IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VICENTE T. SALAS, Guardian Ad Litem, on Behalf of Real Parties In Interest DANIEL F. MAFNAS and DAVID F. MAFNAS,
Plaintiff-Appellant,

v.

RAMON C. MAFNAS,
Defendant-Appellee.

SUPREME COURT NO. 2008-SCC-0037-CIV
SUPERIOR COURT NO. 06-0338

Cite as: 2010 MP 9

Decided June 8, 2010

Danilo T. Aguilar, Saipan, Northern Mariana Islands, for Plaintiff-Appellant.
Victorino DLG Torres, Saipan, Northern Mariana Islands, for Defendant-Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

DEMAPAN, Chief Justice:

¶ 1 This is an appeal from a judgment of the Superior Court upholding an inter vivos gift between Joaquin C. Mafnas and his brother Ramon C. Mafnas. While we recognize that transactions between parties standing in a confidential or fiduciary relationship are examined carefully and that the party facing the presumption of undue influence bears a heavy evidentiary burden to overcome the presumption, for the reasons discussed below, we find that the trial court's judgment upholding the gift in this case is supported by competent and substantial evidence; that the trial court's application of the law does not constitute reversible error; and that although we agree with guardian ad litem Vicente T. Salas that Joaquin's wife and children had a cognizable interest in the settlement proceeds, we disagree with the contention that the gift in this case infringed upon that interest. Accordingly, the judgment of the trial court is AFFIRMED.

I

¶ 2 In November 2001, Joaquin Mafnas sustained severe injuries to his spinal cord while using the swimming pool at Mariana Resort & Spa. As a result of the incident Joaquin was rendered quadriplegic and required constant medical care.[1] Two days after the accident, Joaquin executed a general power of attorney, which authorized his brother Ramon Mafnas to act as Joaquin's attorney-in-fact. At trial, Ramon testified that his brother granted him the power of attorney for the purpose of permitting him to represent Joaquin's interests and allow him to investigate what happened to Joaquin the day of the accident. He testified that following the accident he immediately sought government assistance in obtaining a medical referral for Joaquin to a hospital in Hawaii. Joaquin was thereafter sent to Honolulu for evaluation and treatment.

¶ 3 While Joaquin was in Hawaii, Ramon began to conduct an investigation into the circumstances of his brother's accident. He went to Mariana Resort on two separate occasions to talk with the staff, take pictures of the pool area and locate witnesses. After conducting the investigation Ramon traveled to Honolulu to be with his brother. While in Hawaii, Ramon began negotiations with the insurance companies representing Mariana Resort.

¶ 4 Ramon returned to Saipan in November or December 2001 to actively engage the insurance companies. He did not hire a lawyer to conduct the settlement negotiations because he did not want to accept the large contingency fees that the lawyers demanded. Sometime during January 2002, Ramon and the representatives of the insurance companies for Mariana Resort

---

[1] The Consent Judgment, which approved the settlement and release agreement between Joaquin and Mariana Resort's insurance companies, states that Joaquin was rendered a paraplegic (as opposed to a quadriplegic). *Aioi Ins. Co. v. Mafnas*, Civ. No. 02-0088E (NMI Super. Ct. Mar. 27, 2002) (Consent Judgment). Neither party points out this discrepancy and it is unclear whether the trial court placed any emphasis on Joaquin's status as a quadriplegic in finding that the gift was executed voluntarily.

reached a tentative settlement agreement to compensate Joaquin and release the insurance companies from liability. During negotiations, Ramon reviewed the settlement offer and made a counteroffer of approximately $4.4 million, which was eventually accepted.

¶ 5 On January 28, 2002, Joaquin and the insurance companies signed the settlement agreement. The agreement lists Joaquin's wife, Kiyomi Mafnas, as a party to the settlement but does not allocate any specific percentage of the proceeds to her.[2] The settlement calls for an initial lump sum payment of $1.5 million and the remaining amount to be paid in monthly installments of $9808.15 for a fixed period of twenty-five years. The trial court issued a Consent Judgment approving the terms of the settlement. Unlike the settlement agreement itself, the Consent Judgment specifically allocates part of the monthly payments to Joaquin's wife and children. The Consent Judgment does not vest any other interest in Joaquin's wife or children other than the monthly payments. The Consent Judgment provides:

> In the event that Defendant Joaquin C. Mafnas should die prior to the date on which the last Periodic Payment is due, any remaining payments shall be made to the person or entity designated in writing by him . . . .
>
> As to each periodic payment received, the sum of $1,000.00 shall be deposited in each of two separate trust accounts set up for the benefit of minor David F. Mafnas and minor Daniel F. Mafnas; and a further $3,000.00 shall be deposited in the account of Kiyomi Mafnas.

Consent Judgment at 3-4.

¶ 6 It is undisputed that on April 3, 2002, Ramon cashed a check from the initial settlement proceeds for $650,000. Both Ramon and Joaquin's wife Kiyomi endorsed the check, which has the phrase "Gift contract of 15%" handwritten on the memo line of the check. Joaquin died on February 2, 2003.

Trial Court Proceedings

¶ 7 In 2006, Vicente T. Salas, as guardian ad litem for Joaquin's two minor children (Daniel F. Mafnas and David F. Mafnas), brought this action to set aside the gift as the product of self-dealing by a fiduciary. The complaint alleged, and Ramon does not dispute, that at the time the gift was executed, Ramon was acting as Joaquin's attorney-in-fact.[3] The complaint further

---

[2] The settlement also releases the insurance companies from liability to "all other of Claimant's heirs, family, successors, assigns, directors, officers, agents, general agent, employees, attorneys, representatives, loss payees, predecessors and successors in interest, and all other persons, firms, or corporations with whom any of the former have been, are now, or might hereafter be affiliated."

[3] An "attorney-in-fact" is someone specifically named by another through a written "power of attorney" to act for that person in the conduct of the appointer's business. In a "general power of attorney" the attorney-in-fact can conduct all business or sign any document, and in a "special power of attorney" he

alleged that Ramon's appropriation of settlement funds for his own use or benefit amounted to self-dealing by a fiduciary and that any transaction that utilized Joaquin's funds that did not directly inhere to Joaquin's benefit should therefore be set aside. The complaint sought the imposition of a constructive trust for all the real or personal property acquired by Ramon using funds taken from Joaquin and requested a monetary judgment in the amount of $787,187 representing all funds allegedly improperly taken or utilized by Ramon while a fiduciary of Joaquin.

¶ 8 At a pretrial hearing, Ramon submitted a document entitled "ATTORNEY-IN-FACT CONTRACT AGREEMENT," ("AIF Agreement") dated February 26, 2002 (approximately one month after Joaquin entered into the settlement agreement with the insurance companies). The document states:

> I, Joaquin C. Mafnas, the undersigned *hereby make a gift* . . . and grant to my true and lawful Attorney, Ramon C. Mafnas, of my own will, accord, wish, and choosing, *fifteen percent (15%) of the total amount of the total insurance settlement* claim's amount shown in the Settlement Agreement and Release executed and signed by me and dated January 28, 2002, in Honolulu, Hawaii.

(emphasis added). After recognizing that Joaquin authorized Ramon to act as Joaquin's attorney-in-fact on November 12, 2001, the document then goes on to say:

> For his services, diligence, hard work, dedication, love and affection, made evident by negotiating and securing the said Settlement Agreement and Release, executed and signed by me and others of lawful authority on January 28, 2002, I authorize and grant to Ramon C. Mafnas the authority to receive, disburse, spend and use at his own discretion fifteen percent (15%) of the total amount of the total settlement agreement amount as shown in the said Settlement Agreement and Release immediately upon obtaining court approval of the Settlement Agreement and Release. *The fifteen percent (15%) shall be withdrawn, taken or given from the balance of the up-front cash payment of $1,500,000.00* . . . .

(emphasis added).

¶ 9 The AIF Agreement is endorsed by Joaquin (with his finger print) and the agreement was submitted to the trial court with a witness affidavit in which Edward Benavente and Antonio Mafnas state that they witnessed Joaquin execute the AIF Agreement.[4] Salas did not contest the

---

or she can only sign documents or act in relation to special identified matters. *See Heine v. Newman, Tannenbaum, Helpern, Syracuse & Hirschtritt*, 856 F. Supp. 190, 194 (S.D.N.Y. 1994).

[4] The witness affidavit states in its entirety:

authenticity of the AIF Agreement, but both he and Kiyomi Mafnas informed the trial court that the existence of the gift was not disclosed to them prior to its introduction at the pretrial hearing. Following the introduction of the AIF Agreement, Salas filed a motion for summary judgment.

Motion for Summary Judgment and Shifting the Burden to the Defendant

¶ 10 In his motion for summary judgment Salas asked the trial court to make a number of rulings, the relevant ones for the purposes of this appeal include: (1) that the execution of the power of attorney instrument by Joaquin in favor of Ramon created a fiduciary relationship between the brothers; (2) that the AIF Agreement, giving Ramon 15% of the total settlement amount, is presumptively invalid as a product of self-dealing by a fiduciary; and (3) that a constructive trust be imposed for all real or personal property that was acquired by Ramon using settlement funds.[5] The trial court granted partial summary judgment in favor of Salas – finding that at the time the AIF Agreement was executed Ramon was acting as Joaquin's fiduciary – but denied Salas's motion on all other grounds.

¶ 11 The court began with the proposition that "most jurisdictions, if not all jurisdictions, regard a power of attorney as an instrument which creates an agency relationship." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Mar. 11, 2008) (Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment at 9) (citing *In re Estate of Mehus*, 278 N.W.2d 625, 629 (N.D. 1979) ("Because the power of attorney creates an agency relationship, the principles of the law of agency are applicable in determining the authority and duties of an attorney-in-fact.")). Next, the court referred to the Restatement, which states that an "agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." *Id*. (citing Restatement (Second) of Agency § 13). Finally, the court held, as a

---

> We, the undersigned witnesses, do hereby declare and attest that Joaquin C. Mafnas has on this date signed and executed the ATTORNEY-IN-FACT CONTRACT AGREEMENT (by his mark), and that Joaquin C. Mafnas signed the Attorney-In-Fact Contract Agreement willingly (or willingly directed another to sign for him), and that each of us, in the presence and hearing of Joaquin C. Mafnas, hereby signs this affidavit as witnesses, and that to the best of our knowledge Joaquin C. Mafnas is of sound mind, and under no constraint or undue influence.

[5] Salas also asked the trial court to find: (a) that Ramon had wrongfully engaged in self-dealing for a number of other transactions involving funds belonging to Joaquin and is therefore liable for those amounts acquired or utilized through self-dealing; (b) that Ramon was not authorized to convey gifts under the power of attorney executed by Joaquin and is therefore liable for the amount of those unauthorized gifts; (c) that a monetary judgment be entered against Ramon in the amount of $787,187.33 for all funds taken by Ramon or the amount of money improperly conveyed or utilized by Ramon while a fiduciary of Joaquin; and (d) that Ramon's counterclaim against his brother's estate should be barred under 8 CMC 2924 because it was not brought before the probate court and the claim was otherwise barred by the statute of limitations.

matter of law, that "in a transaction between a principal and agent in which [the] agent obtains a benefit, such as a gift, a presumption arises against its validity which the agent must overcome." *Id*. at 12 (citing *Barnes v. Dobbins*, 324 P.2d 696 (Cal. 1958)).

¶ 12 Based on the above principles, the trial court held that the AIF Agreement would be presumed invalid and that the burden of proof would be on Ramon at trial to prove by clear and convincing evidence that the gift was not procured through undue influence. *Id*. at 12-13. The trial court stated:

> [I]t has already been determined that Defendant was a fiduciary of Joaquin for all times relevant in this proceeding in light of his role as attorney-in-fact for Joaquin pursuant to the power of attorney instrument. Moreover, it is undisputed that Defendant and Joaquin entered into a transaction referred to here as the attorney-in-fact gift contract wherein Defendant obtained a benefit of receiving a gift of 15% of the entire value of the settlement agreement. Because, Defendant derived such a benefit from his transaction with Joaquin, Defendant must bear the burden of demonstrating that the transaction was "fair and equitable and did not result from undue influence," and he must demonstrate such through "clear and convincing evidence."

Id. (citing *Estate of Trampenau v. Szillies*, 410 N.E.2d 918, 922 (Ill. 1980)).

The Bench Trial

¶ 13 On the day of trial, Salas dismissed all claims against Ramon except for the one challenging the $650,000 gift. The only issue at trial was whether the AIF Agreement was procured through undue influence and the burden of proof was on Ramon to show by clear and convincing evidence that it was not. At trial Ramon testified that around February 26, 2002, he went to Joaquin's hospital room to have Joaquin sign the AIF Agreement giving Ramon a 15% share of the settlement proceeds. The AIF Agreement itself was signed by Joaquin, and accompanied by a witness affidavit signed by Edward Benavente and Antonio Mafnas. Benavente testified that he was present when Joaquin executed the AIF Agreement. He testified that Joaquin seemed to be alert and responsive to the people in the room during his visit. He witnessed Joaquin moving his head and making eye-contact with the people in the room. Benavente further testified that he could not remember the entire contents of the document, but he recalled the AIF Agreement being read out loud to Joaquin.

¶ 14 Antonio C. Mafnas (Ramon's and Joaquin's brother) was also present during the execution of the AIF Agreement and testified that he was confident that Joaquin was of sound mind when he executed the gift. He further testified that he remembered the gift granting his brother Ramon 15% of the total settlement; that he was watching his brother Joaquin when the

AIF Agreement was being read out loud; and that it appeared to him that Joaquin was nodding his head to indicate agreement. On at least one prior occasion, Antonio overheard a discussion between Ramon and Joaquin in which the amount of approximately $600,000 was mentioned.

¶ 15 Thomasa Mafnas, the mother of Ramon and Joaquin, testified that she was at the hospital with her son Joaquin twenty-four hours a day and that while Joaquin was hospitalized he was alert, responsive, and of sound mind. Although Joaquin's verbal communications were limited, she was able to communicate with him at the hospital and witnessed Joaquin communicating with other visitors. Mrs. Mafnas was present when Joaquin executed the AIF Agreement, along with Antonio, Ramon, and Edward Benevente, and confirmed that the document was read out loud to Joaquin. She further noted that while the AIF Agreement was read, Joaquin responded by "nodd[ing] his head with agreement with the things that [were] being read to him."

¶ 16 Rafael Mafnas, another of Ramon's and Joaquin's siblings, also visited Joaquin in the hospital many times and stated that Joaquin seemed mentally alert and responsive. Joaquin had told Rafael during one of his visits that he was giving Ramon 15% of the settlement money. Juanita Babauta (Joaquin and Ramon's sister) was called to corroborate the testimony of Antonio and Rafael. She testified that she visited Joaquin in the hospital after he was moved from Hawaii back to Saipan and that during one of their conversations Joaquin told her that Ramon was to receive 15% of the settlement proceeds. Ramon testified that he did not tell Joaquin's wife Kiyomi, or Vicente T. Salas (the guardian ad litem), or the trial court during its review of the settlement agreement about the AIF Agreement. When asked for a reason, he stated that it was none of their business.

¶ 17 In response to Ramon's evidence, Salas called two witnesses. The first was Joaquin's wife Kiyomi. Kiyomi claimed that Joaquin never told her about the AIF Agreement and that she believed that he would have told her something like that. She stated that she didn't think that her husband would have knowingly given $650,000 to Ramon. Kiyomi acknowledged that she signed the check cashed for $650,000, but that she didn't know what the check was for and that she signed it before Ramon wrote in the amount.

¶ 18 Guardian ad litem Salas testified that he had met with Ramon on several occasions prior to the court hearing to approve the settlement agreement. Salas informed the court that at no time did Ramon mention that Joaquin had given him a gift of 15% of the settlement proceeds. Salas then offered what can only be characterized as legal conclusions: that the 15% should not have been taken from the initial lump sum payment; that the AIF Agreement was compensation for services rendered rather than a gift and that Ramon was not entitled to that much money because

he wasn't a lawyer; and that Joaquin's wife and children's share of the settlement should not have been included when Ramon calculated his 15%.

II

¶ 19 The primary issue in this case is whether the trial court's judgment – finding that Ramon did not procure the gift through undue influence – is supported by sufficient evidence. The question of whether an individual has procured a gift through undue influence is a mixed question of law and fact. *See Guerrero v. Guerrero*, 2 NMI 61, 67 (1991). Where the trial court has made factual findings that underlie the issue of undue influence, this Court is statutorily required not to upset those findings unless they are clearly erroneous. *See* 1 CMC § 3103 ("the Supreme Court may not take new or additional evidence, consider issues of fact de novo, or set aside findings of fact unless they are clearly erroneous . . . ."). The question of whether the facts – as determined by the trial court – are sufficient to overcome the presumption of undue influence is a question of law which this Court reviews for competent and substantial evidence. *See Office of the Attorney General v. Estel*, 2004 MP 20 ¶ 23 (holding that when the burden of proof at trial is clear and convincing evidence and the assigned error on appeal is that the evidence does not support the trial court's findings, the standard of review is whether as a matter of law the findings are supported by competent and substantial evidence).

III

¶ 20 The trial court found as a matter of law that the execution of the power of attorney instrument in favor of Ramon created an agency relationship in which Ramon became Joaquin's agent. As the trial court correctly pointed out, the execution of a power of attorney imposes fiduciary obligations on the person acting as the attorney-in-fact. *See*, Restatement (Third) of Agency § 1.01 cmt. b (2006) (indicating that an agency relationship is created by the grant of a power of attorney); *Praefke v. Am. Enter. Life Ins. Co.*, 655 N.W.2d 456, 458 (Wis. 2002) (finding a fiduciary relationship formed upon the execution of a durable power of attorney and stating that "[i]t is a well-established tenet of agency law that an attorney-in-fact has a fiduciary obligation to the principal"). Salas argues that the trial court's ruling required Ramon to make two independent showings at trial: (1) that the gift was "fair and equitable"; and (2) that the gift was not the product of undue influence. Salas further contends that the trial court's failure to analyze whether the AIF Agreement was "fair and equitable," independent from whether the gift was procured through undue influence, constitutes reversible error. We disagree. As discussed below, the "fairness" of a gift to a fiduciary is one of many factors that bear on the overarching question of whether the gift was obtained through undue influence.

¶ 21 This Court has not had occasion to address the presumption of undue influence in the context of transactions between parties standing in a confidential or fiduciary relationship.[6] In the absence of statutory or local customary law, we are required to apply the common law as it is generally understood and applied in the United States. 7 CMC § 3401; *Mundo v. Super. Ct.*, 4 NMI 392 (1996). Ordinarily, the burden of proof to set aside a transaction on the grounds of fraud or undue influence is on the person attempting to invalidate the transfer. *See e.g.*, *Crawford v. Krebs*, 352 N.E.2d 76, 80 (Ill. 1976). However, as the trial court noted in its pre-trial order, the accepted rule among the several states is that when a confidential or a fiduciary relationship exists (such as between an attorney and client), and during that relationship a transaction takes place between the parties inuring to the benefit of the person in whom the duties of trust and loyalty are reposed, a presumption arises that some improper advantage was taken and the burden immediately shifts to the beneficiary to affirmatively show otherwise.[7]

¶ 22 The presumption of invalidity that arises in transactions between fiduciaries applies equally to contractual arrangements and donative transfers. *Parish v. Kemp*, 179 S.W.3d 524, 531 (Tenn. 2005) ("the presumption of undue influence extends to all dealings between persons in fiduciary and confidential relations, and embraces gifts, contracts, sales, releases, mortgages and other transactions by which the dominant party obtains a benefit from the other party."). In dealing with contractual arrangements between fiduciaries the courts look to whether the transaction was made at arm's length and whether the transaction is supported by adequate consideration (i.e., whether the transaction is "fair and equitable" from a bargaining standpoint). *See Rader v. Thrasher*, 368 P.2d 360, 364 (Cal. 1962). In dealing with donative transfers on the other hand, which by definition need not be supported by valuable consideration,[8] the courts look to whether the gift was made "freely and voluntarily, with knowledge of all the facts, and with perfect understanding of the effect of the transfer." *In re Estate of Mehus*, 278 N.W.2d 625, 632 (N.D. 1979).

---

[6] The terms "confidential" and "fiduciary" are ordinarily used interchangeably to connote any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise influence over each other. *See First Nat. Bank v. Curran*, 206 N.W.2d 317 (Iowa 1973).

[7] *See e.g.*, *Amado v. Aguirre*, 161 P.2d 117 (Ariz. 1945); *McDonald v. Hewlett*, 228 P.2d 83 (Cal. 1951); *Jeager v. Elliott*, 134 N.W.2d 560 (Iowa 1965); *In re Timken's Estate*, 280 P.2d 561 (Kan. 1955); *Madden v. Rhodes*, 626 So.2d 608, 618 (Miss. 1993); *Sebree v. Rosen*, 349 S.W.2d 865 (Mo. 1961); *In re Estate of Mehus*, 278 N.W.2d 625 (N.D. 1979); *Lindley v. Lindley*, 356 P.2d 455, 456 (N.M. 1960); *In re Dodge*, 234 A.2d 65 (N.J. 1967); *Massey v. Pemberton*, 390 S.W.2d 709 (Tenn. 1964); *Schlichting v. Schlichting*, 112 N.W.2d 149 (Wis. 1961).

[8] *See e.g.*, *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. 1993) (noting that the lack of valuable consideration is the essential characteristic of a gift).

¶ 23 In *Frame v. Bauman*, the Kansas Supreme Court stated that the presumption of invalidity that arises in transactions between individuals in a confidential or fiduciary relationship "[is] not intended to preclude gifts which honestly reflect the unfettered wishes of those who make them but, rather, [is] intended to prevent persons who stand in positions of confidence and trust from taking advantage of their positions at the expense of those entitled to their loyalty and protection." 449 P.2d 525, 533 (Kan. 1969). Given the purpose of the presumption, the majority of U.S. jurisdictions hold that the mere existence of a confidential or fiduciary relationship – while giving rise to the presumption of undue influence – does not, as a matter of law, operate to bar every transaction between parties where one person occupies a fiduciary status toward the other. *Jernberg v. Evangelical Lutheran Bethany Home for the Aged*, 131 P.2d 691 (Kan. 1942). In other words, the presumption is rebuttable. *Griffin v. Armana*, 687 So.2d 1188, 1192 (Miss. 1996). Where the party benefiting from the transaction can establish good faith and that no undue influence has been exerted, and "where the transaction under scrutiny is shown to have carried out the true and freely formed intentions of the grantor, the law does not stigmatize it as fraudulent and void simply because of the relationship existing between the parties." *Bauman*, 449 P.2d at 532.

¶ 24 In cases similar to the one now before the Court – involving gifts between family members – courts in other jurisdictions have routinely lamented that the duty of distinguishing between freedom of will on the one hand from undue influence on the other is often a difficult task. *See e.g.*, *Roberts-Douglas v. Meares*, 624 A.2d 405, 418 (D.C. Ct. App. 1992); *Whitmire v. Kroelinger*, 42 F.2d 699, 704 (W.D. S.C. 1930) (applying South Carolina law). Given this difficulty, courts rely on several factors in evaluating whether a gift was obtained through undue influence. Such factors include: the mental or physical infirmity of the donor (*McDonald v. Hewlett*, 228 P.2d 83 (Cal. 1951)); whether the donor received independent or disinterested advice before making the gift (*Webster v. Kelly*, 175 N.E. 69 (Mass. 1931)); the improvidence of the gift, i.e., whether the gift is 'fair' (*McDonald*, 228 P.2d at 89); and the transparency of the gift, i.e., whether the beneficiary delayed in revealing the gift until after the donor's death. *Id.*

¶ 25 The key factor in the gift context, however, is whether the person giving the gift was fully informed as to the nature and effect of the gift and whether the gift was a manifestation of the donor's free will. *Lindley v. Lindley*, 356 P.2d 455, 456 (N.M. 1960). We note that the above factors are not exclusive and that the analysis of whether a party has overcome the presumption of undue influence is not conducive to a formulaic or mechanical application of a multi-factor test. *See e.g.*, *Mullins v. Ratcliff*, 515 So.2d 1183, 1194 (Miss. 1987) ("Undue influence is a practical, non-technical conception, a common sense notion of human behavior . . . . [C]ommon sense

counsels against rigid, inflexible multi-part tests . . . . Better that the scope of equitable principles be imperfectly defined than that justice be overborne by the weight of artificial rules."). Rather, the above factors operate as guideposts, and the question of whether a gift was procured through undue influence must be determined on a case-by-case basis under the totality of the circumstances. *See Cersovsky v. Cersovsky*, 441 P.2d 829, 833 (Kan. 1968) ("The test of undue influence is whether the party exercised his own free agency and acted voluntarily . . . *which may be determined from all the surrounding circumstances* . . . .") (emphasis added).

¶ 26 Salas relies on *Estate of Trampenau v. Szillies*, 410 N.E.2d 918 (Ill. 1980), for the proposition that Ramon was required to prove that the AIF Agreement was "fair and equitable" independent from whether the gift was procured through undue influence in order to overcome the presumption of invalidity. As far as Salas interprets "fair and equitable" as meaning that the AIF Agreement had to be supported by adequate consideration, i.e., that the gift should fail because it is out of proportion to the 'services' provided by Ramon in securing the settlement, *Estate of Trampenau* does not support his argument.

¶ 27 In *Estate of Trampenau*, the Illinois court of appeals affirmed the trial court's ruling, which struck down an alleged gift between an elderly aunt and her nephew. 410 N.E.2d at 925. In that case the nephew had assisted his elderly aunt with the management of her financial affairs and provided his aunt with companionship prior to her death. *Id*. at 920. Before dying, the aunt sold her home and asked her nephew to invest the proceeds in gold stocks. *Id*. After initially maintaining that the gold stocks belonged to his aunt's estate in the months following her death, the nephew subsequently changed his story, claiming that the aunt had given him the stocks as a gift. *Id*. at 923. The court of appeals first upheld the trial court's finding that a confidential relationship existed between the nephew and his aunt. *Id*. at 921. The court of appeals went on to say that "[i]t is well established that once a fiduciary or confidential relation has been shown, the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent." *Id*. at 922. The court continued, "[t]he burden then devolves upon the dominant party to prove by clear and convincing evidence *that the transaction was fair and equitable, and did not result from undue influence*." *Id*. (emphasis added) (citing *Clark v. Clark*, 76 N.E.2d 446 (1947)). It is from this language that Salas bases his argument that the "fairness" of the gift is a separate inquiry from whether the gift was procured through undue influence. As shown below, this argument does not comport with the court's analysis in that case.

¶ 28 In analyzing whether the nephew had overcome the presumption of undue influence the court of appeals looked at two factors. First the court considered the fact that the alleged gift was initiated by the nephew and that the nephew was unable to present any corroborating evidence

that the aunt had actually given the nephew the gold stocks. *Id*. at 922-23. The court held that this weighed against upholding the gift. The court then evaluated the transparency of the gift, stating: "Our courts have long regarded with suspicion claims of ownership by alleged donees which are not asserted until after the death of the purported donor." *Id* at 923. In other words, the court looked at (1) who initiated the gift and (2) whether the gift was executed in secret. Significantly, the court of appeals made no independent inquiry as to whether the gift was "fair and equitable." It is clear from the analysis in that case that the "fairness" inquiry is one factor of many that courts look to in evaluating the totality of the circumstances in a given case and ultimately use in deciding whether the beneficiary of a gift has overcome the presumption of undue influence. Therefore, we hold that the trial court's judgment in this case is consistent with the above analysis.

A

The Trial Court's Judgment Upholding the Gift is Supported by Sufficient Evidence

¶ 29 This Court's responsibility on appeal is to ascertain whether the finding of the trial court that the gift was given voluntarily and not as a product of undue influence is supported by competent and substantial evidence. *See Bauman*, 449 P.2d at 532. Appellant states that "[t]he trial court's conclusions that the [gift] was procured without 'undue influence' are completely unsupported by the evidence," Appellant's Opening Brief at 26, and that "the trial court failed to point to specific facts to support its conclusion." *Id*. at 21. After reviewing the record in its entirety, and evaluating the facts in light of the factors outlined above, we find that Ramon presented sufficient evidence to rebut the presumption of undue influence.

1. Mental or Physical Infirmity of the Donor

¶ 30 The trial court held that Ramon demonstrated through clear and convincing evidence that Joaquin executed the AIF Agreement "voluntarily[,] with freedom, intelligence, and full knowledge of all the facts." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Oct. 14, 2008) (Findings of Fact and Conclusions of Law at 17-18). In support of this conclusion, the trial court focused on whether Joaquin was of sound mind at the time he executed the gift. On the issue of mental capacity, the court found that although Joaquin was physically disabled, he did not suffer from a mental infirmity. The trial court stated that "Defendant presented several witnesses . . . pertaining to Joaquin's communications and interactions with the witnesses after [he] sustained his injuries," and "although Joaquin's ability to communicate vocally was severely diminished due to his injuries, [he] was able to communicate by various verbal and non-verbal means." *Id*. at 17. The court further stated that "[i]t was generally uncontested by all witnesses, including Plaintiff's witness Kiyomi Mafnas, that Joaquin was alert, aware, and of sound mind when he

assented to give power of attorney to Ramon Mafnas, and when he assented to the AIF Agreement." *Id*. at 18. The record on appeal supports these findings.

¶ 31 Thomasa Mafnas, Joaquin's and Ramon's mother, testified that after Joaquin sustained his injuries she was with him at the hospital "24 hours a day," that she took her meals at the hospital, showered at the hospital, and slept at the hospital. The record reflects that during her time at the hospital Mrs. Mafnas had many conversations with Joaquin (through verbal and non-verbal communications) and that she believed her son to be of sound mind until his death.[9] She was also present on the day that Joaquin executed the gift, along with two other witnesses, and

---

[9] Thomasa Mafnas testified as follows:

> Q [T]hroughout your time with him night an day, were you able to communicate with him? Were you able to communicate and talk to him?
>
> A Oh yes, a lot of time.
>
> Q Could – was [Joaquin] alert?
>
> A Yes, sir. He is. He's sound in mind.
>
> Q Are you sure?
>
> A Yes, sir.
>
> Q When you talk to him, does he respond?
>
> A Yes, he did.
>
> Q How?
>
> A Well . . . you know . . . the things that is on his throat?
>
> MR. TORRES: Yeah, the tracheas –
>
> A That make him difficult to speak, so when you lose the air from that one, that's the time you can hear him speak clearly, yeah. So, we sometimes talk about families and about, you know the kids, his own kids. Yeah. He is really, he knows everything . . . .
>
> Q When – so when you tell him stories, he responds?
>
> A Yes, he did.
>
> Q When visitors come, he – he's – he responds to visitors?
>
> A Oh yes. I remember one of his friend[s], close friend I should say will come and visit him, so they were talking to one another and that's the first time I hear him enjoy and he laugh a lot, you know because he enjoy his friend that he used to be together as friend[s] . . . .

Excerpts of Record at 57-58.

she corroborated the testimony that the AIF Agreement was read out loud to Joaquin. Like Antonio Mafnas and Edward Benavente, Mrs. Mafnas stated that she observed Joaquin "nodd[ing] his head [in] agreement with the things that [were] being read to him."

¶ 32 Kiyomi Mafnas, Joaquin's wife and witness for the plaintiff, testified that she was with Joaquin much of the time while he was hospitalized. Like Thomasa Mafnas, Kiyomi testified that Joaquin was able to communicate non-verbally and to a lesser extent verbally with the use of a "throat pipe," and that she believed her husband to be of sound mind.[10] Edward Benavente and Antonio Mafnas – both of whom were present when Joaquin executed the gift – testified that based on their observations of Joaquin, he seemed to be alert and responsive to the people around him, and two of Joaquin's other siblings – Rafael Mafnas and Jaunita Babauta – testified that they believed their brother to be of sound mind while he was hospitalized. Based on the foregoing, we hold that the trial court's judgment finding Joaquin of sound mind at the time he executed the AIF Agreement is supported by competent and substantial evidence.

2. Improvidence of the Gift

---

[10] Kiyomi Mafnas testified as follows:

> Q [H]ow would he communicate with you? How would he – how can he talk to you or tell you what was on his mind.
>
> . . .
>
> A It was basically difficult for him to talk. He was able to – he was kind of able to move, but hard, his mouth, so I looked into how he moved his mouth and I try to understand what he told me, then I was responding to him.
>
> One day nurse made up this ABC board, since my husband cannot move his body, he – he followed with his eyes the spelling like, ABC which [was] very painful, so that I can understand what he said. When his condition was very fine, he pull out some ah, pipe at the throat so he was able to talk.
>
> . . .
>
> A Most of the talks were [about our] children . . . .
>
> Q Okay. When you brought the children over, um to visit with Joaquin, did he try to communicate with your children?
>
> A Yes, of course.
>
> . . .
>
> Q What would he tell the children?
>
> A Please [be] well [for] your mom. Be good. How was your day today?

Excerpts of Record at 226-27.

¶ 33 In determining whether a gift should be invalidated on the grounds of undue influence, courts also look to whether the donor is impoverished by the gift or whether the gift seems to be unnatural under the circumstances. *See Richmond v. Christian*, 555 S.W.2d 105, 108 (Tenn. 1977). Salas focuses on the fairness (or lack thereof) of the gift. He points out that Ramon was not a lawyer; that he does not have the training of a lawyer; that he did not retain any other persons with knowledge to assist in performing various legal tasks for Joaquin; and that he did not "utilize any special skills he possessed to perform his duties as a fiduciary." Appellant's Opening Brief at 21-22. Given these facts, Salas argues that Ramon "did not present any evidence providing any economic basis for his claim of compensation," which Salas points out "would amount to an annual compensation of $325,000.00." Appellant's Reply Brief at 6. Salas's argument lacks merit for a number of reasons. First, his characterization of the money given to Ramon as "compensation" for services rendered ignores the fact that the AIF agreement was a gift,[11] which as a matter of black letter law need not be supported by valuable consideration. *See e.g*., *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726 (Tex. 1993). The fact that the AIF Agreement was a gift rather than compensation for services rendered makes Salas's argument that Ramon did not possess the skills of a trained lawyer inapposite. Even if we were to indulge in Salas's "compensation" analysis, we are not persuaded that Ramon was in fact over compensated – securing a multi-million dollar settlement in less than three months is no small feat, even for a trained attorney. Second, in the cases that have struck down a gift due to its improvidence, the gift at issue inevitably conveys all, or nearly all of the donor's estate at a time

---

[11] At oral argument the Appellant argued that the AIF Agreement was a "quasi-contract" rather than a gift. We disagree with this characterization. Although the document is entitled "ATTORNEY-IN-FACT CONTRACT AGREEMENT," it is clear that the legal operation of the AIF Agreement is that of a gift. First, the operative language of the document itself is donative rather than an expression of mutual assent. *See* ER at 41 ("I, Joaquin C. Mafnas, the undersigned *hereby make a gift* . . . .") (emphasis added). Second, the AIF Agreement states that the gift was given in consideration of Ramon's "services, diligence, hard work, dedication, love and affection." *Id*. The Restatement makes clear that "past consideration" is not adequate consideration under the well-settled rules of contract law. *See* Restatement (Second) of Contracts §§ 71, 86 cmt. a (1981) ("'past consideration' is inconsistent with the meaning of consideration stated in § 71 . . . ."). In other words, the AIF Agreement by definition cannot be a contract because it is not supported by adequate consideration. Finally, the AIF Agreement meets all three elements of a valid inter vivos gift that we set out in *Cabrera v. Cabrera*, 3 NMI 1 (1992); (1) the AIF Agreement expressed the present intent that there be an immediate and irrevocable transfer of the subject matter of the gift; (2) the AIF Agreement was delivered; and (3) it was accepted by Ramon. *Id*. at 4; *see also*, *Estate of Grossinger v. C.I.R.*, 723 F.2d 1057, 1061 (2d Cir. 1983) (holding that a donor may effect a completed, present gift future payment so long as there is a present irrevocable assignment of the subject matter of the gift). Although the trial court did not conduct the above analysis in this case, it did characterize the AIF Agreement as a gift, and specifically found that "[t]here is no doubt from the face of the document that Joaquin expressed his intent that Defendant should take 15% of the total value of the Settlement Agreement proceeds." We agree with the trial court's characterization of the AIF Agreement as a gift.

when the donor is old, ill, or otherwise in need of financial assistance. *See e.g.*, *McDonald v. Hewlett*, 228 P.2d 83 (Cal. 1951).[12]

¶ 34 As a general rule, a person has the right to give away his or her property to whomsoever they wish and "in the absence of a statute to the contrary, a person of adequate mentality has the right to give away part or all of his or her property, as the case may be, if he wishes to do so." *Amado v. Aguirre*, 161 P.2d 117, 119 (Ariz. 1945). In the context of a confidential or fiduciary relationship, however, the improvidence of a nontestamentary gift – that is, a gift that amounts to all or a large portion of the donor's property – has been considered by some courts to bear on the question of whether the gift should be set aside on the basis of undue influence. *Ostertag v. Donovan*, 331 P.2d 355, 359 (N.M. 1958) (invalidating a gift between a patient and doctor in which the gift had the effect of impoverishing the patient). After reviewing the cases in which courts have cited improvidence as a factor weighing in favor of striking down a gift, we find that the 15% of the settlement proceeds given in this case falls well short of what other jurisdictions have characterized as "improvident."

¶ 35 In *McDonald v. Hewlett*, the California Court of Appeal affirmed a decision striking down a gift based in part on the gift's improvidence. 228 P.2d at 89. In that case, an attorney systematically appropriated nearly all of an elderly client's assets, who during the time the gifts were allegedly made was suffering from a tumor of the pituitary gland which extended into his brain, and which medical evidence indicated could have affected the client's mental capacity. *Id.* at 84-85. The court of appeal stated that "[t]he purported gift was unfair and unconscionable. If valid, [the client] would practically have made himself a pauper, and this at a time when he was unable to work and needed medical and hospital care." *Id.* at 87.

¶ 36 The present case is readily distinguishable from the facts of *Hewlett*. In this case, the AIF Agreement granted Ramon 15% of the $4.4 million settlement, which amounted to approximately $650,000. While this is undoubtedly a large sum of money, the record reflects that the gift did not leave Joaquin impoverished or that Joaquin's wife and children would be left without provision as a result of the gift. Indeed, the trial court specifically found "that Joaquin's wife and family were [not] left without provision as a result [of the gift]." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Oct. 14, 2008) (Findings of Fact and Conclusions of Law at 19). Ultimately, the trial court concluded "that the transaction in its entirety is a fair and reasonable expression of Joaquin's appreciation for the help Defendant rendered Joaquin in the most dire of situations." *Id.* at 22. The trial court also addressed whether the gift was "natural" under the

[12] Salas does not cite one case that supports his assertion that the gift was unfair or unreasonable under the circumstances.

circumstances of the case, stating: "There is no question that Defendant expended great amounts of time, effort and financial resources to ensure that Joaquin received the best care available, and to ensure that the family would be taken care of should Joaquin succumb to his injuries." *Id*. After reviewing the record and the applicable case law, we find that the trial court's conclusion that the gift was "fair and equitable" is supported by competent and substantial evidence.

3. Transparency and Expression of the Donor's Free Will

¶ 37 One of the factors courts look to in determining whether to sustain a gift between parties to a fiduciary relationship is whether the gift was made in secret, outside the presence of others, and not revealed by the donee until after the donor's death. *Hewlett*, 228 P.2d at 87 (declaring that "long delay in disclosing an alleged transfer, or the fact that there was no disclosure until after the death of the donor, are circumstances which render the testimony of the claimant subject to suspicion"). Furthermore, courts uniformly hold that in order for a party to overcome the presumption of undue influence, he or she must demonstrate that the gift was an expression of the donor's free will. *See e.g.*, *Marron v. Bowen*, 16 N.W.2d 14 (Iowa 1944) ("the burden is upon the donee to rebut the presumption of overreaching on his part and to affirmatively establish that . . . the donor acted voluntarily, with freedom, intelligence, and full knowledge of the all the facts."). Whether a gift is an expression of the donor's free will is partially dependent on whether the donor had full knowledge of, and understood, the nature of the gift. *Id*. While transparency and the evaluation of whether the gift is an expression of the donor's free will are sometimes evaluated separately, since the same facts tend to establish both factors in this case, we evaluate them together below.

¶ 38 The trial court found "that the events surrounding Joaquin's execution of the AIF Agreement indicated that the proceeding was generally transparent and open." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Oct. 14, 2008) (Findings of Fact and Conclusions of Law at 19). The trial court also found that the AIF Agreement "was a realization of the independent will and wish of Joaquin." *Id*. We note that it is the trial court's responsibility to determine, in the first instance, whether the presumption of undue influence existing by virtue of a confidential relationship has been satisfactorily overcome by the party on whom the burden rests and that the trial court is in the best position to weigh conflicting evidence and assess the credibility of witnesses. *Bauman*, 449 P.2d at 532-33. Given the above proposition, we cannot say that the trial court's conclusions on these issues are unsupported by the record.

¶ 39 In the Consent Judgment rendered by the Superior Court following the execution of the settlement agreement, the court found that "[t]he parties have voluntarily engaged in settlement negotiations . . . [and] [a]lthough defendant Joaquin C. Mafnas sustained a serious injury as a

result of the Accident which is the subject of this action, he is legally competent to execute all settlement documentation on his own behalf." *Aioi Ins. Co. v. Mafnas*, Civ. No. 02-0088E (NMI Super. Ct. Mar. 27, 2002) (Consent Judgment). Salas does not contest whether Joaquin understood the nature and amount of the settlement.

¶ 40 Concerning the transparency of the gift, the trial court noted that Thomasa Mafnas, Antonio Mafnas, and Edward Benavente all testified that the AIF Agreement was read out loud to Joaquin and that Joaquin expressed his approval of the agreement. Rafael Mafnas and Juanita Babauta also testified that Joaquin told them on separate occasions that Ramon was to receive 15% of the settlement proceeds. Furthermore, Ramon did not wait until his brother died before withdrawing the $650,000 from the settlement proceeds. We find that these facts sufficiently support the trial court's conclusion that Joaquin understood the nature of the gift and that the execution of the gift was open and transparent.

¶ 41 Salas challenges the transparency of the gift by virtue of Kiyomi Mafnas's testimony that Joaquin never told her about the gift and that she did not know of the gift until the present proceeding was initiated at the trial court. We are not persuaded that this fact, standing alone, destroys the transparency of the gift in this case, which five other people testified to having personal knowledge either through witnessing the execution of the AIF Agreement itself or by Joaquin personally telling them about the gift. Kiyomi testified that she signed the check for the $650,000 (although she also claims not to have known the amount or the purpose of the check) and the trial court pointed out that the phrase "Gift contract of 15%" appears in the memo line of the check. The trial court specifically considered the fact that Joaquin did not tell his wife about the gift, but held that this alone did not exhibit secrecy on the part of Ramon or the lack of transparency in the execution of the gift.

¶ 42 Finally, we note that many courts have found that the absence of independent advice weighs heavily against the party saddled with the burden of overcoming the presumption of undue influence. *Amado*, 161 P.2d at 120. "[I]ndependent advice is not essential to the validity of the gift, although a fiduciary relationship exists between the donor and the donee, but the absence of such advice is a circumstance to be considered in determining whether the gift should be avoided because of undue influence or fraud." *Id*. (citing *Brown v. Canadian Industrial Alcohol Co*., 289 P. 613 (Cal. 1930). The trial court did not mention this factor in its judgment and Salas does not raise the issue on appeal. While we find that the lack of independent advice weighs against sustaining the gift, we are nonetheless convinced that the totality of the circumstances in this case support the trial court's finding that the gift was not procured through undue influence.

B

The Trial Court Properly Applied the Burden of Poof and the Burden of Persuasion in this Case

¶ 43 In its pre-trial order the trial court held that the defendant would bear the burden of proving by clear and convincing evidence that the AIF Agreement was executed with "the fully-informed consent of Joaquin Mafnas." In its final judgment the trial court states that "Plaintiffs have produced no evidence that Joaquin had other specific plans for the money, or that Joaquin's wife and family were left without provision as a result." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Oct. 14, 2008) (Findings of Fact and Conclusions of Law at 19). Salas argues that this statement erroneously required the plaintiff to make a showing that should have properly been on the defendant.

¶ 44 This Court has held that a trial court decision should be affirmed if the result is correct, even though the court relied upon a wrong ground or the judgment complained of contains an inaccurate or erroneous declaration of law. *In re Estate of Dela Cruz,* 2 NMI 1 (1991). This rule applies equally to situations in which the trial court properly applied the law but failed to cite an authority for its application of that law. In this case, although the trial court does not specifically invoke it, Rule 301 of the Commonwealth Rules of Evidence, provides:

> In all civil actions and proceedings not otherwise provided for by law or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

NMI R. Evid. 301.

¶ 45 In *In re Estate of Yong Kyun Kim*, 2001 MP 22, this Court relied on the federal courts' interpretation of Rule 301 of the Federal Rules of Evidence in discussing rebuttable presumptions and shifting of the burden of proof under Rule 301 of the Commonwealth Rules. *Id*. at ¶¶ 12, 13. In that case we noted that a presumption is an "evidentiary tool, 'attaching to proven evidentiary facts certain procedural consequences as to the opponent's duty to come forward with other evidence.'" *Id*. at ¶ 12 (quoting *Legille v. Dann*, 544 F.2d 1, 5 (D.C. Cir. 1976)).[13] Under Rule 301, a presumption has the effect of shifting the burden of proof, that is, the burden of coming

[13] Where rebuttable presumptions are applicable, "if a basic fact (Fact A) is established, then the fact-finder must accept that the presumed fact (Fact B) has also been established, unless the presumption is rebutted." Weinstein's Federal Evidence § 301.02 (2010). In this case the fiduciary relationship between Joaquin and Ramon represents "Fact A." This basic fact was established through the introduction of the power of attorney instrument. The establishment of "Fact A" gave rise to the presumption of "Fact B" – that the AIF Agreement was procured through undue influence – which the trial court, as the fact finder in a bench trial, was required to accept in the absence of clear and convincing evidence to the contrary.

forward with evidence (otherwise known as the burden of production). What Salas fails to realize is that under Rule 301, a presumption does not shift the burden of persuasion, which remains on the party on whom it was originally cast. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-660 (1989) (holding that where a presumption shifts the burden of proof to the defendant in an employment discrimination case the burden of persuasion "remains with the plaintiff *at all times*[,]" and further stating that "[t]his rule conforms with the usual method for allocating persuasion and production burdens in the federal courts") (citing Fed. R. Evid. 301) (emphasis in original)); *see also*, Weinstein's Federal Evidence § 301.02 ("Under Rule 301, the effect of a presumption is to shift to the other party the burden of production, that is, the burden of going forward with [the] evidence . . . . Under Rule 301, a presumption does *not* shift the burden of persuasion . . . . That burden remains on the party on whom it was originally cast.") (emphasis in original). In this case, Salas brought suit seeking to have the AIF Agreement declared void as a product of self-dealing by a fiduciary. Once Salas established that Ramon was the fiduciary of Joaquin, the *burden of proof* shifted to Ramon to prove that the gift was not procured through undue influence. Under Rule 301, however, the ultimate *burden of persuasion* remained with Salas. *Cf. Cripe v. Atl. First Nat'l Bank*, 422 So. 2d 820, 823 (Fla. 1982) ("when a person who is a . . . beneficiary of a will had a confidential relationship with the testator and there was active procurement of the bequest, a presumption of undue influence arises. . . . The burden of going forward with the evidence is shifted by the presumption. Once the defendant comes forward with evidence in response to the presumption, the presumption ceases to exist."), *superseded by statute as recognized in Hack v. Janes*, 878 So. 2d 440 (Fla. 2004). Based on the above discussion we find that the trial court's statement that "Plaintiffs have produced no evidence that Joaquin had other specific plans for the money, or that Joaquin's wife and family were left without provision as a result," was not erroneous as a matter of law.

C

The Gift Did Not Infringe Upon Joaquin's Family's Interest in the Settlement Proceeds

¶ 46 Salas argues that even if this Court affirms the trial court's ruling that the gift to Ramon was not obtained through undue influence, the gift should be reduced to account for Joaquin's wife and children's interest in the settlement proceeds. Based on the Consent Judgment, which allocates $3,000 per month to Kiyomi and $1,000 per month to each of Joaquin's children, Salas calculates that Kiyomi and the minor children 'own' 52% of the entire settlement. By extension, Salas argues that Joaquin only 'owned' 48% of the settlement proceeds. Salas further contends that this 52/48 apportionment not only applies to the monthly payments under the settlement, but also to the initial lump sum payment from which Ramon withdrew the gift. In other words, Salas

contends that even if Ramon is entitled to 15% of the settlement proceeds, it should have been calculated from Joaquin's 48%, not the entire settlement. Since we affirm the trial court's holding that the AIF Agreement was not procured through undue influence, the final issue is whether Joaquin was entitled to give, and Ramon was entitled to receive, a percentage of the *total* settlement proceeds to which Joaquin's wife and children had an identifiable interest. We agree with Salas that Joaquin's wife and children had a cognizable interest in the settlement proceeds, but we disagree with the contention that the gift in this case infringed upon that interest.

¶ 47 Ramon argues that this question of 'ownership' of the settlement proceeds was not raised in the pleadings and should therefore be deemed waived. In response, Salas directs this Court to Rule 15(b) of the Commonwealth Rules of Civil Procedure, which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." NMI R. Civ. P. 15(b). However, Rule 15(b) indicates that in order for a party to amend pleadings to conform to the evidence, the party seeking to amend should do so by motion and can even do so after judgment has been entered. In this case, nothing in the record indicates that Salas moved to amend the pleadings. Furthermore, once an appeal has been taken, the Court may only consider an issue raised for the first time on appeal if: (1) it is one of law not relying on any factual record; (2) a new theory or issue has arisen because of a change in law while the appeal was pending; or (3) plain error occurred and an injustice might otherwise result unless the Court considers the issue. *Commonwealth v. Santos*, 4 NMI 348 (1996). We need not address Salas's argument that Rule 15(b) adequately preserved the apportionment issue for appeal because we find the third factor above applicable; that is, if the gift infringed upon Joaquin's family's interest in the settlement proceeds, then the validation of the gift would necessarily result in an injustice.

¶ 48 The settlement agreement lists Joaquin's wife, Kiyomi Mafnas, as a party to the settlement but does allocate any specific percentage of the proceeds to her. The settlement calls for an initial lump sum payment of $1.5 million and the remaining amount to be paid in monthly installments of $9808.15 for a fixed period of twenty-five years. Unlike the settlement agreement itself, the Consent Judgment specifically allocates part of the monthly payments to Joaquin's wife and children. The Consent Judgment does not vest any other interest in Joaquin's wife or children other than the monthly payments. The AIF Agreement explicitly grants "*(15%) of the total amount of the total settlement agreement* amount as shown in the said Settlement Agreement and Release," and further provides that "[t]he fifteen percent (15%) shall be withdrawn, taken or given from the balance of the up-front cash payment of $1,500,000.00." (emphasis added).

¶ 49 The trial court found the AIF Agreement "to be clear and unambiguous in describing the res granted from Joaquin to Defendant," and that "[t]here is no doubt from the face of the document that Joaquin expressed his intent that Defendant should take 15% of the total value of the Settlement Agreement proceeds." *Salas v. Mafnas*, Civ. No. 06-0338 (NMI Super. Ct. Oct. 14, 2008) (Findings of Fact and Conclusions of Law at 21). We agree with the trial court that the AIF Agreement is clear as to Joaquin's donative intent, and we find that the gift, which was taken from the initial payment rather than the monthly installments, did not infringe upon Kiyomi's or her children's interest in the settlement proceeds. Pursuant to the Consent Judgment, Joaquin's wife and children only had an interest in the monthly installments. The gift in this case did not disrupt those payments.

IV

¶ 50 Considering the totality of the circumstances in the record as a whole, we find that the trial court's judgment – holding that the defendant presented clear and convincing evidence to overcome the presumption of undue influence – is supported by substantial evidence. We further find that the trial court's ultimate conclusion – upholding the gift – is supported by the law governing gifts between persons in a confidential or fiduciary relationship. The judgment of the trial court is AFFIRMED.

SO ORDERED this 8th day of June 2010

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice