

testator at the time and in the very act of making the instrument,” *In re Estate of Burt*, 122 Vt. 260, 264–65 (1961), and have been coercion sufficient to “work a substitution of the dominant purpose of the defendants for the free expression of the will of the decedent.” *Kendall’s Adm’r v. Roseberry*, 120 Vt. 498, 502 (1958).

However, the ultimate burden of persuasion on the issue of undue influence sometimes shifts. A presumption of undue influence may arise in cases where (1) the benefitting party was in a “confidential relationship” with the testator, and (2) there were “suspicious circumstances” surrounding the preparation, formation, or execution of the will. *Eckstein*, 174 Vt. at 579; *In re Will of Collins*, 114 Vt. 523, 533 (1946); Restatement (Third) of Property—Wills and Donative Transfers § 8.3. The presumption is applied where it appears that “a relationship of trust and confidence obtains between the testator and beneficiary,” and that “the beneficiary has procured the will to be made or has advised as to its provisions.” *Will of Collins*, 114 Vt. at 533; *In re Estate of Laitinen*, 145 Vt. 153, 159–60 (1984). If the presumption applies, it establishes the prima facie existence of undue influence, and is sufficient to defeat the will unless overcome by counterproof that no undue influence attended the execution of the will. *Will of Collins*, 114 Vt. at 533; *Estate of Raedel*, 152 Vt. at 482 n.2.

As to the element of a confidential relationship, courts may presume as a matter of law that a relationship of trust and confidence exists when the beneficiary was in a fiduciary relationship with the testator. *Estate of Raedel*, 152 Vt. at 483. This makes sense because fiduciary relationships, like guardian and ward, are relationships “of trust and confidence in which the temptation and opportunity for abuse would be too great if the beneficiary were not required to make affirmative proof that he did not betray the confidence placed in him.” *Id.* (quoting *In re Barney’s Will*, 70 Vt. 352, 369–70 (1898)).

On the other hand, Vermont law establishes that a mere parent-child relationship, without more, does not give rise to a “confidential relationship” even when the child who benefitted was “the adviser of the parent, and had the control and management of his affairs.” *Burton’s Adm’r v. Burton*, 82 Vt. 12, 17 (1909). This rule also makes sense because it is common for a relationship of trust and confidence to arise between parents and their children, and for adult children to begin to manage the affairs of their parents as they grow older. See *In re Estate of Sensenbrenner*, 278 N.W.2d 887, 892 (Wis. 1979) (explaining that it is difficult for courts to determine “the point at which the amount and kind of assistance which a child renders to its parent makes the child a confidential advisor”). In these circumstances, Vermont law has expressed a preference against requiring children to “explain the gift” or “show the fairness” of their parents’ actions. *Burton*, 82 Vt. at 17. A number of cases have explained this preference by stating that the presumption of undue influence does not apply when the beneficiaries are children or grandchildren of the testator. *Eckstein*, 174 Vt. at 579; *Estate of Raedel*, 152 Vt. at 484; *Estate of Rotax*, 139 Vt. at 393.

However, none of the aforementioned Vermont cases have involved a situation where the beneficiary of a will was both the child of the testator and the testator’s legally-appointed guardian. The closest match is *Burton*, where the child had become the “adviser” of the parent, and “had the control and management of [her] affairs,” but there is no indication that any fiduciary relationship existed, or that the legal relationship between the testator and beneficiary was anything other than parent and child.

When a daughter is appointed as her father's legal guardian, the atmosphere of trust and confidence between parent and child does not arise solely from the parent-child relationship and the natural inclination of children to tend to their parent's affairs, but also arises as a legal and fiduciary obligation by virtue of the guardian-ward relationship. In other words, even if a confidential relationship should not be found solely by virtue of a parent-child relationship, a bright line is crossed when the child *actually* assumes fiduciary responsibility for her parent's well-being—as when the child has been appointed a legal guardian. Under those circumstances, the legal responsibilities attendant to the guardian-ward relationship should prevail. Application of the presumption of undue influence is appropriate when a fiduciary relationship is legally present because “the temptation and opportunity for abuse would be too great if the beneficiary were not required to make affirmative proof that he did not betray the confidence placed in him.” *Estate of Raedel*, 152 Vt. at 483 (quoting *In re Barney's Will*, 70 Vt. 352, 369–70 (1898)).

In this case, Valerie was legally appointed as Orville's guardian prior to the execution of the will. Because the appointment gave rise to fiduciary obligations on the part of Valerie, and because the provisions of the will benefitted her, the court concludes that a “confidential relationship” existed between Valerie and Orville in this case.

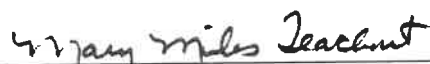
This does not mean that any presumption of undue influence has arisen, or that the burden has shifted. It is still necessary for the court to determine whether or not the will was executed under “suspicious circumstances.” See, e.g., *Will of Collins*, 114 Vt. at 533–34 (explaining that the presence of a “confidential relationship” alone is not sufficient to raise a presumption of undue influence in the absence of “suspicious circumstances”). The question of whether suspicious circumstances were present, and whether the burden of proof should therefore be shifted, can only be determined by the court after hearing the evidence presented at trial. “Whether there is sufficient evidence to raise a presumption of undue influence must be decided by the trial court on a case by case basis.” *Estate of Raedel*, 152 Vt. at 482 (quoting *Estate of Laitinen*, 145 Vt. at 159).

For the foregoing reasons, appellant Valerie Hausmann's motion for a preliminary ruling that appellee Stephen Tucker bears the burden of proving undue influence is *denied*. The court reserves ruling on the factual question of whether suspicious circumstances are present in this case. The determination as to who will bear the ultimate burden of proof on the issue of undue influence will be determined by the court after hearing the evidence presented at trial.

ORDER

For the foregoing reasons, appellant Valerie Hausmann's Motion Regarding Burden of Proof (MPR #14), filed Mar. 26, 2008, is *denied*.

Dated at Chelsea, Vermont this 8th day of May, 2009.



Hon. Mary Miles Teachout
Superior Court Judge