circuit court. As the court's order sustained the demurrer as to all 11 counts, we hold that **Ayers** and Riley have abandoned Counts 7, 8, 9, 10 and 11 by failing to make these claims the subject of an assignment of error. *WBM, LLC v. Wildwoods Holding Corp.,* 270 **Va**. 156, 164, 613 S.E.2d 402, 407 (2005). Because only Counts 9 and 11 assigned liability to "all defendants" and no other count predicated any liability against the **Shaffers**' son Mike, we further hold that the court's judgment is final as to him.

678910 We clearly and concisely stated the law of undue influence in the formation of contracts in *Parfitt v. Parfitt,* 277 **Va**. 333, 672 S.E.2d 827 (2009). What we said there bears repeating here.

*224 A court of equity will not set aside a contract because it is “rash, improvident or [a] hard bargain” but equity will act if the circumstances raise the inference that the contract was the result of imposition, deception, or undue influence. To set aside a deed or contract on the basis of undue influence requires a showing that the free agency of the contracting party has been destroyed. Because undue influence is a species of fraud, the person seeking to set aside the contract must prove undue influence by clear and convincing evidence.

Direct proof of undue influence is often difficult to produce. In the seminal case of *Fishburne v. Furguson,* 84 **Va**. 87, 111, 4 S.E. 575, 582 (1887), however this Court identified two situations which we considered sufficient to show that a contracting party's free agency was destroyed, and, once established, shift the burden of production to the proponent of the contract. The first involved the mental state of the contracting party and the amount of consideration:

n[W]here great weakness of mind concurs with gross inadequacy of consideration, or circumstances of suspicion, the transaction will be presumed to have been brought about by undue influence.

....

The second instance *Fishburne* identified arises when a confidential relationship exists between the grantor and proponent of the instrument:

[W]here **one** person stands in a relationship of special confidence towards another, so as to acquire an habitual influence over him, he cannot accept from such person a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained.

277 **Va**. at 339–40, 672 S.E.2d at 829 (quoting *Bailey v. Turnbow,* 273 **Va**. 262, 267, 639 S.E.2d 291, 293 (2007)).

11**12** Thus, “the presumption of undue influence arises and the burden of going forward with the evidence shifts [to the defendant] when weakness of mind *and* grossly inadequate consideration or suspicious circumstances are shown or when a confidential relationship is established.” *225 *Friendly Ice Cream Corp. v. Beckner,* 268 **Va**. 23, 33, 597 S.E.2d 34, 39 (2004) (emphases in original); *accord Parfitt,* 277 **Va**. at 340, 672 S.E.2d at 829. Such a confidential relationship is “not confined to any specific association of the parties; it is **one** wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the **one** side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.” *Friendly Ice Cream Corp.,* 268 **Va**. at 34, 597 S.E.2d at 39–40 (internal citation omitted); *accord Parfitt,* 277 **Va**. at 341, 672 S.E.2d at 830.

We have further explained that “[t]rust alone, however, is not sufficient. We trust most men with whom we deal. There must be something reciprocal in the relationship before the rule can be invoked. Before liability can be fastened upon **one** there must **91 have been something in the course of dealings for which he was in part responsible that induced another to lean upon him, and from which it can be inferred that the ordinary right to contract had been surrendered.” *Friendly Ice Cream Corp.,* 268 **Va**. at 34, 597 S.E.2d at 40.

13 “We have identified several particular classes of relationships that may give rise to a presumption of undue influence. Among them ... is when **one** person is an agent for the other.” *Parfitt,* 277 **Va**. at 341, 672 S.E.2d at 830 (citing *Bailey,* 273 **Va**. at 268, 639 S.E.2d at 293). Undeniably, **one** such relationship is that between a principal and a person authorized to act as her agent and attorney-in-fact. *Grubb v. Grubb,* 272 **Va**. 45, 53, 630 S.E.2d 746, 751 (2006). Importantly, in such cases, the presumption of undue influence will “arise[ ] independently of any evidence of actual fraud, *or of any*

limitations of age or capacity in the other party to the confidential relationship, and is intended to protect the other party from the influence naturally present in such a confidential relationship." *Id.* at 54, 630 S.E.2d at 751 (emphasis added).

141516 A confidential relationship "springs from *any* fiduciary relationship, and when such relationship is found to exist, *any* transaction to the benefit of the dominant party and to the detriment of the other is presumptively fraudulent." *Nicholson v. Shockey,* 192 **Va**. 270, 278, 64 S.E.2d 813, 817. (1951)(emphasis added). Thus, whenever a fiduciary relationship exists between parties, the existence of **one** or more transactions which benefit the party who owes a fiduciary duty to the other shifts the burden of proving the bona fides of *226 the transaction to the party owing the duty. *Id.* at 277, 64 S.E.2d at 817. It is not necessary that the transaction be accomplished directly as a result of the fiduciary relationship, but rather, it is the fact that "a confidential relationship existed between the parties at the time of the transaction" that gives rise to the presumption and the shifting of the burden of going forward with the evidence. *Diehl v. Butts,* 255 **Va**. 482, 489, 499 S.E.2d 833, 838 (1998); *Friendly Ice Cream Corp.,* 268 **Va**. at 33, 597 S.E.2d at 39.

17 From this summary of the law, it is clear that to survive a demurrer, a complaint seeking to set aside a contract or other transaction favorable to a defendant or her interests because of undue influence by the defendant must allege *either* that because of great weakness of mind of the other party the defendant obtained the bargain for grossly inadequate consideration or under some other circumstance of suspicion, *or* alternately that a confidential relationship existed between the parties at the time of a transaction beneficial to the defendant, even in the absence of other suspicious circumstances. Both allegations will support a finding of undue influence resulting in a fraudulent transaction, and may be pled independently or in the alternative.

18 Because the two circumstances that will suffice to allege undue influence are not interdependent, the capacity, or lack thereof, of the party allegedly defrauded by the defendant to conduct her own business is not relevant to establishing a presumption of undue influence based upon the existence of a confidential relationship. Likewise, the absence of an allegation of a confidential relationship alone would not defeat a claim that the undue influence arose from the defendant taking advantage of the other party's diminished capacity. In short, while it may frequently be the case that a claim of undue influence may be supported by allegations that the defendant both overbore the will of the other party through weakness of mind and also took advantage of a confidential relationship, in considering a demurrer to such claims the trial court must evaluate the sufficiency of each theory independently.

Although the amended complaint in this case contains allegations that the defendants exercised undue influence over Elsie both through her diminished capacity and as a result of confidential relationships, it is clear that the circuit court's determination to grant the demurrer was premised only on its determination that there was no confidential relationship between Elsie and Toni. The court concluded *227 that because the transactions were conducted by Elsie personally, or by Toni as a joint account holder, no confidential relationship **92 between Elsie and Toni arose by virtue of the DPOA, which in the court's view precluded any presumption of undue influence. Without elaborating further, the court summarily concluded that the amended complaint also failed to allege facts sufficient to find that a confidential relationship existed between Elsie and either Bruce or Audrey.[2]

19 Ayres' and Riley's first assignment of error challenges the circuit court's ruling that there was no confidential relationship between Elsie and Toni because the transactions at issue did not require Toni to exercise her powers under the DPOA. Unquestionably, the amended complaint pleads that Toni was in a position of trust and exercised habitual influence over Elsie, as evidenced by Elsie having entrusted the management of her property and affairs to Toni though the DPOA, such that a confidential relationship existed between Elsie and Toni. Contrary to the court's ruling and the position urged by the defendants below and in this appeal, it was not necessary under the allegations of the amended complaint for Toni to have exercised her authority under the DPOA to

accomplish the transactions that benefited her or others close to her for the presumption of undue influence to apply. Accordingly, we hold that the circuit court erred in ruling that no confidential relationship could arise between Elsie and Toni solely because Toni may not have exercised her powers under the DPOA with respect to the challenged transactions.

20 We now consider the issue raised by **Ayers** and Riley in their second assignment of error challenging the sustaining of the demurrer as to Counts **1**, 2 and 3. In each of these counts, the amended complaint alleges that a confidential relationship existed between Elsie and Audrey, Toni, and Bruce respectively because they were each parties to a joint account with Elsie for which she provided all the assets.

21 Code § 6.2–619(A) provides that "[p]arties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to *228 his ownership interest in the joint account and as agent in regard to the ownership interest of the other party." In *Parfitt* we explained that where, as in this case, a joint account is established between two parties under which all the assets are contributed by **one** party, the second party becomes "an agent with regard to the entire account. By statute, a confidential relationship was established creating a fiduciary duty [and] a presumption that the self-dealing transactions were unduly obtained." 277 **Va**. at 342, 672 S.E.2d at 830 (internal citations and quotation marks omitted). Under such circumstances, it need not be alleged or proven that the defendant procured the creation of the joint account by undue influence. Rather, the existence of the account itself imposes a fiduciary duty on the defendant and with regard to a subsequent transaction creates the presumption of undue influence which shifts to the defendant the burden of proving the bona fides of the transaction. *Id.; Nicholson,* 192 **Va**. at 277, 64 S.E.2d at 817.

Because the amended complaint alleges that Audrey, Toni, and Bruce were each made co-owners of **one** or more accounts with Elsie for which Elsie provided all the funds, under Code § 6.2–619(A) a confidential relationship existed between each of the three and Elise as a matter of law with respect to those accounts, and the burden would fall upon each of them to rebut the presumption that the transactions were the result of undue influence.[3] Accordingly, we hold that **93 the circuit court erred in sustaining the demurrer as to Counts **1**, 2 and 3.

22 In their third assignment of error, **Ayers** and Riley challenge the circuit court's sustaining the demurrer as to Counts 4, 5 and 6, which respectively asserted that Toni, Bruce and Audrey each had a confidential relationship with Elsie apart from that implied by the creation of the joint accounts. We have already determined that the court erred in finding that no confidential relationship arose between Toni and Elsie because of the DPOA. Moreover, even without the *229 existence of the DPOA, the amended complaint contains allegations that would support a finding that a confidential relationship developed between Elsie and Toni. Specifically, it is alleged that Elsie was "dependent on Toni ... for both physical and mental/intellectual assistance" calling upon her both day and night. Likewise, in Count 5, the complaint alleges that "[e]ven without the confidential relationship arising ... from the multi-owner bank account, a confidential relationship existed between [Elsie] and ... Bruce ... because of the aid Mr. and Mrs. Smith needed and requested" from him.

A confidential relationship will not necessarily arise in every case where a person requests or receives regular aid from another. Nonetheless, when the amended complaint is viewed as a whole, it is clear that Elsie was alleged to have relied almost exclusively on Toni and Bruce to maintain her property and for most of her daily needs and activities until October 2007, and a reasonable inference can be made that Elsie was dependent on Toni and Bruce to such an extent that a confidential relationship existed between them. Given the standard of review applicable to a demurrer, we hold that the circuit court erred in sustaining the demurrer as to Counts 4 and 5.

23 With respect to Audrey, the amended complaint alleges in Count 6 that a confidential relationship between her and Elsie was demonstrated by the fact that Audrey "collaborated with Toni **Shaffer** in

the handling of [Elsie]'s financial affairs, and especially in the process of persuading [Elsie] to sign documents to accomplish many of the ... transactions which Toni **Shaffer** proposed, advised, or persuaded [Elsie] to participate in," and that when Elsie was accompanied by Audrey to the banks to conduct these transactions, "[s]he was completely under the influence of, and dependent upon Toni **Shaffer** and/or her sister, Audrey Wingo. This was especially true in regard to the management of her financial affairs." Additionally, there are allegations that the familial relationship between Elsie and Audrey was of a confidential nature "especially after certain events caused [Elsie] to distrust her granddaughter (Plaintiffs' mother)."

While these allegations are less specific than those concerning Toni and Bruce, they nonetheless constitute facts and reasonable inferences which, taken as true, give rise to the existence of a confidential relationship and the consequent presumption of undue influence upon Elsie in those transactions that benefited Audrey. *230 Accordingly, we hold that the circuit court erred in sustaining the demurrer to the amended complaint with respect to Count 6.[4]

CONCLUSION

For these reasons, we will affirm the judgment of the circuit court sustaining the demurrer **94 to the amended complaint as to Counts 7, 8, 9, 10 and 11, and the dismissal of Michael T. **Shaffer** as a defendant. We will reverse the judgment of the circuit court sustaining the demurrer to the amended complaint as to Counts **1**, 2, 3, 4, 5 and 6, and remand the case to the circuit court for further proceedings consistent with the views expressed in this opinion.

Affirmed in part, reversed in part, and remanded.

Footnotes

1 Although the amended complaint did not expressly incorporate any of the allegations of the original complaint, it did reference exhibits attached to the original complaint. Accordingly, those exhibits, which were already a part of the record, are properly considered part of the amended complaint for purposes of resolving the demurrer. *See* Rule 3:4(b).

2 The circuit court made no express ruling on whether the amended complaint adequately pled facts to support a finding that **one** or more of the defendants exercised undue influence over Elsie because of her weakness of mind in obtaining a benefit for inadequate consideration or under other suspicious circumstances, and neither party has addressed that issue in this appeal. Accordingly, we express no opinion on whether the amended complaint would have supported a cause of action based on the alternate method of proving undue influence.

3 Because this case was decided on a demurrer, we are not here concerned with what quantum of evidence the defendants would need to present to rebut the presumption of fraud arising from the statutorily-imposed confidential relationship between joint owners of an account. Indeed, it is self-evident that such evidence will be case specific and, thus, should be decided by a trier-of-fact on evidence adduced at trial. It is also self-evident, however, that these transactions clearly reduced Elsie's estate, that neither Toni nor Bruce are legatees under Elsie's will, and that, as she is a residuary legatee under the will, Audrey's share of the estate could be increased if funds were to be recovered for the estate as a result of this litigation.

4 We will briefly address an issue raised by **Ayers**' and Riley's fourth assignment of error. As framed, this assignment of error asserts that the circuit court erred in determining that Toni was entitled to reimbursement of her costs in defending the suit as executrix of the estate. **Ayers** and Riley contend that this was error because the suit was filed against Toni only in her personal capacity. While the court stated from the bench that it would allow reimbursement of costs incurred by Toni on behalf of the estate, neither the final order nor any other order entered by the court

memorialized an award of costs and, thus, there is no ruling on this issue to review. However, because we will remand the case for further proceedings, the court may revisit the question of whether Toni is entitled to reimbursement of any costs of this litigation if they were incurred in her capacity as executrix.

277 Va. 333
Supreme Court of **Virginia**.
ESTATE OF Audrey Jane **PARFITT**, by Janice **Parfitt** Causey, Administrator, CTA.
v.
Jeffrey E. **PARFITT**, et al.
Feb. 27, **2009**.

Synopsis

Background: Administrator of **estate** filed action against decedent's son and his wife alleging breach of fiduciary duty, conversion, and unjust enrichment, and claim in detinue. The Circuit Court, Fairfax County, Gaylord L. Finch, Jr., J., granted judgment for defendants. Plaintiff appealed.

Holdings: The Supreme Court, Donald W. Lemons, J., held that:

1 confidential relationship was established by son's joint ownership of bank account with mother with right of survivorship to which he had not contributed;

2 son was agent with regard to entire account;

3 dead man's statute required higher degree of corroboration of testimony of adverse or interested party; and

4 **estate** waived argument on appeal that trial court erred in holding that it failed to prove either conversion or unjust enrichment.

Reversed and remanded.

Opinion

**828 OPINION BY Justice DONALD W. LEMONS.

*337 In this appeal, we consider whether the trial court erred in dismissing a complaint filed by the administrator of the **Estate** of Audrey Jane **Parfitt** ("**Estate**") against the decedent's son, Jeffrey E. **Parfitt**, and his wife, Boyka S. **Parfitt**.

I. Facts and Proceedings Below

Before her 2004 cancer diagnosis, Audrey Jane **Parfitt** (known as "Jane") executed a will leaving her entire **estate** in equal shares to her children and stepchildren. Throughout her final illness, Jane required considerable physical assistance to complete even the most basic daily tasks. During this time, she received help from hired caregivers, as well as from her son, Jeffrey E. **Parfitt** ("Jeff"), and his wife, Boyka S. **Parfitt** ("Boyka").

With the knowledge and assent of his brother Gordon Vance **Parfitt** ("Vance"), who lived out of state, Jeff was added as a joint owner of Jane's bank account ("joint account") in order to assist Jane in paying her bills. Jane, Jeff, and Vance also agreed that Jeff would quit his construction job to care for Jane until care providers could be hired, and that Jeff would pay himself $500.00 per week from

the joint account to make up for his lost income. Although care providers were hired in July 2004, Jeff did not return to work until after Jane's death in March 2006.

During this period, Jeff liquidated a number of Jane's assets and obtained various loans, depositing the proceeds into the joint account. The sources of funds used in these transactions included an annuity from New York Life surrendered for $106,093.05, a certificate of deposit from BB & T Bank worth $14,675.66, a home equity loan also from BB & T Bank in the amount of $50,000, a certificate of deposit *338 from USAA Federal Savings Bank worth $12,811.41, and a reverse mortgage obtained from Seattle Mortgage Company in the amount of $155,000. The total value of assets deposited in the joint account as a result of these transactions was at least $338,580.12.

During the period of Jane's illness, Jeff transferred $305,591.00 from the joint account to an account he shared with Boyka. Jeff also wrote checks to himself from the joint account totaling $67,500. Additionally, Jeff wrote checks from the joint account to various payees in the amount of $9,013.37 for his and Boyka's benefit.

Jane died on March 7, 2006. In July 2006, the **Estate** filed a complaint against Jeff, alleging breach of fiduciary duty, conversion, unjust enrichment, and including a claim in detinue. Boyka was added as a defendant on the same claims in a November 2006 amended complaint.

After a three-day bench trial, the trial court entered an order holding that (i) the **Estate** had failed to establish the existence of undue influence; (ii) the evidence had not established a confidential relationship between Jeff and Jane; and, (iii) the **Estate** had failed to prove a claim in detinue, for conversion, or for unjust enrichment. We awarded an appeal to the **Estate** on the following assignments of error:

1. The court made an error of fact in determining that Plaintiff did not demonstrate that Jane **Parfitt's** free agency was destroyed.

2. The court made an error of law in determining that Plaintiff did not demonstrate a confidential relationship existed between Jeffrey **Parfitt** and Jane **Parfitt**.

3. The court made an error of law in determining that Plaintiff did not demonstrate a prima facie claim of undue influence, thereby shifting the burden of proof to the Defendants.

4. The court made an error of law in determining that Plaintiff did not prove a claim of conversion or unjust enrichment.

5. The court made an error of fact and law in not determining that Defendants' testimony should be struck for lack of corroboration pursuant to **Virginia** Code § 8.01–397.

6. The court made an error of law in not finding that Jeffrey **Parfitt** breached his fiduciary duty to Jane **Parfitt**. ***339**829**

II. Analysis

A. Undue Influence

1. Standard of Review

1 In dismissing the **Estate's** claims, the trial court rejected the **Estate's** contention that it had introduced sufficient evidence to establish, as a matter of law, a prima facie case of undue influence. Whether a plaintiff alleging undue influence has established a prima facie case is reviewed de novo, *see* ***Virginia*** *Baptist Homes, Inc. v. Botetourt County,* 276 **Va**. 656, 663, 668 S.E.2d 119, 122 (2008); *Quatannens v. Tyrrell,* 268 **Va**. 360, 365, 601 S.E.2d 616, 618 (2004), with deference given

to the factual findings of the trial court, *see* *Friendly Ice Cream Corp. v. Beckner,* 268 **Va**. 23, 33, 597 S.E.2d 34, 39 (2004).

2. Personal Benefit and Confidential Relationship

23 We recently reiterated the law of undue influence in **Virginia**:

A court of equity will not set aside a contract because it is "rash, improvident or [a] hard bargain" but equity will act if the circumstances raise the inference that the contract was the result of imposition, deception, or undue influence. To set aside a deed or contract on the basis of undue influence requires a showing that the free agency of the contracting party has been destroyed. Because undue influence is a species of fraud, the person seeking to set aside the contract must prove undue influence by clear and convincing evidence.

Direct proof of undue influence is often difficult to produce. In the seminal case of *Fishburne v. Ferguson's Heirs,* 84 **Va**. 87, 111, 4 S.E. 575, 582 (1887), however this Court identified two situations which we considered sufficient to show that a contracting party's free agency was destroyed, and, once established, shift the burden of production to the proponent of the contract. The first involved the mental state of the contracting party and the amount of consideration:

[W]here great weakness of mind concurs with gross inadequacy of consideration, or circumstances of suspicion, the transaction will be presumed to have been brought about by undue influence.

....

*340 The second instance *Fishburne* identified arises when a confidential relationship exists between the grantor and proponent of the instrument:

[W]here one person stands in a relationship of special confidence towards another, so as to acquire an habitual influence over him, he cannot accept from such person a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained.

Bailey v. Turnbow, 273 **Va**. 262, 267, 639 S.E.2d 291, 293 (2007) (quoting *Friendly Ice Cream Corp.,* 268 **Va**. at 31–32, 597 S.E.2d at 38–39 (internal citations omitted)). "[T]he presumption of undue influence arises and the burden of going forward with the evidence shifts when weakness of mind *and* grossly inadequate consideration or suspicious circumstances are shown or when a confidential relationship is established." *Friendly Ice Cream Corp.* 268 **Va**. at 33, 597 S.E.2d at 39 (emphases in original). This presumption will satisfy the plaintiff's burden of proving undue influence unless it is rebutted. The defendant therefore has the burden of producing evidence sufficient to rebut the presumption.

These principles apply to gratuitous transfers as well as contracts. The **Estate** contends it demonstrated, by clear and convincing evidence, that both situations described in *Fishburne* were present here and that, under either analysis, the trial court should have shifted to Jeff and Boyka the burden of producing evidence sufficient to rebut the presumption of undue influence. However, in this case we need not decide the issue of Jane's weakness of mind, because a confidential relationship was established as a matter of law by Jeff's joint ownership of the bank account through which all the assets at issue flowed.

First, it is undisputed that by virtue of their actions with regard to Jane's property, Jeff and Boyka received considerable personal benefit. This is a necessary precondition for the burden to be shifted when a transaction is challenged on the ground that it was **830 procured by undue influence in a confidential relationship. *Friendly Ice Cream Corp.,* 268 **Va**. at 31–32, 597 S.E.2d at 38–39.

*341 We next turn to whether a confidential relationship was established. We discussed the general outline of such relationships in *Friendly Ice Cream Corp.,* which described a confidential relationship as not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.

Trust alone, however, is not sufficient. We trust most men with whom we deal. There must be something reciprocal in the relationship before the rule can be invoked. Before liability can be fastened upon one there must have been something in the course of dealings for which he was in part responsible that induced another to lean upon him, and from which it can be inferred that the ordinary right to contract had been surrendered.

Friendly Ice Cream Corp., 268 **Va**. at 33–34, 597 S.E.2d at 39–40 (quoting *Hancock v. Anderson,* 160 **Va**. 225, 240–41, 168 S.E. 458, 463 (1933) (citation omitted)). We have identified several particular classes of relationships that may give rise to a presumption of undue influence. Among them, and most relevant in this appeal, is when one person is an agent for the other. *Bailey,* 273 **Va**. at 268, 639 S.E.2d at 293.

In this case, Jeff was an agent for Jane by statute, as a joint owner of an account to which he had not contributed. **Code § 6.1–125.15:1** provides that "[p]arties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as a principal in regard to his ownership interest in the joint account and ***as agent in regard to the ownership interest of the other party.***" (Emphasis added). The transfers challenged in this case passed through an account that Jane and Jeff held as joint owners with right of survivorship. The evidence at trial indicated that the proceeds from the New York Life annuity and the Certificates of Deposit from BB & T and USAA were deposited into the joint account. Furthermore, proceeds from the home equity line of ***342** credit Jane obtained from BB & T were also deposited to the joint account as a "counter deposit." Likewise, $155,000 obtained under the reverse mortgage was deposited into the joint account. These funds all belonged to Jane.

4 Because Jeff did not contribute any funds to Jane's account, he was, by operation of statute, an agent with regard to the entire account. By statute, a confidential relationship was established creating a fiduciary duty. **Code § 6.1–125.15:1**; ***Horne v. Holley,* 167** Va**. 234, 241, 188 S.E. 169, 172 (1936)** ("[A]n agent is a fiduciary with respect to the matters within the scope of his agency"). The confidential relationship created a presumption that the self-dealing transactions were "unduly obtained." ***Fishburne,* 84** Va**. at 113, 4 S.E. at 582.** Accordingly, the trial court erred in holding that there was no confidential relationship, and therefore erred in failing to shift the burden of production to Jeff and Boyka to rebut the presumption of undue influence in the various transactions.

B. Dead Man's Statute

5 The **Estate** also argues that the entire trial testimony of Jeff and Boyka should have been stricken in accordance with Code § 8.01–397, **Virginia's** "dead man's statute," and that the trial court's failure to do so constituted reversible error. In this case, the dead man's statute requires corroboration of testimony of an adverse or interested party in an action concerning the decedent's **estate**.

1. Standard of Review

6 "Whether or not corroboration exists and the degree and quality required are to be determined by the facts and circumstances of the particular case." *Nicholson v. Shockey,* 192 **Va**. 270, 283, 64 S.E.2d 813, 821 (1951). However, if the trial court failed to identify the correct legal standard in

determining the level of corroboration required, then it is an issue of law that, like other issues of law, must be reviewed de novo.****831**

2. Level of Corroboration Required

7 The statute relied on by the **Estate** reads in relevant part:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person *343 so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.

Code § 8.01–397. We have often been called on to apply the statute, and have made it clear that [i]t is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, for then there would be no need for the adverse or interested party's testimony to be corroborated. Corroborating evidence tends to confirm and strengthen the testimony of the witness[,] and it may come from other witnesses as well as from circumstantial evidence. It is not essential that a survivor's testimony be corroborated on all material points.

The corroboration, to be sufficient under the statute, however, must at least tend, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness ... which allegation or issue, if unsupported, would be fatal to the case.

Rice v. Charles, 260 **Va**. 157, 165–66, 532 S.E.2d 318, 323 (2000) (citations, emphases by the Court, and internal quotation marks omitted). Additionally, “[w]here a confidential relationship existed between the parties at the time of the transaction relied on, a higher degree of corroboration is required than in ordinary transactions.” *Clay v. Clay,* 196 **Va**. 997, 1002, 86 S.E.2d 812, 815 (1955) (citing *Nicholson,* 192 **Va**. at 283, 64 S.E.2d at 821).

Here, the trial court denied the **Estate's** motion to strike Jeff and Boyka's testimony based on the dead man's statute. In doing so, the trial court found that Jeff and Boyka's testimony was sufficiently corroborated by the defendants' witnesses and by the **Estate's** own “exhibits and demonstrative preparations.” However, given the trial court's erroneous holding that no confidential relationship existed, we must conclude that the trial court did not apply the “higher degree of corroboration” as it was required to do.***344**

C. Conversion or Unjust Enrichment

8 Finally, the **Estate** also contends the trial court erred in holding that it failed to prove either conversion or unjust enrichment by Jeff and Boyka. However, the **Estate** failed to address either issue in its brief, and consequently has waived the argument on appeal.

Rule 5:27, titled “Opening Brief of Appellant,” requires that “[t]he form and contents of the opening brief of appellant shall conform in all respects to the requirements ... set forth in Rule 5:17(c)”. Rule 5:17(c), in turn, instructs that with respect to any assignments of error in the petition for appeal, the appellant shall include “[t]he principles of law, the argument, and the authorities relating to each assignment of error.” Rule 5:17(c)(4). Rule 5:27 therefore requires that the same elements be included in the opening brief for each granted assignment of error. The failure to comply with the requirements of Rules 5:27 and 5:17(c)(4) results in waiver of the arguments the party failed to make. *Jay v. Commonwealth,* 275 **Va**. 510, 519, 659 S.E.2d 311, 316 (2008). The **Estate** has violated Rule 5:27 by failing to include any “principles of law,” “argument,” or “authorities” relating to this granted assignment of error. Consequently, the **Estate** has waived these arguments on appeal.

III. Conclusion

The trial court erred in holding that a confidential relationship did not exist with respect to transactions involving the joint bank account. Flowing from this error, the trial court then erred in application of evidentiary burdens regarding proof of undue influence and corroboration necessary under the dead man's statute. Accordingly, we will reverse the judgment of the trial court and remand the matter for a new trial consistent with this opinion. At a new trial of this matter, the **Estate** is not precluded from offering proof of undue influence on any basis including the confidential relationship created by application of Code § 6.1–125.15:1. **832 However, the failure to argue claims of conversion and unjust enrichment on appeal will preclude the **Estate** from presenting those claims upon retrial.

Reversed and remanded.

272 Va. 45
Supreme Court of **Virginia**.
Roy **GRUBB**, et al.
v.
Ernest E. **GRUBB**, Individually and as Executor of the Last Will and Testament of Eva Belle Logan, Deceased
Ernest E. **Grubb**, Individually and as Executor of the Last Will and Testament of Eva Belle Logan, Deceased
v.
Roy **Grubb**, et al.
Record Nos. 051859, 051860.
June 8, **2006**.

Synopsis

Background: Legatees filed cross bill against testator's agent on ground that he used durable power of attorney to transfer testator's assets into certificates of deposit (CDs) with right of survivorship. The Circuit Court, Washington County, C. Randall Lowe, J., ordered agent to pay testator's estate the value of the CDs, but refused to award prejudgment interest or attorney fees and costs as discovery sanctions. Appeals were taken.

Holdings: The Supreme Court, Barbara Milano Keenan, J., held that:

1 agent failed to rebut presumption of constructive fraud arising from his use of durable power of attorney to make himself joint owner of CDs;

2 surviving joint owner of CD was not a necessary party;

3 chancellor did not abuse discretion by failing to award prejudgment interest; and

4 award of attorney fees and costs as discovery sanctions was not required.

Affirmed in part, reversed in part, and remanded.

Opinion

OPINION BY Justice BARBARA MILANO KEENAN.

*49 In these consolidated appeals, we consider an executor's claim that the chancellor erred in ordering him to pay to the decedent's estate the value of certain assets in which the executor asserted an ownership interest. We also consider claims by certain of the decedent's siblings that the chancellor erred: 1) in determining that he could not adjudicate the executor's responsibility to reimburse the estate for the value of one contested asset because a necessary party was not before

the court; 2) in refusing to award prejudgment interest; and 3) in declining to require the executor to pay an award of costs and attorneys' fees pursuant to Rule 4:12(c).

749 In November 1996, Eva Belle Logan (Logan) executed a general durable power of attorney naming her brother, Ernest E. **Grubb (Ernest), as her attorney in fact. Logan died in February 1999. In addition to Ernest, Logan was survived by three other brothers, W.H. **Grubb**, Roy **Grubb**, and Gilbert **Grubb**, and by three sisters, Reba **Grubb**, Lula Mae Freeman, and Katherine G. Davenport.[1] In her last will and testament, Logan named Ernest executor of her estate and directed that her estate be divided in equal shares among her seven siblings.

According to the inventory Ernest filed, Logan's probate estate included assets of $326,783.74, with an additional $418,727.77 held outside the estate in funds Logan maintained in various joint bank accounts. This latter amount was divided among the following accounts: 1) $251,630.06 held in eight certificates of deposit issued by Wachovia Bank, formerly known as Central Fidelity Bank, that were listed as jointly owned by Logan and Ernest (Wachovia certificates); 2) $75,000.00 held in one certificate of deposit issued by Highlands Union Bank that was listed as jointly owned by Logan and Ernest (Highlands certificate); 3) $11,528.81 held in one certificate of deposit issued by Bank of America, formerly known as NationsBank, that was listed as jointly owned by Logan and Ernest (Bank of America certificate); 4) $58,068.90 held in one Bank of America checking account that was listed as jointly owned by Logan and *50 Ernest (Bank of America checking account); and 5) $5,000.00 held in one certificate of deposit issued by Wachovia that was listed as jointly owned by Logan and Ernest's granddaughter, Meagan Marie **Grubb** (Meagan).[2] Each of the Wachovia and Highlands certificates was designated as a “Joint Account-With Survivorship.”

After obtaining Logan's power of attorney, Ernest either opened or renewed several of the above accounts that were not included in the inventory for the probate estate. The bank records involving these accounts did not indicate whether Ernest was previously listed as a joint owner on the accounts. However, Ernest maintained that Logan had placed his name on the various certificates before he received her power of attorney, and that his actions after November 1996 on accounts showing him as a joint owner were limited to the renewal of existing joint accounts.

This litigation began when a lawsuit concerning certain real estate was filed against all the **Grubb** siblings in the circuit court. Three of Ernest's siblings, Roy **Grubb**, Gilbert **Grubb**, and Katherine G. Davenport (collectively, Roy), filed a cross bill against Ernest, alleging that Ernest improperly used his power of attorney to transfer assets from Logan's sole ownership to accounts jointly owned by her and Ernest with rights of survivorship. Roy also alleged that Ernest committed constructive and actual fraud by adding his name to the accounts without Logan's knowledge and consent, and by entering her signature on the documents that created or renewed the joint accounts. Roy asked that the court order the amounts at issue returned to Logan's estate so that they could be distributed equally among the surviving siblings in accordance with the terms of Logan's will.[3]

Before trial, the parties obtained the deposition testimony of Mary M. Millsap, an employee of the Abingdon branch of Wachovia Bank (the bank) since 1989. Millsap testified that she personally dealt with Ernest on all but two of the Wachovia financial instruments at issue. Although the bank had not retained copies of any original certificates, Millsap stated that based on the bank's policy she was certain that Ernest's name was on each of the accounts before their renewal.

*51 According to Millsap, under the bank's policy, “[i]f you were joint owner on an account with a customer and then after that you became their power of attorney, you could come in and renew that certificate for that person using your power of attorney.” Millsap **750 also stated that the bank would not allow an individual to add his name to a certificate using a power of attorney if the certificate did not previously list his name. In such a circumstance, Millsap explained, the person seeking to add his name to the account would need the account owner to sign a signature card making the attorney in fact a joint owner of the certificate. During the deposition, Roy objected to

substantial portions of Millsap's testimony on the grounds of hearsay and violations of the “best evidence rule.”

At the beginning of trial, Roy offered Millsap's deposition testimony into evidence. Roy submitted the deposition without qualification, despite the earlier objections he had noted during portions of Millsap's testimony. The chancellor admitted Millsap's deposition without addressing Roy's earlier objections.

As part of his case, Roy presented Ernest as a witness. Ernest gave equivocal testimony regarding the signatures on the financial instruments. He initially testified that he could not recall whether Logan signed the documents or whether he signed them on her behalf. However, he later testified that he witnessed Logan sign each document.

With regard to the Highlands certificate, which was purchased after Ernest obtained Logan's power of attorney, Ernest admitted that all the money used to purchase the certificate came from Logan's assets. However, Ernest could not recall whether he or Logan signed the document to procure the Highlands certificate, but contended that Logan wished to share the account with him.

Dr. Larry S. Miller, a forensic document examiner who qualified as an expert witness, also testified as part of Roy's case. He opined that Ernest, not Logan, actually signed Logan's name on all but one of the Wachovia certificates at issue.

At the conclusion of Roy's case, Ernest made a motion to strike the evidence. The chancellor denied the motion, holding that Roy's evidence raised a rebuttable presumption of constructive fraud.

Ernest presented evidence on his own behalf, including the testimony of his brother, W.H. **Grubb**, who recalled the close relationship between Logan and Ernest. In addition, Ernest again testified that Logan made him a joint owner on each of the accounts in question before giving him her power of attorney, and that he renewed *52 the certificates at issue with Logan's consent. However, Ernest failed to produce documentary evidence confirming the existence of any jointly owned certificates that he alleged existed before Logan provided him her power of attorney.

In a letter opinion, the chancellor first concluded that Meagan was not properly before the court and that, therefore, the ownership of the Wachovia certificate listing her and Logan as joint owners could not be determined. With regard to the eight Wachovia certificates that named Logan and Ernest as joint owners, the chancellor determined that only one of the documents used to obtain or renew these certificates was actually signed by Logan. The chancellor found that the remaining seven accounts, in the total amount of $239,624.83, were created by Ernest using his power of attorney and, thus, Ernest's actions involving these accounts were subject to a presumption of constructive fraud.

The chancellor further concluded that Ernest had not rebutted the presumption of constructive fraud, stating that “Ernest [had] not proven the existence of any records that indicate [the Wachovia] accounts were joint with survivorship prior to the execution of the power of attorney.” The chancellor directed that these funds be paid to Logan's estate. The chancellor did not rule on the objections raised by Roy at Millsap's deposition, nor did the chancellor indicate to what degree he had considered Millsap's testimony in reaching his conclusions regarding the Wachovia certificates.

1 Additionally, the chancellor concluded that Ernest failed to rebut the presumption of constructive fraud regarding the Highlands certificate because that instrument was purchased using money Logan acquired from the sale of her property. The chancellor further directed that the funds from this account be paid to Logan's estate. The chancellor also ordered that Ernest pay to **751 the estate the funds from the two disputed Bank of America accounts.[4]

After the chancellor issued his letter opinion, Roy filed a motion pursuant to Rule 4:12(c) requesting attorneys' fees and costs for Ernest's failure to admit during the discovery process that he signed Logan's name on the various accounts. Roy also requested an award *53 of prejudgment interest on the funds that the chancellor ordered returned to the estate.

The chancellor denied Roy's request for costs and attorneys' fees, as well as his request for prejudgment interest. However, the chancellor ordered that Ernest pay to Logan's estate the interest accrued during the litigation on the funds that Ernest was found to have fraudulently converted.

Ernest appeals from the chancellor's final decree ordering Ernest to pay to Logan's estate the funds from the Highlands certificate and the seven Wachovia certificates that the chancellor found Ernest fraudulently converted. He asserts that Millsap's deposition testimony was undisputed that the Wachovia certificates listed him as a joint owner before he obtained Logan's power of attorney. He further contends that the chancellor should not have applied a presumption of constructive fraud because Ernest proved that as a joint owner of the accounts, he merely renewed the accounts in order to maintain the "status quo." With regard to the Highlands certificate, Ernest likewise maintains that the evidence established that he was an owner of the account before being granted power of attorney. In the alternative, Ernest argues that if the chancellor was correct in applying a presumption of constructive fraud to Ernest's actions as attorney in fact, the evidence showed that he rebutted that presumption. We disagree with Ernest's arguments.

2 Ernest had a confidential relationship with Logan in which Ernest acted as Logan's attorney in fact and provided her advice on many financial matters. As a result of this confidential relationship, Ernest owed a fiduciary duty to Logan. *See Economopoulos v. Kolaitis,* 259 **Va**. 806, 812, 528 S.E.2d 714, 718 (2000); *Jackson v. Seymour,* 193 **Va**. 735, 740-41, 71 S.E.2d 181, 184-85 (1952); *Nicholson v. Shockey,* 192 **Va**. 270, 278, 64 S.E.2d 813, 817-18 (1951).

3456 Based on Ernest's status as Logan's attorney in fact, any transaction involving her assets that he consummated to his own benefit while acting as her fiduciary is presumptively fraudulent. *See Economopoulos,* 259 **Va**. at 812, 528 S.E.2d at 718; *Nicholson,* 192 **Va**. at 277-78, 64 S.E.2d at 817-18. When a presumption of constructive fraud arises, the burden of proof shifts to the fiduciary to produce clear and convincing evidence to rebut the presumption.[5]*54 *Creasy v. Henderson,* 210 **Va**. 744, 749-50, 173 S.E.2d 823, 828 (1970); *Nicholson,* 192 **Va**. at 277, 64 S.E.2d at 817; *see Carter v. Williams,* 246 **Va**. 53, 59, 431 S.E.2d 297, 300 (1993). This rule arises independently of any evidence of actual fraud, or of any limitations of age or capacity in the other party to the confidential relationship, and is intended to protect the other party from the influence naturally present in such a confidential relationship. *Nicholson,* 192 **Va**. at 277, 64 S.E.2d at 817; *Stiers v. Hall,* 170 **Va**. 569, 577-78, 197 S.E. 450, 454 (1938).

7 We have defined clear and convincing evidence as the degree of proof that provides the fact finder a firm belief or conviction regarding the allegations that a party seeks to establish. This evidentiary standard is intermediate in nature, exceeding the "preponderance" standard but not requiring the **752 level of certainty in criminal cases of "beyond a reasonable doubt." *Commonwealth v. Allen,* 269 **Va**. 262, 275, 609 S.E.2d 4, 13 (2005); *Judicial Inquiry & Review Comm'n v. Lewis,* 264 **Va**. 401, 405, 568 S.E.2d 687, 689 (2002); *Fred C. Walker Agency, Inc. v. Lucas,* 215 **Va**. 535, 540-41, 211 S.E.2d 88, 92 (1975).

89 Here, the Highlands transaction and the seven Wachovia transactions at issue are subject to a presumption of constructive fraud because Ernest either opened or renewed those accounts using his power of attorney. These transactions were consummated to Ernest's own benefit because he signed his name as a joint owner of all these accounts. Therefore, we review the evidence presented to determine whether the chancellor erred in concluding that Ernest failed to rebut the presumption of constructive fraud arising from those transactions.

10 In making this determination, we apply an established standard of review. With the exception of Millsap's testimony, the chancellor heard the evidence ore tenus and evaluated the witnesses' testimony and their credibility. Thus, his judgment is entitled to the same weight as a jury verdict. *Forbes v. Rapp,* 269 **Va**. 374, 379-80, 611 S.E.2d 592, 595 (2005); *The Dunbar Group, LLC v. Tignor,* 267 **Va**. 361, 366-67, 593 S.E.2d 216, 219 (2004). Accordingly, we will not set aside the chancellor's judgment on appeal unless it is plainly wrong or without evidence to support it. Code § 8.01-680; *Forbes,* 269 **Va**. at 380, 611 S.E.2d at 595; *Shooting Point, L.L.C. v. Wescoat,* 265 **Va**. 256, 264, 576 S.E.2d 497, 501 (2003).

11 In determining the credibility of the witnesses and the weight to be accorded their testimony, the chancellor may consider the *55 appearance and manner of the witnesses, their bias, and their interest in the outcome of the case. *Schneider v. Commonwealth,* 230 **Va**. 379, 383, 337 S.E.2d 735, 737 (1985); *see Cherrix v. Commonwealth,* 257 **Va**. 292, 301-02, 513 S.E.2d 642, 648-49 (1999); *Burket v. Commonwealth,* 248 **Va**. 596, 614-15, 450 S.E.2d 124, 134 (1994); *Fisher v. Commonwealth,* 228 **Va**. 296, 300, 321 S.E.2d 202, 204 (1984). Here, the chancellor made findings against Ernest's credibility that were critical to the decision in the case.

The chancellor first observed that Ernest had contradicted himself on the crucial issue whether he or Logan had signed the eight Wachovia certificates. After making this observation, the chancellor accepted Dr. Miller's opinion that Logan had signed only one of those certificates. Upon the chancellor's own review of the documents, he plainly rejected Ernest's testimony, finding that “a handwriting expert is not needed to determine that each time ‘Eva Belle Logan’ was penned, that it was by the same person but that person was not Eva Belle Logan.”

In reaching his decision, the chancellor also cited the fact that Ernest had not produced any documentary evidence to support his position. The chancellor stated in his letter opinion that “the [c]ourt relies on the fact that Ernest **Grubb** has not proven the existence of any records that indicate these accounts were joint with survivorship prior to the execution of the power of attorney.”

Admittedly, the chancellor did not reference Millsap's testimony when considering the issue whether Ernest had rebutted the presumption of constructive fraud. However, even if we assume that the chancellor accorded some weight to her testimony, we nevertheless conclude that the record supports his determination that Ernest failed to rebut the presumption with regard to the Wachovia certificates at issue. Having completely rejected Ernest's credibility, the chancellor could properly conclude that the remainder of Ernest's evidence did not meet the clear and convincing standard.

Significantly, Millsap's testimony showed only a limited recollection of the circumstances surrounding the issuance of each certificate, and she had to rely on her knowledge and application of the bank's policy regarding the processing of such certificates. In addition, Millsap could not testify that she observed either Ernest or Logan sign the signature cards for the certificate accounts. Accordingly, we conclude that the evidence concerning the Wachovia certificates supports the chancellor's determination that Ernest failed to *56 rebut the presumption **753 of constructive fraud with clear and convincing evidence.

We reach the same conclusion with regard to the Highlands certificate. The chancellor found that Ernest obtained the certificate by using his power of attorney, and that the funds for this certificate “were predominantly created by the sale of Eva Belle Logan's personal residence.” Also noting that Ernest used his power of attorney to convey Logan's real estate, the chancellor held that “Ernest **Grubb** has not rebutted the presumption of constructive fraud in regard to this account.” We conclude that the above-stated evidence plainly supports this determination. Thus, we hold that the chancellor did not err in ordering Ernest to pay to the estate the funds held in the Highlands certificate and the Wachovia certificates at issue.

12 We next consider the claims raised by Roy in his appeal. Roy first argues that the chancellor erred in holding that he could not adjudicate the issue of the Wachovia certificate held jointly by Meagan and Logan because Meagan was not made a party in the case. Roy contends that he was not required to make Meagan a party because he did not attack her ownership interest in the Wachovia certificate but merely sought to have Ernest account for and pay to the estate the amount of the funds he fraudulently converted in that account.

In response, Ernest observes that it is undisputed that Meagan is listed as a joint owner of the Wachovia certificate. Thus, Ernest maintains, if the chancellor were to determine that the funds from the certificate should be placed in the estate, Meagan's interest in those funds "will be totally and completely affected." We disagree with Ernest's argument.

In his cross bill, Roy alleged that Ernest breached his fiduciary duty to Logan when he removed the various amounts from her accounts and purchased the certificates of deposit at issue. Roy requested that the chancellor order Ernest "to pay unto the Estate of Eva Belle Logan the proceeds of all certificates of deposit ... acquired by him from Eva Belle Logan ... with interest thereupon from the date of said transfer."

1314 A necessary party is a person, natural or artificial, who has a legal or beneficial material interest in the subject matter or event of the litigation. *Jett v. DeGaetani,* 259 **Va**. 616, 619, 528 S.E.2d 116, 118 (2000); *Atkisson v. Wexford Assocs.,* 254 **Va**. 449, 455, 493 S.E.2d 524, 527 (1997); *Kennedy Coal Corp. v. Buckhorn Coal Corp.,* 140 **Va**. 37, 49, 124 S.E. 482, 486 (1924). If such a person is *57 not made a party to the suit, a decree cannot be rendered in the cause. *Id.* Among other things, the rule is designed to avoid having persons deprived of their property without giving them an opportunity to be heard and defend their interests in the property. *Atkisson,* 254 **Va**. at 456, 493 S.E.2d at 528.

In the present case, however, Roy did not seek to invalidate Meagan's ownership interest in the Wachovia certificate in which Meagan and Logan were listed as joint owners. Roy also did not attempt to recover funds from that account, or ask that the chancellor take any other action regarding the account or Meagan. Instead, Roy asked that Ernest be held liable to pay the amount of the proceeds held in that account, plus accumulated interest, to Logan's estate. Therefore, we hold that because Meagan's interest in the funds held in the Wachovia certificate could not be affected by Roy's claim and requested relief, she was not a necessary party to the suit and the chancellor erred in concluding otherwise.

15 Roy next argues that the chancellor abused his discretion in failing to award prejudgment interest on the amounts that Ernest was found to have fraudulently converted. We disagree.

16 As Roy acknowledges in his argument, the award of prejudgment interest rests in the chancellor's sound discretion. Code § 8.01-382; *see Tauber v. Commonwealth,* 263 **Va**. 520, 544, 562 S.E.2d 118, 131 (2002); *Dairyland Ins. Co. v. Douthat,* 248 **Va**. 627, 631, 449 S.E.2d 799, 801 (1994); *Skretvedt v. Kouri,* 248 **Va**. 26, 36, 445 S.E.2d 481, 487 (1994). Here, although the chancellor refused Roy's request for prejudgment interest, the chancellor ordered that Ernest pay the interest accrued during the course of **754 this litigation on the account funds that were fraudulently converted. We hold that this provision was a reasonable exercise of the court's discretion, and that the chancellor did not abuse his discretion by failing to award prejudgment interest.

17 Finally, Roy argues that the circuit court abused its discretion by denying his motion under Rule 4:12(c) for costs and attorneys' fees for failing to provide accurate answers in response to Roy's requests for admission. In his request for admissions, Roy asked Ernest to admit that, for each of the accounts at issue, Ernest signed Logan's name. In response to each such request, Ernest either denied that he had signed Logan's name, denied that Logan had not signed her name, or stated that

he could neither admit nor deny who had signed a particular document because he could not recall that information.

*58 We conclude that the chancellor did not abuse his discretion in denying Roy's request for costs and fees. Although these issues of fact on which admissions were sought were ultimately decided against Ernest, he had a reasonable basis for failing to admit the signatures on the Wachovia certificates based on Millsap's testimony. *See* Rule 4:12(c)(3). While Ernest did not have similar corroborative evidence to support his testimony regarding the remaining accounts in dispute, we nevertheless conclude that the chancellor did not exceed the broad discretion granted him by this Rule in denying the requested relief. *See Erie Ins. Exch. v. Jones,* 236 **Va**. 10, 14, 372 S.E.2d 126, 128 (1988).

In conclusion, we will reverse the part of the chancellor's judgment holding that Meagan was a necessary party to the claims involving Exhibit # 3, the Wachovia certificate that listed her as a joint owner. We will affirm all remaining parts of the chancellor's judgment before us in this appeal.

Accordingly, we will affirm in part, and reverse in part, the chancellor's judgment and remand the case for further proceedings related to Exhibit # 3, the Wachovia certificate bearing Meagan Marie **Grubb's** name as a joint owner of that account.

Affirmed in part, reversed in part, and remanded.

Footnotes

1 Reba **Grubb** died in February 2001.

2 An additional $17,500.00 was held in bonds, which Ernest distributed to various members of Logan's family without objection.

3 The chancellor granted the complainant's motion to sever the action pending in the bill of complaint from the action pending in the cross bill. The original complaint is not at issue in this appeal.

4 In his brief on appeal, Ernest does not refer to the Bank of America certificate and checking account nor does he reference exhibits 16 and 17, the documentary evidence pertaining to those accounts. Therefore, we conclude that he has waived argument regarding those accounts. *See* Rule 5:27 and 5:17(c)(3) and (4); *Whitley v. Commonwealth,* 260 **Va**. 482, 492, 538 S.E.2d 296, 301 (2000); *Carstensen v. Chrisland Corp.,* 247 **Va**. 433, 445, 442 S.E.2d 660, 667 (1994); *Quesinberry v. Commonwealth,* 241 **Va**. 364, 370, 402 S.E.2d 218, 222 (1991).

5 Although Code § 6.1-125.5(A) generally provides a right of survivorship to a joint account holder in sums remaining on deposit on the death of another joint account holder, that statute is not applicable here because the presumption of fraud attached to Ernest's actions before Logan died.

259 Va. 806
Supreme Court of **Virginia**.
Anastasia **ECONOMOPOULOS**, et al.
v.
Andrew M. **KOLAITIS**.
Record No. 991245.
April 21, **2000**.

Testator's daughters sued testator's son for constructive fraud, conversion, unjust enrichment, and "tortious interference with inheritance," in connection with son's redemption of testator's treasury bills at testator's request, and son's retaining for himself portion of proceeds therefrom in accordance with testator's instructions. The Circuit Court, Fairfax County, Stanley P. Klein, J., entered judgment for son. Daughters appealed. The Supreme Court, Stephenson, Senior Justice, held that: (1) confidential relationship did not exist between father and son; (2) uncontradicted evidence failed to present prima facie case of constructive fraud; (3) son's actions did not give rise to claims for conversion or unjust enrichment; and (4) cause of action for "tortious interference with inheritance" is not recognized in **Virginia**.

Affirmed.

Opinion

STEPHENSON, Senior Justice.

This case involves claims of constructive fraud, conversion, "intentional interference with inheritance," and unjust enrichment. In *809 this appeal, the plaintiffs have assigned twelve errors, and the defendant has assigned one cross-error. These alleged errors present three principal issues, *viz.*:

1. Whether the trial court erred in finding the existence of a confidential relationship between a father and son.

2. Whether the trial court erred in striking the plaintiffs' constructive fraud claim.

3. Whether the trial court erred in striking the plaintiffs' claims of conversion, "intentional interference with inheritance," and unjust enrichment.

I

By separate four-count motions for judgment, Anastasia **Economopoulos**, Aphroditi **Kolaitis**, and Fereniki **Kolaitis** (the Plaintiffs) sued Andrew M. **Kolaitis** (the Defendant). Each Plaintiff sought to

recover $262,500 in compensatory damages and $50,000 in punitive damages arising from the redemption of certain Treasury bills. The Plaintiffs alleged conversion and misappropriation in Count I, constructive fraud in Count II, unjust enrichment in Count III, and “tortious interference with inheritance” in Count IV. The Plaintiffs also sought certain equitable relief, including the imposition of a constructive trust.

By an agreed order, the actions were transferred to the chancery side of the court, and the trial court consolidated them for trial. At the conclusion of the Plaintiffs' case-in-chief, the trial court struck the Plaintiffs' evidence as to all counts and entered judgment in favor of the Defendant. This appeal ensued.

II

Michael A. **Kolaitis** died on April 21, 1997. He had four children, Anastasia **Economopoulos**, Aphroditi **Kolaitis**, Fereniki **Kolaitis**, and Andrew M. **Kolaitis**.

Michael had been a businessman in Arlington County, and, from the mid–1960's until 1980, he operated the Parkington Sleep Center. In 1966, Andrew began working at the business on a part-time basis, and, upon his graduation from college in 1973, he became a full-time employee. About 1980, Andrew took over the business from his father, although Michael continued to work part-time, **717 and the two remained co-owners of the real property upon which the business was located.

*810 Andrew operated the business until 1990, when the business property and several adjoining properties, also co-owned by Michael and Andrew, were sold to Arlington County for about $3 million. As a result of the sale, Michael and Andrew's business relationship terminated, and, as co-owner of the properties, Michael netted $956,502.91.

Michael invested $900,000 of his portion of the sale proceeds in five Treasury bills: three $200,000 bills, each titled jointly with a daughter; a $50,000 bill titled jointly with Andrew; and a $250,000 bill titled solely in Michael's name. The Treasury bills were deposited in Michael's bank account, and Michael told his three daughters that he had invested $200,000 for each of them.

From April 1990 until May 1996, Michael renewed the Treasury bills quarterly. In 1994, Michael executed a codicil to his 1992 will, directing his executor (Andrew) to divide into three equal shares $600,000 of the Treasury bill funds and to pay the shares to his three daughters.

From about 1991 until 1996, Andrew and Michael engaged the same accountant, Larry D. Spring. Spring prepared their personal tax returns, and each was present when the other's tax return was discussed with Spring.

On April 1, 1996, Michael signed a check, prepared by and payable to Andrew, in the amount of $40,000. Andrew testified that Michael had directed him to prepare the check and that Michael intended the sum as four gifts of $10,000 each to Andrew, Andrew's wife, and Andrew's two sons.

On April 3, 1996, Andrew, at Michael's request, was added as a signatory on Michael's First Union Bank account. Andrew, however, wrote no checks on that account.

In March 1996, at age 82, Michael was diagnosed with kidney disease, and he was hospitalized for renal failure several times between March and June of that year. During this period, Michael's health steadily declined. In late June 1996, Michael began thrice-weekly dialysis treatments, which continued until his death. About the same time, Michael's wife, Theresa, also was experiencing serious medical problems. She was diagnosed with cancer and underwent treatment until her death in January 1997.

In May 1996, Michael, during one of his hospitalizations, directed Andrew to retrieve Michael's NationsBank checkbook from his house. On May 16, Andrew brought the checkbook to the hospital, and Michael instructed Andrew to prepare a check, which *811 Michael signed, payable to Andrew and in the amount of $300,000. At that time, Michael's account did not contain sufficient funds to cover the check.

On May 17, 1996, while Michael was hospitalized, Andrew went to Michael's home and retrieved Michael's mail, including renewal notices for the Treasury bills. Michael, however, had decided to redeem all of the Treasury bills so that he would have control over his funds. Consequently, Michael directed Andrew to hold the $300,000 check until June 27, 1996, the day the Treasury bills were to be redeemed and the funds deposited in Michael's NationsBank account. Michael also directed Andrew to place the funds represented by the check in an account in Andrew's name and to hold the funds until further notice. Andrew did as directed.

In early July 1996, Michael told Andrew that he wanted $140,000 of the $300,000 returned to him and that the $160,000 balance was a gift to Andrew. Consequently, at Michael's direction, Andrew drew two checks, payable to Michael, each in the amount of $70,000. Thereupon, Michael deposited one of the checks in a new Signet Bank account, and he deposited the other $70,000 check in his existing account at Chevy Chase Bank. The funds remained in these two accounts, subject to Michael's control, until his death. Upon Michael's death, the funds were paid to Andrew.

On July 11, 1996, Michael executed a new will by which he divided his residuary estate equally among his four children. By his new will, Michael also revoked all prior wills and codicils. This will was admitted to probate upon Michael's death.

Throughout 1996, Michael exercised control of his various bank accounts and made **718 financial decisions on his own. In addition to the gifts to Andrew, Michael wrote checks to Anastasia in July 1996 for expenses she incurred on a trip to **Virginia** to visit him. Michael also made separate gifts to each of Anastasia's two children, as well as a $4,000 gift to Anastasia.

In November 1996, Michael learned that Fereniki had altered a check he had drawn by changing its face amount. Up to that time, Fereniki had filled out many of Michael's checks for his signature. Upon learning of the altered check, Michael took steps to ensure that Fereniki no longer had access to his checkbooks.

In January 1997, Michael directed Andrew to take his financial information to Spring so that Spring could prepare Michael's tax returns. Andrew took the information to Spring and advised Spring *812 of the gifts that Michael had made to him in 1996. Spring then prepared gift tax returns that Michael subsequently signed.

III

12 Initially, we consider the effect to be given to Andrew's testimony resulting from his having been called and examined by the Plaintiffs as an adverse party. It is well established that, when an adverse party is called and examined by an opposing party, the latter is bound by all of the former's testimony that is uncontradicted and is not inherently improbable. *Brown v. Metz,* 240 **Va**. 127, 131, 393 S.E.2d 402, 404 (1990); *Crabtree v. Dingus,* 194 **Va**. 615, 622, 74 S.E.2d 54, 58 (1953); *Saunders v. Temple,* 154 **Va**. 714, 726, 153 S.E. 691, 695 (1930). Also, under such circumstances, Code § 8.01–397 (the so-called “Deadman's Statute”) does not apply. *Brown,* 240 **Va**. at 131–32, 393 S.E.2d at 404; *Balderson v. Robertson,* 203 **Va**. 484, 488, 125 S.E.2d 180, 184 (1962).

3 In the present case, Andrew's testimony about the events in issue is uncontradicted and is not inherently improbable. Nevertheless, the Plaintiffs contend that these longstanding evidentiary rules do not apply in matters regarding confidential relationships or claims of fraud. They cite no authority

for this proposition, and we are not aware of any. We see no reason to create this exception to these rules, and, therefore, we reject the Plaintiffs' contention.

IV

A

We now consider the issue raised by Andrew's assignment of cross-error; that is, whether the trial court erred in finding the existence of a confidential relationship between Andrew and Michael. The existence of such a relationship would give rise to a presumption of fraud and shift to Andrew the burden to prove the *bona fides* of the transactions at issue. *Nicholson v. Shockey,* 192 **Va**. 270, 277–78, 64 S.E.2d 813, 817 (1951).

4 A parent-child relationship, standing alone, is insufficient to create a confidential or fiduciary relationship. *Nuckols v. Nuckols,* 228 **Va**. 25, 36–37, 320 S.E.2d 734, 740 (1984); *Carter v. Carter,* 223 **Va**. 505, 509, 291 S.E.2d 218, 221 (1982). On the other hand, we have found a confidential relationship to exist in a familial relationship that is accompanied by an attorney-client relationship, *Nicholson,* 192 **Va**. at 276–77, 64 S.E.2d at 817, or by a principal-agent relationship, *Creasy v. Henderson,* 210 **Va**. 744, 749–50, 173 S.E.2d 823, 828 (1970). *813 We also have recognized a confidential relationship where one family member provides financial advice to or handles the finances of another family member. *Jackson v. Seymour,* 193 **Va**. 735, 740–41, 71 S.E.2d 181, 184–85 (1952).

5 In the present case, the Plaintiffs, in claiming that a confidential relationship existed between Michael and Andrew, rely strongly on Michael and Andrew's seventeen-year business association. While this association existed, such a relationship may have arisen. However, the business association ended in 1990, approximately six years before the time of the events at issue in this case. Therefore, Michael and Andrew's former business association cannot serve as a basis for a confidential relationship at the time of the events at issue.

6 The Plaintiffs further assert that, after 1990, Andrew advised and assisted Michael **719 in his business affairs. Although Andrew did assist his father in his latter years, the undisputed evidence shows that Michael had complete and exclusive control of his financial affairs up to the time of his death.

We conclude, as a matter of law, that the evidence fails to establish a confidential relationship between Michael and Andrew, and the trial court erred in finding otherwise. Consequently, the transactions at issue were not presumptively fraudulent, and the burden to prove fraud remained on the Plaintiffs.

B

78 Next, we consider whether the trial court erred in striking the Plaintiffs' evidence with respect to their constructive fraud claim. Fraud, whether actual or constructive, must be proved by clear and convincing evidence. *Henderson v. Henderson,* 255 **Va**. 122, 126, 495 S.E.2d 496, 499 (1998).

A finding of constructive fraud requires proof that a false representation of a material fact was made, innocently or negligently, and that the injured party suffered damage as a result of his reliance on the misrepresentation.... In addition, the evidence must show that the false representation was made so as to induce a reasonable person to believe it, with the intent that the person would act on this representation. *Id.* (citations omitted).

910 When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, a trial court must resolve all reasonable *814 doubt as to the evidence's sufficiency in the plaintiff's favor and deny the motion unless it is conclusively apparent that the plaintiff has proved no cause of action.

Higgins v. Bowdoin, 238 **Va**. 134, 141, 380 S.E.2d 904, 908 (1989); *Williams v. Vaughan,* 214 **Va**. 307, 309, 199 S.E.2d 515, 517 (1973). When a trial court strikes a plaintiff's evidence, an appellate court, in reviewing the ruling, must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. *West v. Critzer,* 238 **Va**. 356, 357, 383 S.E.2d 726, 727 (1989).

11 As previously stated, there is no presumption of fraud in the present case because Michael and Andrew did not have a confidential relationship at the time of the events at issue. Consequently, when we view the Plaintiffs' evidence in the light most favorable to them, absent a presumption of fraud, we are compelled to conclude that the Plaintiffs failed to present a *prima facie* case of constructive fraud. To the contrary, the Plaintiffs' uncontradicted evidence shows that Michael intended to give Andrew the $160,000 and that Michael also intended to redeem the Treasury bills. Moreover, the Plaintiffs do not contend that Michael was enfeebled in mind or subjected to undue influence, and, indeed, the evidence clearly shows that he was fully capable of managing his financial affairs and did so until the time of his death. We hold, therefore, that the trial court did not err in striking the Plaintiffs' evidence relating to their claim of constructive fraud.

V

The Plaintiffs also contend that the trial court erred in striking their claims of conversion, unjust enrichment, and "tortious interference with inheritance." We do not agree.

1213 Conversion is the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights. *Universal C.I.T. Credit Corp. v. Kaplan,* 198 **Va**. 67, 75–76, 92 S.E.2d 359, 365 (1956). An action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted. *United Leasing Corp. v. Thrift Ins. Corp.,* 247 **Va**. 299, 305, 440 S.E.2d 902, 906 (1994).

14 In the present case, the Plaintiffs were not entitled to the immediate possession of the Treasury bills at the time they allegedly were wrongfully converted. Moreover, as the trial court correctly noted, "the failure to renew the Treasury bills cannot be a conversion *815 because, even assuming that Andrew **Kolaitis** was involved in the fact that they were not renewed, the monies from the **720 T-bills went into an account in Michael **Kolaitis**' name."

15 Additionally, as previously noted, the uncontradicted evidence shows that Michael intended to redeem the Treasury bills and to make the $160,000 gift to Andrew. In the face of that evidence, there could be no conversion, even if we assume that the Plaintiffs had standing to institute the action.

16 The same analysis is applicable to the Plaintiffs' claim of unjust enrichment. The uncontradicted evidence of Michael's intent respecting the redemption of the Treasury bills and the gift to Andrew runs counter to any such claim.

1718 We also agree with the trial court that a cause of action for "tortious interference with inheritance" is not recognized in **Virginia**. A person who is mentally competent and not subject to undue influence may make any disposition of his property he chooses during his lifetime or by will at his death. Moreover, the Plaintiffs had only an expectancy in the Treasury bills while Michael was alive and in control of them.

VI

In sum, we hold the following:

1. A confidential relationship did not exist between Michael and Andrew, and, therefore, there was no presumption of fraud.

2. The trial court did not err in striking the Plaintiffs' constructive fraud cause of action because their uncontradicted evidence failed to present a *prima facie* case of constructive fraud.

3. The trial court did not err in striking the Plaintiffs' claims of conversion, unjust enrichment, and "tortious interference with inheritance."

Accordingly, the trial court's judgment will be affirmed.

Affirmed.

238 Va. 134
Supreme Court of **Virginia**.
Malcolm B. **HIGGINS**, II, Executor, etc.
v.
Jacqueline L. **BOWDOIN**.
Record No. 880082.
June 9, **1989**.

Executor of joint tenant's estate brought action to recover funds from joint money market account that had been paid over to surviving tenant. The Circuit Court of the City of **Virginia** Beach, Austin E. Owen, J., struck executor's evidence at close of his case, and executor appealed. The Supreme Court, Thomas, J., held that: (1) executor bore burden of proving by clear and convincing evidence that tenant did not intend that account have survivorship feature; (2) joint account did not have to mention survivorship in order for survivorship right to exist; and (3) evidence of tenant's intent as to survivorship feature was for jury and should not have been struck.

Affirmed in part, reversed in part and remanded.

Opinion

THOMAS, Justice.

In this appeal, Malcolm B. **Higgins**, II, Executor of the Estate of Gladys L. Steel (**Higgins**), claims, on behalf of the estate, money which his decedent had placed in a joint money market account with Jacqueline L. **Bowdoin** (**Bowdoin**), an individual who was not related to the decedent. The account card identified the account as a survivorship account. **Higgins** demanded the money from the bank which refused to pay it to him. Instead, the bank paid the money to **Bowdoin**. **Higgins** sued, seeking a return of the money. The matter was tried to a jury. However, the trial court struck **Higgins**' evidence at the close of plaintiff's case. **Higgins** appeals.

Because the trial court sustained a motion to strike at the conclusion of plaintiff's case, upon familiar principles, we will set forth the facts and all reasonable inferences arising therefrom in the light most favorable to **Higgins**. Gladys L. Steel (Steel), died testate on October 4, 1986. A will dated April 10, 1980, and a codicil to that will dated April 23, 1980, were admitted to probate. In the will, Steel made four specific bequests. One was to **Bowdoin** and her husband. Steel bequeathed to them her “1971 Volkswagen, or such personal automobile” as she might own at the time of her death. In the will's residuary clause, Steel left the remainder of her property to six of her relatives.

In the codicil, Steel made ten additional specific bequests. Again, one bequest was to **Bowdoin** and her husband, consisting of a marble top table, all dolls and doll furniture, all afghans, and all crystal and glassware. Other than the specific bequests listed in the codicil, Steel re-affirmed her will.

On April 12, 1985, Steel, accompanied by **Bowdoin**, went to First American Bank in **906 **Virginia** Beach to close a savings account and to open a money market account. Rebecca B. Chandler was the bank employee who opened the money market account for Steel. Chandler discussed with Steel whether the account should be interest bearing or a regular account. She also recommended that the account be opened as a joint account so that if the depositor *137 became sick or incompetent “someone could at least pay their bills for them.” When Steel heard Chandler's advice, she was unsure and confused about what to do. Several times, Steel sought Chandler's advice regarding the names in which the account should be opened. Chandler said she could not tell Steel what to do.

Steel then conversed with **Bowdoin** about the matter. During that conversation, which Chandler overheard, Steel “mentioned that she didn't have anyone locally that she could-any family locally that she could add their name onto the account.” Asked what happened after Steel conferred with **Bowdoin**, Chandler said “[w]ell, at that time I went ahead and started typing the signature card, and she said she would go ahead and put Mrs. **Bowdoin's** name on there.”

Chandler did not recall that Steel had told her to create a survivorship account. When she was asked why she typed an “x” in the box signifying survivorship, Chandler said that almost every account was opened that way. She explained further, however, that joint accounts with survivorship were usually opened with two family members listed on the account. Chandler was unsure whether Steel understood that she was opening a survivorship account. All of the money in the account came from Steel.

Cary P. Quincy, Jr., who was Steel's neighbor for twenty-five years, contacted **Higgins** on his own when he learned of the disposition of the funds from the money market account because Quincy “knew that it was not the way that [Steel] wanted it.” Quincy testified that he talked to Steel about the money market account in April 1985, shortly after Steel had opened the account. Quincy had long urged Steel to execute a power of attorney so that someone could manage her affairs if need be. In April 1985, the issue was fresh in Quincy's mind because he had just placed one of his uncles in a nursing home and had become responsible for taking care of his uncle's business affairs.

Quincy again asked Steel whether she had executed a power of attorney. She told him she had not but that “she had made up a checking account with Jackie [**Bowdoin**] which authorized her to write checks” on the account in the event that Steel became incapacitated. Upon learning what Steel had done, Quincy told her that if she had opened a joint account with **Bowdoin**, at Steel's death all the money in the account would belong to **Bowdoin**. Steel became “greatly disturbed” and replied, “[t]hat's not the *138 way that I wanted it and that's not the way that I understood it.” She was so disturbed by Quincy's statements that, had the bank been open, he would have taken her there immediately. Quincy asked Steel whether she was going to do something about it, she said “I sure do hope that you're wrong about that.” Steel added, “I will take care of it. I'll talk to Jackie [**Bowdoin**] about it.”

Bowdoin was also of the understanding that the joint account did not have a survivorship feature. **Higgins** spoke to **Bowdoin** and her husband about the account shortly after he learned of its existence. **Higgins** talked to **Bowdoin** by telephone on October 11, 1986, seven days after Steel's death and two days after he received a bank statement regarding the money market account. **Bowdoin** told **Higgins** that, though she was aware it was a joint account, it was not a survivorship account.

Thereafter, on October 17, 1986, **Higgins** met **Bowdoin** and her husband at the local Division of Motor Vehicles' office to transfer title of the Volkswagen to them pursuant to Steel's will. At that time, he again asked **Bowdoin** about the account. **Bowdoin** reiterated that the account was a joint account. **Bowdoin** explained that she had been there on the day the account was opened and that it had been opened for the purpose of providing access to Steel's **907 funds by **Bowdoin** in the event Steel became ill or was hospitalized as had occurred in 1982. **Bowdoin** further advised **Higgins** that, at the time the account was opened, she did not understand that it was a survivorship account.

The evidence also established that Steel had a close loving relationship with the individuals named in the residuary clause in her will. Further, it showed that the money market account was worth in excess of $106,000 and that, excluding the money market account, Steel's estate was valued at $170,000 to be divided among her six relatives.

The trial court struck **Higgins**' evidence because it was of opinion that **Higgins** was required to prove by clear and convincing evidence that at the time the account was opened Steel had a different intent than to create a survivorship account. Further, the trial court concluded "that the jury could not from that evidence find that the plaintiff [had] established by clear and convincing evidence that there was some intention different from that presumed by statute, that is, that the [survivor] would receive the funds."

*139 **Higgins** advances four assignments of error which we paraphrase as follows:

1. That the trial court erred in imposing upon the plaintiff the burden of proving his case by clear and convincing evidence;

2. that the trial court erred in ruling that a joint account need not express survivorship in order for a joint owner to take by survivorship;

3. that the trial court erred in ruling that the evidence, viewed in the light most favorable to the plaintiff, was insufficient to present a jury question regarding decedent's intent at the time the joint account was opened; and

4. that the trial court erred in excluding from the evidence the will of decedent's husband.

We will consider the issues in the order set forth above. In order to resolve the first two issues, we must decide whether the case should have been tried according to common-law principles, as **Higgins** urges, or whether the provisions of Code §§ 6.1-125.1 through 6.1-125.16 were properly applied.

12 Under the common-law, the burden was on the party claiming survivorship rights in a joint account to establish entitlement to the money for reasons other than whether the account card was marked survivorship. *Quesenberry v. Funk,* 203 **Va**. 619, 622, 125 S.E.2d 869, 872 (1962). Further, under the common law, where a person made a deposit in his or her own name and the name of someone other than their spouse, there existed a presumption that the account was opened for the purposes of convenience only. *Stevens v. Sparks, Executrix,* 205 **Va**. 128, **134**, 135 S.E.2d 140, 145 (1964). Thus, had common-law principles applied to the present case, it would have been presumed that the account was opened for Steel's convenience and **Bowdoin** would have been required to prove that when Steel opened the account, Steel intended to create survivorship rights in favor of **Bowdoin**.

Bowdoin submits that Code § 6.1-125.5 reverses the common-law presumption by creating a new presumption that any joint account is a survivorship account unless the depositor plainly designates that the account excludes survivorship. The statutory provisions relied on by **Bowdoin** went into effect July 1, 1980. The *140 account here under review was opened in April 1985. Thus, **Bowdoin** argues, the account was fully subject to the statutory requirements.

Higgins argues that **Bowdoin** is not entitled to the benefit of the statutory presumption because the account card used to establish the joint account here in dispute did not meet the requirements of Code § 6.1-125.15. According to **Higgins**, because the statutory provisions relied on by **Bowdoin** are in derogation of the common law, they must be strictly construed and cannot be enlarged in their operation beyond their express terms. *Hyman v. Glover,* 232 **Va**. 140, 143, 348 S.E.2d 269, 271 (1986). **Higgins** submits that the common-law rules should have been applied.

908 We disagree with **Higgins. The statutory provisions convince us that the General Assembly intended to change the common-law presumption without regard to the type of account cards used by the bank. Code § 6.1-125.1(4) provides that a joint account need not mention survivorship. Code § 6.1-125.5(A) provides generally that sums on deposit to a joint account belong to the survivor. Code § 6.1-125.5(E) makes reference to two ways to create a survivorship account: the express

terms of the account or through the operation of the statute. Code § 6.1-125.16 provides that the statutory provisions apply to all accounts in existence on the effective date of the statute regardless of when the accounts were opened. If the account cards were crucial, the statute would not have applied to accounts opened before the statute's effective date because those accounts could not have used the statutorily required account cards. Moreover, if the account cards were crucial, the statute would have limited the creation of survivorship accounts to the terms of the accounts. For these reasons, we are of opinion that the common-law rule has been supplanted by the statute. Therefore, we hold that the trial court did not err in requiring **Higgins** to comply with Code § 6.1-125.5(A) and prove by "clear and convincing" evidence that Steel had "a different intention at the time" she opened the disputed account. We hold further that the trial court correctly concluded that a joint account does not have to mention survivorship in order for survivorship rights to exist.

3 We turn now to the question whether **Higgins**' evidence was sufficient to survive a motion to strike at the end of plaintiff's case. In ruling on the motion to strike, the trial court commented as follows: that the fact **Bowdoin** did not understand that the account *141 was one with survivorship "does not create any basis for determining that Mrs. Steel was unaware that there was survivorship"; that when Quincy told Steel that the money in the account would go to **Bowdoin**, Steel did not say that "that is not what [she] wanted" nor that she was going to change it; and that while **Higgins** and Chandler's testimony had some bearing on Steel's intention, that testimony was overcome by certain things testified to by Chandler who opened the joint account. Finally, the trial court concluded "that the jury could not from that evidence find that the plaintiff has established by clear and convincing evidence that there was some intention different from that presumed by statute, that is, that the [survivor] would receive the funds." We disagree with the trial court.

It is a drastic measure to strike the evidence at the end of a plaintiff's case. *Walton v. Walton,* 168 **Va**. 418, 421-22, 191 S.E. 768, 770 (1937). The costs to the administration of justice are high when a plaintiff's evidence is struck because, if the trial court's decision is reversed, the matter must be re-tried in its entirety. *Williams v. Vaughan,* 214 **Va**. 307, 199 S.E.2d 515 (1973). Because of these concerns, we have said that a motion to strike at the end of plaintiff's case should not be granted unless it is conclusively apparent that plaintiff has not proven any cause of action against the defendant. *Id.* at 309, 199 S.E.2d at 517. We have said further that in ruling on such a motion, any doubt about the sufficiency of the evidence "should be resolved against the party making the motion, and the issue submitted to the jury." *Walton,* 168 **Va**. at 423, 191 S.E. at 770. We have also stated that, "[t]he credibility of witnesses and the weight to be given their testimony are matters peculiarly within the province of the jury. In ruling on a motion to strike, *trial courts should not undertake to determine the truth or falsity of testimony or to measure its weight.*" *Williams,* 214 **Va**. at 310, 199 S.E.2d at 517-18 (emphasis added).

In our opinion, the trial court did not adhere to the foregoing principles. The evidence was not considered in the light most favorable to the plaintiff. Nor were doubts about the sufficiency of the plaintiff's case resolved against the defendant. Moreover, it appears that the trial court undertook to determine the truth or falsity of the testimony and to weigh the evidence.

Contrary to the trial court's view of the evidence, we think a jury could have found **909 it significant that **Bowdoin** understood that the account did not give her survivorship rights. **Bowdoin** was present *142 when the account was opened. She heard what Steel heard. If **Bowdoin** came away thinking that she did not have survivorship rights, a jury could have concluded that Steel came away with the same understanding. Moreover, a jury could have found it significant that **Bowdoin** said the account was opened by Steel for Steel's convenience in the event Steel became sick or was hospitalized as occurred in 1982.

In addition, a jury could have relied on Quincy's testimony. Quincy stated that when he told Steel that **Bowdoin** would get the money on Steel's death, Steel said that was not what she wanted and not what she understood. Steel said she would talk to **Bowdoin** about it. A jury could have concluded

that if Steel asked **Bowdoin** whether the account was with survivorship, **Bowdoin**-who believed that it was *not* a survivorship account-would have alleviated Steel's fears by saying “no,” thus, causing Steel to abandon any further steps to ensure that the account complied with Steel's intentions.

Further, a jury could also have found it significant that **Bowdoin** and her husband were already provided for twice by Steel: in her will and in her codicil; that Steel had a close relationship with her relatives who were her residuary beneficiaries; that **Bowdoin** would wind up with the lion's share of Steel's assets, while each of Steel's own relatives would take, at most, one-sixth of $170,000. In short, there was ample evidence to raise a jury question regarding Steel's intent.

4 **Bowdoin** argues, in effect, that even though it may not have been proper to strike the plaintiff's evidence had the plaintiff's burden of proof been by a preponderance of the evidence, it was proper to strike the evidence in this case because the burden of proof was by clear and convincing evidence. We disagree. The fact that a plaintiff must prove his case by clear and convincing evidence does not mean that the case cannot be hotly contested or factually close. It is for the trier of fact, upon proper instructions, to decide whether the clear and convincing burden of proof is met, that is, whether the evidence presented produces in the trier-of-fact's mind “a firm belief or conviction as to the allegations sought to be established.” *Walker Agcy. & Aetna Cas. Co. v. Lucas,* 215 **Va**. 535, 540-41, 211 S.E.2d 88, 92 (1975).

Lucas itself was a case in which the evidence was in sharp conflict. The plaintiffs had the burden of proving by clear and convincing evidence the existence of an oral contract to provide insurance. *143 The plaintiffs' evidence was completely oral; the defendants' evidence was both oral and documentary. We noted that even though plaintiffs' evidence was “not completely plausible” it was “not manifestly false nor” incredible. *Id.* at 541, 211 S.E.2d at 92. Despite the apparent closeness of the evidence and despite the clear and convincing burden which confronted the plaintiffs, we wrote as follows: “We are unable to say that the plaintiffs' evidence fails to produce in the mind of a reasonable man a firm belief as to the facts sought to be established, even considering the effect of the contrary documentary evidence offered by the defendants.” *Id.*

By the same token, in this appeal we cannot say that reasonable persons could not form a firm belief as to Steel's intent at the time the joint account was opened. We hold, therefore, that the trial court erred in sustaining the motion to strike at the conclusion of plaintiff's case.

We find no merit in **Higgins**' final assignment of error that the trial court erred in refusing to admit into evidence the will of Albert Steel, who predeceased **Higgins**' decedent in 1965. As **Bowdoin** argues, the husband's will did not mention the funds ultimately placed in the joint account; the joint account had not been opened at the time Steel's husband died; and after her husband's death, Steel changed her will so that it no longer comported with her husband's will. We hold that the trial court did not err in excluding Albert Steel's will as irrelevant.

In light of all the foregoing, the judgment appealed from will be affirmed in **910 part, reversed in part, and the case remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

192 Va. 270
Supreme Court of Appeals of **Virginia**
RUTH **SHOCKEY NICHOLSON**, ET AL.
v.
HARRY A. **SHOCKEY**, INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF FANNIE C. SHOCKLEY, DECEASED, ET AL.
Record No. 3768.
May 7, **1951**.

*270 Present, Hudgins, C.J., and Eggleston, Spratley, Buchanan, Miller and Smith, JJ.

Suit by Ruth **Shockey Nicholson**, and others against Harry A. **Shockey**, individually, and as executor of the last will and testament of Fannie C. **Shockey**, deceased, and others, to determine status and ownership of funds belonging to testatrix which had been deposited in two joint bank accounts. The Circuit Court of Fairfax County, Paul E. Brown, J., rendered a decree for defendants and plaintiffs appealed. The Supreme Court of Appeals, Eggleston, J., held that evidence failed to overcome adverse presumption of constructive fraud and to sustain defendant's, claim that his mother fully understood nature and character of joint bank deposits.

Reversed and remanded.

Opinion

EGGLESTON, J., delivered the opinion of the court.

Mrs. Fannie C. **Shockey**, a resident of Fairfax county, died testate on May 14, 1947, at the age of seventy-nine years. She left surviving her husband, Joseph L. **Shockey**, who was eighty-three or eighty-four years old, two sons, Harry A. **Shockey**, a member of the local bar, and Joseph A. W. **Shockey**, and three *273 married daughters, Mrs. Ruth **Shockey Nicholson**, Mrs. Margaret **Shockey** Hand, and Mrs. Catherine **Shockey** Stone.

Under the terms of her will Mrs. **Shockey** devised ‘a one-half life interest‘ in her home place to her husband in lieu of curtesy. All the rest of her property, ‘real, personal and mixed,‘ she devised to her son, Harry A. **Shockey**, ‘for the purpose of distribution between himself and my other living children, then living, their heirs or assigns in such proportions as my executor, the above-named legatee or devisee, may deem appropriate for them to have.‘ **815 The will further provided that, ‘This power is to be left wholly within his discretion and not to be questioned,‘ and was granted to him because of her ‘full faith and confidence in his ability and integrity.‘

On April 21, 1947, Mrs. **Shockey** closed the sale to the **Virginia** Electric & Power Company of a right of way across her homestead property in Fairfax county, for the sum of $16,200 cash, which was deposited in the Arlington Trust Company, Inc., at Arlington, **Virginia**. One-half of the amount was deposited in a joint account to the credit of ‘Fannie C. **Shockey**‘ and ‘Harry A. **Shockey**,‘ and the other in a joint account to the credit of ‘Jos. L. **Shockey**‘ and ‘Harry A. **Shockey**.‘

According to the provisions printed on the signature cards,[1] the sums deposited in the two accounts were owned jointly by the respective depositors, ‘with right of survivorship,‘ and were ‘subject to the check or receipt of either of them or the survivor of them.‘

On the day after these deposits were made, namely, April 23, Mrs. **Shockey** executed a deed, in which her husband did not join, conveying the homestead property to her son, Harry A. **Shockey**, in consideration of the sum of ‘five dollars * * * and *274 other good and valuable consideration.‘ This deed was recorded on July 3, 1947, after Mrs. **Shockey's** death, under circumstances hereinafter related.

On October 13, 1948, Harry A. **Shockey** filed a bill of complaint on behalf of himself individually and as executor of his mother's last will and testament, against his father, brother and sisters, praying for a construction of the will. Some months later in that suit a consent decree was entered in which it was adjudicated that the deed from his mother to him should be set aside, and that this real estate was subject to and should be administered under the terms of the will.

However, Harry A. **Shockey** claimed absolute title to the balance of the fund which had been deposited to his and his mother's joint account. He likewise claimed absolute title to any balance which might remain after his father's death in the joint account which had been opened to the credit of his father and himself.

Thereupon his brother and sisters filed the bill of complaint in the present suit against Harry A. **Shockey**, individually and as executor of their mother's will, and against their father, Joseph L. **Shockey**, to determine the status and ownership of the funds which had been deposited in the two joint accounts.

The bill alleged that the fund derived from the sale of the easement or right of way across the homestead property had come into the hands of Harry A. **Shockey** acting as attorney for and confidential advisor to his mother; that such fund was impressed with a trust in favor of Mrs. **Shockey**; that the deposit thereof in the joint accounts, with the right of survivorship in both to Harry A. **Shockey**, ‘was not the free and voluntary act of Fannie C. **Shockey**;‘ that she did not at the time ‘have a full understanding either of her rights or of the legal effect of said deposits;‘ **816 that they were made as the result of the exercise by him ‘of undue influence on his client and aged mother;‘ and that because of the confidential relationship which existed between him and her, the transaction was invalid in so far as it operated as a gift to him of any interest in the fund.

The prayer of the bill was that the transaction whereby Harry A. **Shockey** had derived an interest in the deposits, other than that to which he was entitled under the provisions of his mother's will, be annulled and set aside; that the sum which had been deposited in the joint account of Harry A. **Shockey** and his mother should be decreed to be an asset of her estate and administered *275 under her will; and that the balance of the other deposit which had been made to the credit of Joseph L. **Shockey** and Harry A. **Shockey**, subject to the life estate of the father, should likewise be decreed to be an asset of the mother's estate and administered under the terms of her will.

After Harry A. **Shockey's** demurrer to the bill had been overruled, he filed an answer in which he denied that he had received the fund derived from the sale of the easement as the attorney for or confidential advisor of his mother. He alleged that the money had been paid to his mother who had deposited it in bank in the manner described; that such deposits had not been made as the result of any undue influence exercised by him upon her, but were her free and voluntary act. He further alleged that the title to or ownership of such fund remaining in the joint account of his mother and himself passed by operation of law to him; that the same would be true of any balance remaining in the other joint account after the death of his father; and that his mother's estate had no interest whatsoever in these funds.

Joseph L. **Shockey**, the father, filed no answer and made no appearance either in person or by counsel.

After an *ore tenus* hearing upon the issues thus drawn, the lower court entered a decree dismissing the bill on the ground that the evidence was 'insufficient to sustain the allegations' therein. On this appeal from that decree we need consider only the assignment of error that the finding of the lower court is contrary to the law and the evidence.

The appellants do not minimize the full force and effect of the lower court's finding on the issues of fact on the *ore tenus* hearing. They concede that such finding is tantamount to an adverse verdict of a jury. Their argument on the insufficiency of the evidence to sustain the decree runs thus:

The evidence shows, as a matter of law, that Harry A. **Shockey** received the fund derived from the sale of the easement as the attorney for or confidential advisor to his mother; that a gift from her to him of that fund, or any interest therein, is presumptively invalid on the ground of constructive fraud or undue influence; and that in this situation the burden was on him to overcome that presumption by clear and satisfactory evidence that his mother had a full understanding of the nature of the transaction and made the deposits with the purpose and intent of bestowing upon him a complete title to the money, subject *276 only to her interest and that of her husband therein. This burden of proof, the appellants say, their brother has not borne.

Moreover, the appellants say, under Code, § 8-286, the validity of the alleged gift requires corroboration, and such corroboration is not found in the evidence.

In our opinion the position of the appellants is sound on both aspects of the case.

Although Harry A. **Shockey** insisted both in his answer and at the hearing that in the transaction between his mother and the **Virginia** Electric and Power Company he acted merely as her son or advisor, and not as her attorney, the circumstances and especially the documentary evidence conclusively refute that contention.

The purchase of the easement was negotiated on behalf of the Power Company by Franklin R. Murray. Mr. Murray testified that he first approached Mrs. **Shockey** either in December, 1946, or January, 1947, and that she referred him to her son, Harry A. **Shockey**, who she said was authorized to act for her, and who thereafter conducted **817 all negotiations in her behalf for the sale of the right of way. Murray knew that **Shockey** was an attorney, and on April 16, 1947, wrote a letter to 'Fannie C. **Shockey** and Joseph L. **Shockey**, c/o Mr. Harry A. **Shockey**, Attorney,' confirming the verbal agreement reached between 'your attorney and our company.' **Shockey** acknowledged acceptance of the offer by this endorsement on the letter which he returned to Murray: 'Fannie C. **Shockey**, Joseph L. **Shockey**, By Harry A. **Shockey**, Atty., Date: April 21, 1947.'

The purchase price for the right of way was paid by a draft of Stone & Webster Engineering Corporation, agent for **Virginia** Electric & Power Company, payable to the order of 'Harry A. **Shockey**, Atty. for Fannie C. and Joseph L. **Shockey**. ' Acknowledgment of the payment of the money was made by receipt which was signed, 'Fannie C. **Shockey**, Joseph L. **Shockey**, By Harry A. **Shockey**, Atty. ' Neither Mrs. **Shockey** nor her husband was present when the draft and receipt were executed and delivered.

At the time the deposit was made the draft was endorsed in Harry A. **Shockey's** handwriting, 'Harry A. **Shockey**, Atty. for Fannie C. and Joseph L. **Shockey**, Harry A. **Shockey**.'

1 'Formality is not an essential element of the employment *277 of an attorney. The contract may be express or implied, and it is sufficient that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession.' 7 C.J.S., Attorney and Client, § 65, p. 848.

2 Clearly, we think, the evidence here meets these requirements and shows that there was an implied relation of attorney and client between the son and mother.

3 As is said in 7 C.J.S., Attorney and Client, § 65, p. 848, '* * * where the necessary elements of a contract (of employment) exist, the creation of the relation is not prevented merely by the fact that a blood relationship exists between the attorney and client.'

4 It is true that **Shockey** made no charge to his mother for his services, but that was not necessary to the creation of the relation of attorney and client. See 5 Am. Jur., Attorneys at Law, § 31, p. 279; 7 C.J.S., Attorney and Client, § 65-b, p. 849; *Shoup v. Dowsey,* 134 N.J.Eq. 440, 36 A. (2d) 66, 85.

5 It is well settled that a gift by a client to an attorney of funds which the attorney has in his hands is presumptively nugatory on the ground of constructive fraud, and the burden of proof is on the attorney to show by clear and satisfactory evidence that there was no undue influence or undue advantage because of the relation, and that the client was fully informed as to the nature and effect of the gift. See 5 Am. Jur., Attorneys at Law, § 51, p. 290; 7 C.J.S., Attorney and Client, § 129, p. 971.

In *Thomas v. Turner,* 87 **Va**. 1, 12 S.E. 149, 668, this court said: '* * * all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy, and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise.' See also, *Bruce v. Bibb,* 129 **Va**. 45, 49, 105 S.E. 570; *Stiers v. Hall,* 170 **Va**. 569, 577, 578, 197 S.E. 450, 454.

678 But the presumption of fraud or undue influence which casts the burden of proving the *bona fides* of the transaction upon the appellee, Harry A. **Shockey**, is not dependent upon the *278 existence of the relation of attorney and client between him and his mother. The rule is not limited to attorneys at law. It springs from any fiduciary relationship, and when such relationship is found to exist, any transaction to the benefit of the dominant party and to the detriment of the other is presumptively fraudulent. The same high standard of good **818 faith and loyalty is required of an agent to his principal as of an attorney to his client. See *Byars v. Stone,* 186 **Va**. 518, 529, 530, 42 S.E.(2d) 847, 852, 853.

Admittedly, **Shockey** was his mother's agent in handling and consummating this transaction. But that is not all. It is quite clear from the evidence that a confidential relationship had existed between the mother and son over a period of years. He was a trained lawyer in the prime of life, while she was a person of limited education and of advanced years. According to his own testimony each reposed the greatest confidence in the other. He had furnished the purchase price for sundry pieces of property, had the titles taken in her name, and later had them conveyed by her to him.

In fact, just prior to his marriage he executed and recorded a deed for his own home property to his mother, which he says she held as 'a straw person' for his benefit. He then had her execute and deliver a deed reconveying the property to him, and this deed he withheld from recordation. There was no satisfactory explanation of this unusual transaction other than the obvious effect of placing the property beyond the control of his intended wife.

As has been said, on the day after the deposit which is the subject of this suit had been made, his mother executed in his office a deed conveying the fee-simple title in the home place to him, a transaction which he concealed from his father, who did not join in the deed, and from his brother and sisters, until after his mother's death. According to his own testimony she gave him custody of this deed only for the purpose of placing it in the lockbox to which they had joint access. Although he

admitted that there had been no legal delivery of this deed to him, and that he had no right to record it, he did so after his mother's death. It was this conveyance which he later agreed should be set aside.

In all of these transactions with his mother he was the dominant person, and she readily executed or accepted such deeds as he presented to her. That she fully understood and *279 comprehended the purpose and effect of these transactions is by no means clear from the evidence.

Although there is evidence that Mrs. **Shockey** was mentally competent to transact business on the day the deposit was made, the record clearly shows that her physical condition was not good. From January 14 to 31, 1947, both inclusive, she was a patient at the Arlington Hospital and left there against the wishes of her attending physician. From January 31 to April 19 she was at the home of her daughter, Mrs. **Nicholson**, and during that time was attended by two physicians. On April 19 she returned to her home near Falls Church and remained there until May 14, when she suffered a stroke and was taken to a hospital where she died.

The evidence with respect to the purpose of the deposit, as to whether Mrs. **Shockey** understood the nature of the transaction and intended thereby to make him a gift of an interest therein, comes only from the lips of Harry A. **Shockey** himself.

His story is that he advised his mother to divide the proceeds of the draft into two equal parts, and deposit one-half to her own credit and one-half to the credit of the husband, with the right of each to check on her or his share. He said she was unwilling to do this because, she said, her husband would ‘squander‘ his share, and the other children would importune her to give them her share of the fund. To avoid this, he said, she wanted the money deposited in such a manner that ‘I would have to sign with her so she would tell these children and my father we would open up a joint account and both of us would have to sign the checks together.‘ Furthermore, she said, ‘I want you to have this money in the event of your father's death or my death.‘

Upon her insistence that she wanted the money deposited in this manner, he suggested that they discuss the matter ‘with the young lady in the bank,‘ and see whether this could be done. They went to the bank where ‘the young lady,‘ he said, explained the effect of the deposit to his mother ‘who fully understood it.‘ After this explanation the necessary signature cards for the two accounts were prepared.

Mr. **Shockey** positively identified Mrs. Julia Lyle, an employee of the Arlington Trust Company, as ‘the young lady in the **819 bank‘ who explained the deposit to his mother. However, when Mrs. Lyle was called as a witness on his behalf she signally *280 failed to corroborate his testimony. She did recall having opened the account with Mr. **Shockey**, and was ‘under the impression‘ that at the time he was accompanied by ‘an elderly lady.‘ But she was not ‘absolutely sure‘ of that, and could not ‘definitely‘ ‘recall any discussion‘ with reference to the matter.

Mr. **Shockey** further testified that it was his mother's wish that the fund deposited to her and his joint account be subject to checks signed by either him or her, and that this arrangement was carried out.

As to the fund deposited to the joint credit of his father and himself, Mr. **Shockey** testified that it was his mother's wish and direction that the account be opened in such manner that all checks thereon be signed by both him (Harry) and his father. He admitted, however, that this account was not opened in this manner, that a joint account was established, with the right of either him or his father to draw thereon over his individual signature. Despite the manner in which the account was opened, he said that he told his father that all checks drawn thereon must be signed by both of them. He admitted on cross-examination that this statement was not true.

He further admitted that his father continued under the impression that he was unable to check on the fund by a check bearing his (the father's) signature alone until he learned the truth from the other members of the family. In the meantime he (Harry) had checked the entire sum of $8,100 out of the father's account. He placed $5,948.66 in his own lockbox, but what disposition he made of the balance is not clearly shown.

He further testified that after his mother's death he drew out the fund deposited to her and his joint account and ‘spent it‘ ‘on the farm.‘

So far as the record shows, Mrs. **Shockey** discussed the nature of the deposits with the other members of the family on only *281 one occasion. Mrs. **Nicholson**, one of the daughters, testified that on the Saturday before her mother died, her mother told her that she had received $16,200 for the sale of the easement; that ‘$8,100 has been put in the bank in my name, and $8,100 has been put in the bank in your father's name, and Harry has brought each of us $100 and he wants us to spend $100 a month.‘ Neither at this time nor at any other did Mrs. **Shockey** say or intimate to anyone that she had given to her son, Harry, an interest in the deposits.

Mr. **Shockey** further testified that he withheld from his brother and sisters until after their mother's death information as to the manner in which the money had been deposited and the fact that he had been given an interest therein.

At the time he disclosed to his brother and sisters what he characterized as the ‘complete story‘ of his recent dealings with his mother, - that is, the collection of the purchase price of the easement, the method in which the money had been deposited, and the execution by her of the deed conveying the home place to him, - he tendered to them for their signatures what he termed a ‘Cooperative Agreement.‘ By the terms of this agreement the brother and sisters agreed ‘to the terms and conditions‘ of their mother's will, the deed to him for the home place, and further agreed ‘to cooperate and work with‘ him ‘in the execution of said estate and render all aid and assistance possible to him in his duties.‘

He was examined at length by the trial court as to the nature and purpose of this agreement. He finally admitted that it bound him to do nothing, that there was no consideration for its execution by the other **820 parties thereto, and that neither he nor they were bound thereby. ‘I just wanted something in hand in the event there was any question,‘ he said.

We, then, have these incidents which cast grave doubt upon the credibility of Mr. **Shockey's** story of his fair dealing with his mother with respect to the disposition of the deposits and a gift by her to him of an interest therein:

(1) His preparation of the deed whereby his mother, without the knowledge and signature of her husband, conveyed to him (Harry) the home place, and his recordation of this deed after her death, although he knew that it had not been delivered to him and that he had no right to record it.

(2) In his answer he denied that the money derived from the *282 sale of the right of way had passed through his hands and averred that it ‘was paid to the said Fannie C. **Shockey** and deposited by her.‘ Upon being asked whether the check had been made payable to him, his reply was ‘I don't know.‘ Only when the check was produced at a later date during the trial did he admit that it had been made payable to and endorsed by him, in the manner which has been stated, and that it carried no endorsement by his mother.

(3) The admitted fact that he did not deposit the fund in his father's account in the manner in which his mother directed.

(4) The admitted fact that he deceived his father with respect to the nature of the deposit which had been made for the father's benefit, and the father's right to draw thereon, with the result that he (Harry) had exclusive control of the fund.

(5) His inability to present evidence corroborating his testimony that the bank employee, Mrs. Lyle, had fully explained to his mother the nature and effect of the joint deposits and of his interest therein.

Moreover, a reading of his testimony as a whole shows numerous other contradictions, inconsistencies and discrepancies. Frequently questions with respect to material matters were answered, ‘I don't recall,‘ or ‘I don't remember.‘

He could not ‘recall‘ just where the conversation took place between his mother and himself, in which she expressed the desire that the money be deposited in bank in such a way that he would have a joint ownership therein.

Questioned closely as to just what his mother had said with respect to such joint ownership, his answer was, ‘I don't remember. That was explained to her at the bank. She said she wanted me to have it in the event of her death.‘

910 We are not unmindful of the rule that the credibility of a witness and the effect of discrepancies in and the weight to be given his testimony is primarily for the trier of fact in the court below. But here the burden was on the appellee to overcome the presumption of constructive fraud by clear and satisfactory evidence. Such degree of proof means something more than a mere preponderance of the evidence. 32 C.J.S., Evidence, § 1023, p. 1059; 20 Am. Jur., Evidence, § 1253, pp. 1103-5.

11 In our opinion the testimony of Mr. **Shockey**, upon which his case mainly rests, when viewed in the light of the many discrepancies therein, the evidence of his unfair dealings with his *283 mother and father in closely related matters, and other surrounding circumstances, fails to measure up to the clear and satisfactory proof which is required to overcome the adverse presumption of constructive fraud and sustain his claim that his mother fully understood the nature and character of these deposits, and that she thereby intended to make him a gift of an interest therein.

12 Moreover, we are of opinion that Mr. **Shockey's** contention that his mother made him a gift of an interest in the deposits must fail for the further reason that his testimony on the subject lacks the corroboration required by Code, § 8-286. This section provides in part: ‘In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the * * * executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party **821 founded on his uncorroborated testimony; * * *.‘

13 While technically this is not a suit by Harry A. **Shockey** against his mother's estate or personal representative, it is in effect such a proceeding. He claims title to funds by virtue of a gift which he says his mother made to him during her lifetime, while the appellants claim that such gift is nugatory, that the fund should be paid to and administered by the executor under the terms of the will. Thus Harry A. **Shockey** is ‘an adverse or interested party‘ who seeks a decree against his mother's estate sustaining that gift. Under the terms of the statute such a decree cannot be ‘founded on his uncorroborated testimony.‘ See *Grace v. **Virginia** Trust Co.,* 150 **Va**. 56, 142 S.E. 378; *Shenandoah Valley Nat. Bank v. Lineburg,* 179 **Va**. 734, 20 S.E.(2d) 541.

14 Whether or not corroboration exists and the degree and quality required are to be determined by the facts and circumstances of the particular case. *Trevillian v. Bullock,* 185 **Va**. 958, 963, 40 S.E.(2d) 920, 922; *Leckie v. Lynchburg Trust, etc., Bank,* 191 **Va**. 360, 370, 60 S.E.(2d) 923, 928.

15 Where, as here, a confidential relation existed between the parties at the time of the transaction relied on, a higher degree of corroboration is required than in ordinary transactions.

As has been pointed out, Mr. **Shockey's** claim that his mother fully understood the nature and effect of the deposits and intended to give him an interest therein, depends entirely upon *284 his own testimony. The bank employee, Mrs. Lyle, failed to corroborate his testimony that she fully explained the nature and effect of the deposits to Mrs. **Shockey**.

It is true that Mrs. **Shockey** signed the signature card on which is printed the lengthy agreement, which provided among other things, that either she or her son, ‘or the survivor of them,‘ would have the right to check on the fund. But there is no evidence whatsoever that she read this provision, or that it was read to her, or that she was capable of understanding it. In this connection, it will be recalled that although her husband signed a similar signature card carrying a like provision, he did not comprehend its meaning and effect.

It is argued on behalf of Harry A. **Shockey** that evidence of the close relationship existing between him and his mother and of her particular affection for him is sufficient corroboration to validate the gift. If this amounts to any corroboration at all, it is very slight. Indeed, as we have seen, the close and confidential relationship of the parties emphasizes the necessity of subjecting the transaction to a close scrutiny and of requiring more than ordinary corroboration.

For these reasons the decree complained of is reversed and the cause remanded with directions that a decree be entered in the court below adjudicating that the alleged gift by Mrs. **Shockey** to her son, Harry A. **Shockey**, of an interest in these deposits be declared null and void and of no effect; that the balance in the joint account of Mrs. **Shockey** and Harry A. **Shockey**, unexpended by her or for her benefit during her lifetime, be paid to her executor to be held and administered by him under the terms of her will; and that the balance in the joint account of Joseph L. **Shockey** and Harry A. **Shockey**, unexpended by or for the benefit of Joseph L. **Shockey** during his lifetime be likewise paid to the executor to be administered under the terms of the will. By appropriate decrees or proceedings the said Harry A. **Shockey** should be required to account for such withdrawals as he may have made from the two accounts.

Reversed and remanded.

SPRATLEY, J., dissenting.

The controlling issue in this case is, as the majority opinion states, whether the finding of the trial court is contrary to the law and the evidence. Admittedly, there is evidence in support *285 of the chancellor's conclusion. It clearly is not incredible. There is no evidence of actual fraud. At most, there are circumstances sufficient to create a presumption of constructive fraud, a rebuttable **822 presumption. The law is not in dispute. The burden of proof was on the appellee to overcome the presumption that the alleged gifts to him from his mother were constructively invalid because of the relationship between them. His testimony to that effect required corroboration.

The evidence was heard *ore tenus* before the chancellor without the intervention of a jury, and certified to us. In such a case, the rule of decision is that ‘the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.‘ Code of **Virginia**, 1950, section 8-491.

The evidence shows the following uncontradicted facts:

Harry A. **Shockey** is a lawyer and has been engaged in the practice of his profession for nearly twenty-five years. He and his mother occupied the closest confidential relationship. He was a dutiful and helpful son, and she favored him above all of her children. From his early youth he had contributed largely to the support and welfare of his mother and her family. He assisted in educating his three sisters and brother, and out of his earnings paid the original purchase money mortgage on real estate which belonged to his mother. His father apparently was not frugal and contributed little

or nothing to the maintenance of the home or the education of his children. None of the children aided their mother after they became wage-earners. One of the sons, Joseph A. W. **Shockey**, an appellant, constantly sought money from his mother. According to appellee and a disinterested witness, she upbraided that son for misappropriating funds belonging to her.

In 1925, Fannie C. **Shockey** made and executed her last will and testament. The will was not prepared by appellee and he did not see it until his mother's death. By her will, Mrs. **Shockey** devised to her husband, ‘a one-half life interest‘ in her home property, and gave all of the rest of her property, subject to that life interest, to appellee as executor and trustee, with directions to distribute the estate or proceeds thereof between himself and her other children, in such proportions as he might ‘deem appropriate for them to have.‘ In expressing her feelings *286 towards appellee, she employed the following language in her will:

‘This is my desire because I have full faith and confidence in his ability and intelligence.

‘This power is to be left wholly within his discretion and not to be questioned.‘

It was wholly natural and logical that, with this regard for her son, Mrs. **Shockey** consulted him in her negotiations with the **Virginia** Electric & Power Company for the sale of her property rights. She did not seek the guidance and advice of her husband and remaining children for reasons sufficient to her.

Three physicians testified that up to a few days before her death, her mind was clear. Others who saw her a short time prior thereto said that she was mentally alert, seemed to be an educated woman, and was careful in her business transactions.

Regarding the deposits of the funds received from the **Virginia** Electric & Power Company, appellee testified as follows:

‘My mother and myself discussed that matter on the morning the deposits were made. She wanted to see Dr. Bowen that day to have a physical check-up, so I told her I would advise she fix that up in a checking account so that she and my father could check that out later. She said no. She said, 'You know Joe got $1,900.00 or $2,000.00 from me. He got all my money.’

‘Q. Her son?

‘A. Her son, yes, and she said 'You know how your father is. I don't want him to take this money and squander it.’ She said 'You know how he spends it.'

‘Q. She said this?

‘A. That was the conversation.

* * *

‘Q. You go ahead and finish.

‘A. And she said 'Whenever I get a cent of money, Joe is after it or Ruth is after it.’ She didn't complain about Margaret and Catherine.

‘I am very reluctantly telling this, but I am telling the truth and she said she **823 wanted to keep it. She said I would have to sign with her so she would tell these children and my father we would open up a joint account and both of us would have to sign the checks together, and she said 'I feel it is due to you, all you have done on this farm and this home that the home exists today, and if it wasn't for you, it would not be here today and I *287 want this account opened in the manner it is and I want you to have this money in the event of your father's death or my death.’

* * *

‘Q. Yes, I want to know the reasons.

‘A. Well, her reasoning of it was she felt in view of all that I had done for her and made it possible that the property existed and also put this deal through which she was very much elated over, that I should have it in the event of either of them dying. My suggestion to her in answer to that was: 'Mother, I think you should go to work and put it in a checking account so you would have half of it in your name and half in my father's name, so each of you can check on it.’

‘She said: 'Oh, no. I have had experience with Joe and my children and I know what the results are. If I leave it in my name so I can check on it, Joe and the girls, if they find out about it, I won't have a penny very long. It will be gone.’ And she told me about Joe having taken her bonds and cashed them and not giving her any security for them, and she said that was not fair. She said: 'You know that was not right, Harry.' I said, 'Well, that's your business.' She says, 'As to your father, if he had his way about it, he would squander every cent. He was never able to save or keep a cent.'

‘I might add one other thing. She also mentioned one thing. She said: 'After the girls finished school and got their education, those girls went to town and kept their money and instead of contributing money to the home, they went to work for the Government and paid room rent and board in Washington instead of contributing to the home.’ She said they were very anxious to stay at home while they were going to school and getting their education, but after they got their education, they stayed in town.‘

It will be observed that in making the deposits of the funds received from the power company, she carefully divided it into two parts, one of which she gave to her husband and her son, the appellee, and the other she provided for herself and appellee. The similarity between these deposits and the provisions of the will is marked. Two days after making the deposits, she executed a deed in fee simple conveying her homestead estate to appellee. All of this strikingly points to her desire to do more for appellee than for any one else. It is clear that she did not desire to make any provision for her remaining children. Her *288 written expression of gratitude, evidenced by her will, the deposit signature cards, and the deed testify in the strongest manner to her feeling of appreciation and gratitude towards appellee. She evidently thought that she had the right to dispose of her property as she pleased.

To say that Mrs. **Shockey** did not understand and comprehend the purpose and effect of the transactions with her son is a gratuitous reflection upon her intelligence, not warranted by a single fact or circumstance in evidence. She was not required to make a written claim of intelligence and understanding.

The comments on the testimony of Mrs. Lyle have no value. It is not unusual for an employee of a bank to fail to remember the circumstances of a deposit made during the busy hours of employment. We should not be critical about appellee's dealing with his father so as to prevent the latter from squandering the funds provided for him. The donor did not want them wasted. There was nothing despicable in the dealings between the appellee, his brother and sisters.

The suggested contradictions and inconsistencies in his testimony were explainable as due to the lapse of time and the change of circumstances in the several proceedings concerning his mother's estate. His actions were those of an obedient, dutiful, considerate and affectionate son towards his parents, in contrast to the concern manifested **824 by his brother and sisters. His reward was natural and logical. Appreciation and gratitude are among the noblest of human traits, and when exhibited should be allowed effect.

In consideration of the evidence, we must bear in mind that the chancellor saw and heard the witnesses testify, and observed their manner and attitude. All of the facts and circumstances surrounding the negotiations and conferences between the appellee and his mother were presented to him in a more vivid picture than a printed record can show. He, of course, was aware of the interest of each party and the influence their interest had upon the testimony. That he gave consideration to the inconsistencies in the appellee's testimony is indicated by the language of his decree. 'His conclusions on questions of fact are entitled to peculiar weight and consideration, and we must accept them just as we accept a jury's verdict, sustained by evidence which it might have believed.' *289 *First Nat. Bank v. RoanokeOil Co.,* 169 **Va**. 99, **192** S.E. 764; *Wyckoff Pipe, etc., Co. v. Saunders,* 175 **Va**. 512, 9 S.E.(2d) 318.

The chancellor accepted the testimony of the appellee as he had the right to do, and we are faced with the presumption that his conclusion was correct. The burden was on appellants to show error. *Smith v. Alderson,* 116 **Va**. 986, 83 S.E. 373.

It is conceded that the same weight should be given to the decision of a chancellor as if it were the verdict of a jury. In a large number of cases which have come to this court, we have uniformly refused to set aside verdicts as contrary to the evidence where there was involved the credibility of witnesses whose testimony the jury might reasonably believe, or the weight to be given to their testimony, or the question of a mere preponderance of the evidence. Whatever may have been our view as to the preponderance of the evidence, we have refused to set aside the judgment of a trial court unless we were able to say that the judgment was plainly wrong or without any evidence to support it. *Varner v. White,* 149 **Va**. 177, 140 S.E. 128. We considered the cases very much as upon a demurrer to the evidence. *Updike v. Texas Co.,* 147 **Va**. 208, 136 S.E. 591; ***Virginia*** *Elec., etc., Co. v. Blunt,* 158 **Va**. 421, 431, 163 S.E. 329.

Even doubts as to its correctness are not sufficient to bring a reversal in this court. *Graham v. Commonwealth,* 127 **Va**. 808, 103 S.E. 565; *Bragg v. Commonwealth,* 133 **Va**. 645, 112 S.E. 609.

We accept as true all facts favorable to the party in whose favor judgment has been entered. ***Virginia*** *Elec., etc., Co. v. Blunt, supra.*

Where the evidence consists of circumstances and presumptions, a new trial will not be granted merely because we would have arrived at a different conclusion. *Davis v. Commonwealth,* 132 **Va**. 525, 110 S.E. 252.

This case is not one of that exceptional character where we can say that the record discloses that the finding of the chancellor was plainly wrong and unjust. The gift to the appellee was not unusual under the circumstances recited. The undisputed facts provided a natural and logical basis for Mrs. **Shockey's** action in favor of appellee. The presumption of invalidity created by the relationship of the mother and her lawyer son was fully overcome when the chancellor became convinced *290 that the evidence clearly and satisfactorily showed Mrs. **Shockey** had a full understanding of the nature of the transactions.

What constitutes clear and satisfactory evidence upon any given question is dependent upon various considerations, circumstances, viewpoints, and, especially in the case of oral testimony, upon the opportunity to see, hear, and observe the witnesses testify. Men and judges may differ in their evaluation of testimony; but greater weight is and ought to be given to the conclusion of the one who has had the benefit of the opportunity to give consideration to all of the factors.

It is settled law of this State by cases too numerous to cite that the corroboration required when one party is incapable of testifying depends on no hard and fast rule, **825 but upon the facts in each case. *Trevillian v. Bullock,* 185 **Va**. 958, 40 S.E.(2d) 920.

Section 8-286 of Code of **Virginia**, 1950, only requires such corroboration as would confirm and strengthen a belief in the testimony of the adverse witness. *Varner v. White, supra; Krikorian v. Dailey,* 171 **Va**. 16, 197 S.E. 442; *Shenandoah Valley Nat. Bank v. Lineburg,* 179 **Va**. 734, 20 S.E.(2d) 541.

Nor it is necessary that the testimony be corroborated in all material points. *Davies v. Silvey,* 148 **Va**. 132, 138 S.E. 513; *Morrison v. Morrison,* 174 **Va**. 58, 4 S.E.(2d) 776; *Heath v. Valentine,* 177 **Va**. 731, 15 S.E.(2d) 98; *Rorer v. Taylor,* 182 **Va**. 49, 27 S.E.(2d) 923.

In *Morrison v. Morrison, supra,* we held that Mrs. Morrison's testimony of loans made to her husband was corroborated by the production of cancelled checks for the precise amount, the dates of which corresponded to the bank's record of the credit of the amount to her husband's account, and by a provision in the will of her husband for the payment of debts due to his wife. Between the two there existed the most confidential of relationships.

In the present case, evidence of corroboration is stronger than in most of the cited cases. Here corroboration of the gift to appellee was expressly shown by the character of the deposits in his behalf, and by her actual signatures on the deposit cards. The signature cards of themselves constitute documentary evidence of the highest character. The repeated expression of her feeling of gratitude towards appellee served but to confirm and strengthen a belief in appellee's testimony that she willingly *291 favored him, with full knowledge of the effect of her acts. That she did act intelligently and of her own free will is confirmed by the evidence of independent witnesses concerning the relationship which had long existed between appellee and his mother. Nothing that she did runs counter to common experience under like circumstances. Her actions were in accord with the impulses of appreciation and gratitude.

It is only where the narrative to be corroborated runs contrary to common experience, that more is required than where it is in line with common experience. *Trevillian v. Bullock, supra.*

The evidence strongly indicates that Joseph L. **Shockey** was not fully competent to handle money to the best advantage. This accounts for the manner and means provided by Mrs. **Shockey** for his welfare, and likewise supports the action of appellee in refraining from telling his father that the deposit to their joint account could not be checked on without the signature of both.

Joseph L. **Shockey** did not appear in the proceeding or answer the pleadings. He makes no claim that he was misinformed or deceived as to his rights by appellee. He does not ask that the latter be required to replenish the deposit in his favor, nor complain that the fund has been improperly dissipated.

When we disregard the statutory rule of decision, by weighing conflicting evidence and judging the credibility of witnesses in arriving at a conclusion opposite from the one reached by the chancellor, and modify our former construction of Code, section 8-286, we begin to multiply the difficulties we will hereafter encounter in the practical adjudication of cases coming within the purview of those statutes.

Appellants, under established principles, come to this court with the presumption that the decree of the chancellor is correct. The burden upon them to show that it is plainly wrong has not, in my opinion, been successfully borne.

I would affirm the decree appealed from.

Footnotes

1 ‘The undersigned joint depositors, hereby agree each with the other and with the above bank that all sums now on deposit heretofore or hereafter deposited by either or both of said joint depositors with said bank to their credit as such joint depositors with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship and be subject to the check or receipt of either of them or the survivor of them and payment to or on the check of either or the survivor shall be valid and discharge said bank from liability. Each of the undersigned appoint the other attorney, with power to deposit in said joint account moneys of the other and for that purpose to endorse any check, draft, note or other instrument payable to the order of the other or both said joint depositors. Payment to or on check of the survivor shall be subject to the laws relating to inheritance and succession taxes and all rules and regulations made pursuant thereto. The rights or authority of the bank under this agreement shall not be changed or terminated by said depositors or either of them except by written notice to said bank which shall not affect transactions heretofore made. * * *‘

2 ‘Q. Your father had the understanding it was necessary for both to sign?
‘A. Yes.
‘Q. As a matter of fact you told him that?
‘A. Yes.
‘Q. You were lying to him, weren't you?
‘A. No.
‘Q. What was it? It wasn't the truth, was it?
‘A. It wasn't the truth.
‘Q. It wasn't the truth?
‘A. It was a question of law to me.‘