IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY B. MINIERI, f/k/a NANCY WOLFF, Personal Representative and Beneficiary, and GARY H. BEAROR, Beneficiary of and on Behalf of the ESTATE OF BERTHA W. PARKER, deceased,	)	
Petitioners,	)	
v.	)	C.A. No. 4792-ML
DIANE E. BENNETT,	)	
Respondent.	)	

MASTER'S REPORT

Date Submitted: July 31, 2013
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LEGROW, Master

As is often the case in estate-related disputes that find their way to this Court, this is a sad tale of once-close siblings, whose shared love for their elderly mother was not enough to overcome resentment and hurt feelings stemming from perceived inequities in the respective burdens the parties shouldered while caring for their mother in the last years of her life. The petitioners are two siblings who did not play a substantial role in the day-to-day care of their mother as she began to experience health problems. The petitioners brought suit against the respondent, their sister, who undertook the daily work of caring for her mother and who ultimately became the beneficiary of several *inter vivos* gifts, including, most substantially, an addition the mother funded on the respondent's home, in which the mother lived in the last year of her life. It also appears, although the evidence is less than perfect, that the respondent was the beneficiary on most of her mother's bank accounts, which named the respondent as joint account holder with right of survivorship. The two children who left the day-to-day care of their mother to their sister, and who were not the beneficiaries of similar gifts, contend these transfers were tainted by undue influence. The parties also dispute whether the bank accounts in question were truly joint with right of survivorship, and whether purchases made from those accounts toward the end of their mother's life were for her benefit.

For the reasons that follow, I find the petitioners largely have failed to either establish that the challenged transactions were the product of undue influence or shift the burden to the respondent to demonstrate the fairness of the challenged transactions. I am directing the petitioner to obtain additional bank records in an effort to clarify how the bank accounts were titled. Depending on the outcome of that inquiry, additional

proceedings may be necessary regarding certain expenditures from the accounts. This is my post-trial final report.

FACTUAL BACKGROUND

These are the facts as I find them after trial.

A. Family Background

The parties are the three surviving children of Bertha W. Parker (the "Decedent"), who passed away on December 16, 2008, at the age of 84. Petitioner Nancy Minieri ("Ms. Minieri") is the oldest of the surviving children and was named as executrix in the Decedent's will. The Decedent's son, Gary Bearor ("Mr. Bearor"), joined Ms. Minieri in bringing this lawsuit against their sister, Diane Bennett ("Ms. Bennett"). Sadly, Mr. Bearor passed away while this case was pending and his estate became a substitute party.[1] The Decedent had another son, Skip Bearor, who passed away in 1975. The parties' father died in 1978.

The witnesses at trial almost uniformly described the Decedent as a strong-willed, independent woman, who was decisive and particular about her appearance and her belongings, and "had things her way."[2] The family was close-knit, and the siblings appeared to be relatively close. Until their relationship became strained over the Decedent's care and finances, Ms. Bennett and Ms. Minieri had a trusting relationship

[1] *See* Transac. ID 47165380. Mr. Bearor's wife, Cynthia, is the personal representative of his estate.

[2] *Minieri v. Bennett*, C.A. No. 4792 (Nov. 29, 2012) (TRIAL TRANSCIPT) (hereinafter "Tr. Vol. I") at 200-01 (Minieri); *Minieri v. Bennett*, C.A. No. 4792 (Jan. 25, 2013) (TRIAL TRANSCIPT) (hereinafter "Tr. Vol. III") at 484 (Mace), 507 (Ward), 531 (L. Bearor).

and worked together in addressing their mother's needs.[3] Ms. Bennett described her relationship with Mr. Bearor as "like buddies," in part because they were very close in age.[4] When Mr. Bearor became sick and needed a bone marrow transplant in 2000, Ms. Bennett donated her bone marrow to her brother.

For a period of her life, the Decedent lived in Delaware. When she moved to Maryland in the 1980s to be closer to her work in Washington, D.C., Ms. Bennett purchased the Decedent's home, which was a 3 bedroom/1 bathroom home in Delaware. The Decedent later moved from Maryland to Florida in the early 1990s with her second husband, Kim. The Decedent survived a battle with throat cancer in the mid 1990s, but Kim passed away in March 2002.

B. The Decedent in Florida

After Kim's passing, the Decedent continued to live independently in Florida. Shortly after Kim's death, the Decedent executed a will dated October 17, 2002 (the "Will"), which she never revoked.[5] The Will left the Decedent's estate to her three living children, in equal shares. Around the same time, the Decedent asked Ms. Bennett if she could add her as joint account holder on the Decedent's three bank accounts: two accounts at Bank of America (the "Bank of America Accounts") and an account at Raymond James (the "Raymond James Account"). Ms. Bennett agreed, and the Decedent then sent Ms. Bennett the necessary paperwork so she could be added to the

[3] *Minieri v. Bennett*, C.A. No. 4792 (Nov. 30, 2012) (TRIAL TRANSCIPT) (hereinafter "Tr. Vol. II") at 309, 320 (Bennett).
[4] Tr. Vol. II at 311-12 (Bennett).
[5] Joint Trial Exhibit (hereinafter "JX") 16.

account.[6] Ms. Minieri was aware of this arrangement and thought it was an appropriate plan.[7] According to the testimony of the parties, neither Ms. Bennett nor Ms. Minieri knew that the Bank of America Accounts were joint with right of survivorship.[8] Although there is no evidence documenting how the accounts were titled, the bank paid those funds to Ms. Bennett upon the Decedent's death, and it is reasonable to infer that Ms. Bennett therefore was the designated beneficiary on the accounts.

The Decedent led an active lifestyle in Florida and enjoyed the company of many friends. She played golf and bowled until she was 82, and frequently went shopping and out to eat. She also enjoyed the company of Ms. Minieri, who purchased a second home near the Decedent's home in Florida. Ms. Minieri spent approximately six weeks a year in Florida, in a community that connected to the community where her mother lived.

In 2004 or 2005, the Decedent's children began to notice some decline in her ability to manage her finances without assistance, and she began having some trouble with her memory.[9] They apparently did not view the problem as critical until Thanksgiving 2006, when the Decedent got lost when driving to pick Ms. Minieri up at the airport, a drive with which the Decedent was familiar.[10] After the Thanksgiving incident, Ms. Bennett and Ms. Minieri arranged for the Decedent to undergo a driving test with the Florida Highway Safety Administration.[11] The Decedent failed the test the

[6] Tr. Vol. II at 326-29 (Bennett).
[7] Tr. Vol. I at 163-64 (Minieri).
[8] Tr. Vol. III at 326-29 (Bennett).
[9] Tr. Vol. I at 74-76 (Minieri).
[10] *Id*. at 76-77 (Minieri).
[11] JX 5; Tr. Vol. I at 77-79 (Minieri).

first time, but passed it when she insisted that she be given an opportunity to retake the test. When leaving the Highway Safety Administration, however, the Decedent backed into a truck in the parking lot.[12] She did not drive again after that accident.

As a result of these incidents, Ms. Minieri took the Decedent to see her primary care physician, who referred the Decedent to a neurologist.[13] The neurologist, Dr. Chris Marino, M.D., examined the Decedent, performed a Folstein mini-mental status exam ("MMSE") and ordered a series of tests.[14] Although her daughters accompanied her to the appointments with Dr. Marino, the Decedent was able to report to Dr. Marino that she was experiencing problems with her memory and was able to provide "a coherent history."[15] The Decedent received 26 out of 30 possible points on the MMSE.[16] After reviewing the tests and performing an additional examination, Dr. Marino concluded that the Decedent was in the early stages of Alzheimer's disease, and also was suffering from Hypertensive Encephalopathy.[17] Dr. Marino prescribed Aricept; a drug used to slow the progression of Alzheimer's disease, and indicated that he expected the Decedent would see "good results" with the drug.[18]

In the spring of 2007, while the Decedent was undergoing neurological testing, the Decedent, Ms. Minieri, and Ms. Bennett agreed that the Decedent should move to Delaware to be closer to family. At the time, Ms. Minieri and Mr. Bearor were living in

[12] Tr. Vol. I at 77-79 (Minieri).
[13] *Id.* at 80-81 (Minieri).
[14] JX 3A.
[15] *Id.* at 1, 3; JX 3B at 1, 3.
[16] JX 3A at 3.
[17] JX 3B at 3.
[18] *Id.* at 4; JX 6.

Maryland, and Ms. Bennett was living in Sussex County. Although the petitioners have suggested that the Decedent played no part in the decision to leave Florida, and that Ms. Minieri and Ms. Bennett effectively substituted their judgment for hers, the testimony indicates otherwise. Indeed, on cross-examination, even Ms. Minieri conceded that the Decedent participated in the discussions regarding the move, and that the Decedent agreed that she should move back to Delaware.[19] Although Ms. Minieri and Ms. Bennett assisted the Decedent with packing her home, finding an apartment, and traveling to Delaware, it was the Decedent who took steps to list and sell her home in Florida, withdrew money from her account to pay the moving expenses, and decided which of her furniture would be moved to her Delaware apartment and which would be placed in storage.[20]

C. The Decedent moves back to Delaware

Once the Decedent, Ms. Minieri, and Ms. Bennett agreed that the Decedent should move to Delaware, Ms. Bennett began exploring various living arrangements. She toured assisted living facilities, but the associated cost proved to be a barrier for the Decedent.[21] Ms. Bennett ultimately found a senior living apartment in Lewes, Delaware, approximately five minutes from Ms. Bennett's office. Once the Decedent moved into the apartment, Ms. Bennett saw her approximately five days a week, and Ms. Minieri visited bi-weekly. Mr. Bearor, who was dealing with his own health concerns, visited irregularly. Because the Decedent no longer was driving, and was not willing to utilize

[19] Tr. Vol. I at 174 (Minieri).
[20] *Id.* at 176-77, 230 (Minieri).
[21] JX 6.

public transportation, either Ms. Bennett or her husband, Frank Mace, bore the primary burden of transporting the Decedent to appointments and for entertainment.

The toll of the responsibilities associated with helping the Decedent move to Delaware and seeing that she was settled in her apartment quickly frustrated Ms. Bennett, who chided Mr. Bearor for what she perceived to be his nonchalance toward, or lack of participation in, the care of their mother. In an e-mail to Mr. Bearor's wife, Cynthia Bearor ("Mrs. Bearor") in May 2007, Ms. Bennett rebuked Mr. and Mrs. Bearor for failing to visit the Decedent on Mother's Day and for refusing to take an active role in her care.[22] Ms. Bennett exclaimed that "MOM's BRAIN IN HEMMORAGING [sic]! … [She] has SEVERE brain damage and is very ill!! VERY ILL!!"[23]

Although Ms. Bennett's e-mail paints the Decedent's condition as very serious, the full record does not support a conclusion that she was in a weakened mental state or exhibiting substantial mental defects. Instead, this e-mail and several others like it appear to be aimed at prodding Mr. Bearor – and later Ms. Minieri – into taking a more active role with their mother. As even Ms. Minieri and Mrs. Bearor concede, Ms. Bennett had a tendency to exaggerate, and was frustrated with the unequal distribution of responsibilities among the siblings.[24] As a result, Mrs. Bearor believed that Ms. Bennett made things sound worse than they were to provoke sympathy or assistance from her siblings.[25] More reliable evidence indicates that, although she was experiencing some of

[22] JX 9.
[23] *Id*. (emphasis in original).
[24] Tr. Vol. I at 181-82 (Minieri); Tr. Vol. II at 295-96 (Bearor).
[25] JX 15.

the symptoms of early Alzheimer's disease and hypertensive encephalopathy, the Decedent remained relatively sharp, strong-willed, and decisive.

For example, shortly after moving to Delaware, the Decedent decided to create bank accounts at Delaware National Bank (the "DNB Accounts"), rather than continuing to rely on the Bank of America Accounts she had established in Florida. Ms. Bennett credibly testified that it was the Decedent's idea to establish the DNB Accounts, and that the Decedent pursued the move because there was not a Bank of America branch close to the Decedent's apartment and she was tired of incurring ATM fees when she withdrew cash.[26] Ms. Bennett drove the Decedent to the bank, and sat with her while she opened the accounts, but the Decedent did not require Ms. Bennett's assistance during the process and Ms. Bennett did not play any role in opening the accounts or deciding how they would be titled.[27] Consistent with the apparent arrangement of her other accounts, the Decedent named Ms. Bennett as a joint account holder and determined the survivorship status of the accounts.[28] The evidence at trial established that the DNB checking account was a right of survivorship account, and the bank paid the funds in both accounts over to Ms. Bennett upon the Decedent's death.[29] Ms. Bennett did not understand until after the Decedent's death that she would be the beneficiary of the funds

[26] Tr. Vol. II at 330 (Bennett).
[27] *Id*. at 331-33 (Bennett).
[28] *Id*.
[29] JX 22.

in those accounts.[30] Ms. Minieri was aware that the accounts were being established, and demurred when Ms. Bennett asked if Ms. Minieri wanted to be a signatory on the accounts.[31]

Consistent with that pattern of actively participating in the management of her finances, the Decedent understood her financial picture, and would contact the bank when necessary to verify her account balance.[32] Although Ms. Bennett sat with the Decedent and assisted her in paying her bills and writing checks, the Decedent typically paid by herself when she went shopping and she understood her assets and obligations.[33] She also continued to exhibit her "strong-willed" personality when shopping for clothing and furniture.[34] In late June 2007, the Decedent executed an advanced health care directive and durable general power of attorney, naming Ms. Minieri and Ms. Bennett as her agents.[35] Neither Ms. Minieri nor Ms. Bennett suggested that the Decedent did not have the capacity to designate agents or sign those documents.

D. The Decedent undergoes two surgeries

In July 2007, while with Ms. Bennett at a nail appointment, the Decedent collapsed and became unconscious. Her doctors ultimately determined that she had a blockage in her carotid artery that required surgery. The Decedent spent a week in the

[30] Tr. Vol. II at 421 (Bennett). Although the petitioners seem to suggest otherwise, the fact Ms. Bennett viewed the money in these accounts as belonging to the Decedent has no bearing on the beneficiary status of the accounts.
[31] Tr. Vol. I at 187 (Minieri).
[32] Tr. Vol. II at 338-39 (Bennett).
[33] *Id*. at 331, 338-39 (Bennett).
[34] *Id*. at 336 (Bennett)
[35] JX 25-26.

hospital and two weeks in rehabilitation, and experienced a number of falls and other setbacks during her recovery. An X-ray performed upon her discharge from the hospital showed a spot on the Decedent's lung, and her doctor ordered a PET scan to follow-up.[36] None of the testimony or evidence submitted at trial indicates whether that PET scan ever was performed, but, if it was, the results did not appear to alarm the Decedent's physicians. E-mails exchanged among the family members in July 2007 indicate that the Decedent was in good spirits after the surgery.[37] In late July 2007, the Decedent returned to her apartment and hired a family friend to move into the apartment for a period of time to provide daily care. The in-home care giver stayed for four or five weeks, until the Decedent decided she no longer required assistance.[38] Neither Ms. Bennett nor Ms. Minieri made any effort to override that decision.

After the surgery in July 2007, the Decedent began experiencing problems with mobility, but the evidence does not support the conclusion that she was showing substantial mental deficits.[39] Although the e-mail record shows Ms. Bennett's increasing frustration from the perceived lack of support from Ms. Minieri and Mr. Bearor, Ms. Bennett described the Decedent as "in great spirits"[40] and stated that she "knows what is going on."[41]

[36] JX 10.
[37] *Id.*; JX 11.
[38] Tr. Vol. III at 521 (Ward).
[39] JX 11-13.
[40] JX 11.
[41] JX 13.

The Decedent's primary care physician, Dr. Steven Berkowitz, D.O., who testified by deposition, echoed that sentiment. Dr. Berkowitz began seeing the Decedent after she moved back to Delaware, and saw her five times between May 2007 and April 2008.[42] Dr. Berkowitz testified that, although the Decedent exhibited some memory problems typical of her age, he did not see any signs of dementia or Alzheimer's disease during her visits to his practice.[43] He described the Decedent as well-groomed, clean, and mentally sharp, able to hold an intelligent conversation, and able to understand humor.[44] Although he acknowledged that hypertensive encephalopathy can affect a person's cognitive abilities and functions, Dr. Berkowitz did not believe that the disease was impacting the Decedent in that way, based on his observations.[45] He described her score on the MMSE as higher than average for someone her age.[46]

In late December 2007, the Decedent collapsed while visiting Ms. Minieri's home, and again was hospitalized and underwent surgery on her carotid artery.[47] Just before the surgery, the Decedent gifted to Ms. Bennett a pendant the Decedent frequently wore. Although the pendant was not particularly expensive, it apparently had a great deal of sentimental value to both Ms. Bennett and Ms. Minieri. When Ms. Minieri saw Ms. Bennett wearing the necklace shortly thereafter, and Ms. Bennett indicated that it was a

[42] Deposition of Steven Berkowitz, D.O. (TRANSCRIPT) at 77 (hereinafter "Berkowitz Dep.")
[43] *Id*. at 16-18.
[44] *Id.* at 16-20.
[45] *Id*. at 19-20.
[46] *Id*. at 18.
[47] Tr. Vol. II at 351-53 (Bennett).

gift from the Decedent, Ms. Minieri expressed anger.[48] Notably, Ms. Minieri did not dispute this version of events, or testify that she saw the Decedent wearing the necklace after the surgery.

E. The Decedent moves to Ms. Bennett's home

While she was recuperating from the second carotid artery surgery, the Decedent moved into Ms. Bennett's home. The Decedent initially moved into an extra bedroom with the expectation that she would return to her apartment in Lewes once she recuperated from the second surgery. At the same time, Ms. Bennett continued to express frustration with her siblings that they had "dumped" all the responsibility "in [her] lap."[49] In January 2008, Ms. Bennett told Mr. Bearor that, if she knew when their mother would pass, she would take her out and make sure she spent all her money, so there would be nothing left to pass to the beneficiaries of her estate.[50]

This statement, again, seems to be more indicative of Ms. Bennett's penchant for spleen-venting and "embellishment" than any true intent to ensure Mr. Bearor or Ms. Minieri did not receive anything upon the Decedent's death.[51] In fact, in that same period, Ms. Bennett assisted the Decedent in converting the Raymond James Account from one that named Ms. Bennett as sole beneficiary to one that named all three children as equal beneficiaries.[52] The parties dispute Ms. Bennett's intentions when she facilitated

[48] Tr. Vol. II at 393-94 (Bennett).
[49] JX 13.
[50] Tr. Vol. II at 271 (C. Bearor).
[51] *See* Tr. Vol. I at 181-82 (Minieri) (conceding that Ms. Bennett had tendency to embellish or exaggerate).
[52] Tr. Vol. I at 190, 207-212 (Minieri); JX 28.

this change, but – whatever her intentions – the retitling of the account demonstrates two important things: (1) the Decedent had taken some steps earlier in her life to provide death benefits to Ms. Bennett disproportionate to those received by the other children, and (2) Ms. Bennett did not intend to follow through with her proclamation about making sure that Mr. Bearor would not receive anything when his mother died, and instead took affirmative steps that she knew would result in payments to him upon the Decedent's death.

As time passed, the Decedent seemed reluctant to return to her apartment, and finally confessed to Ms. Bennett that she did not want to return to the apartment in Lewes.[53] Ms. Bennett then suggested that the Decedent live permanently in Ms. Bennett's home, using the bedroom where she had been recuperating, which was a small room that previously was as a bedroom for Ms. Bennett's son, and later was an office for Ms. Bennett's husband, Mr. Mace.[54] When the Decedent moved into the bedroom, Mr. Mace's office desk was moved to the garage.[55] The Decedent, however, was concerned about further inconveniencing Mr. Mace, and mused that things would be easier if the Decedent and her first husband had built an addition on the house when they owned it.[56]

F. The Decedent funds an addition to Ms. Bennett's home

According to Ms. Bennett, when the Decedent suggested that an addition to the property would resolve the problem of where the Decedent would stay permanently, Ms.

[53] Tr. Vol. II at 354 (Bennett).
[54] *Id.* at 353 (Bennett). The parties refer to Mr. Mace as "Weston."
[55] *Id.*; Tr. Vol. III at 488 (Mace).
[56] Tr. Vol. II at 354-56 (Bennett).

Bennett indicated she was unable to afford the construction costs.[57] Ms. Bennett testified that the Decedent then offered to finance the addition herself.[58] Although the petitioners dispute the veracity of Ms. Bennett's version of the events, pointing out that Ms. Bennett had long expressed a desire to expand her home,[59] I find Ms. Bennett's testimony credible on this point. It also is reasonable to conclude that the Decedent would make such an offer. First, it is hardly surprising that the Decedent no longer wanted to live alone, but nonetheless wanted to have a room that was larger and afforded her some privacy and personal space. Second, it is reasonable that the Decedent would offer to pay for such an addition, particularly when Ms. Bennett had been providing regular assistance to the Decedent, and was allowing her to live in the home without paying rent, utilities, or expenses.[60]

Ms. Bennett then discussed the idea with Ms. Minieri, who felt that building an addition on Ms. Bennett's home, where the Decedent could reside, was a reasonable and affordable solution to the parties' concerns about the Decedent's long term care.[61] Ms. Minieri was aware that the Decedent's funds were being used to finance the addition, and conceded at trial that the Decedent was aware she was paying for the addition, did not question why her funds were being used for that purpose, and "seemed fine with it."[62]

[57] Tr. Vol. II at 355-358 (Bennett).
[58] *Id*.
[59] Tr. Vol. I at 117 (Minieri); Vol. II at 268 (C. Bearor).
[60] Tr. Vol. I at 120 (Minieri).
[61] *Id.* at 121 (Minieri).
[62] Tr. Vol. II at 225 (Minieri).

Ms. Minieri suggested Ms. Bennett obtain bids on the proposed addition.[63] The first bid estimated the price of the construction at approximately $70,000, which Ms. Minieri deemed "too high."[64] The second bid was substantially lower, with a cost of $39,580.[65] Ms. Bennett and Mr. Mace also obtained a separate bid for additional work on their home, including new siding and windows.[66] Mr. Mace and Ms. Bennett credibly testified that they paid for the bulk of that work, with a total cost of approximately $6,000, out of their own funds.[67] The record supports that testimony.[68]

Ms. Bennett signed the construction contract on March 20, 2008,[69] and the addition was completed in June 2008. After the contractor completed the initial work, a bathroom was added to the addition, with the Decedent paying for the costs associated with the bathroom.[70]

G. The Decedent is diagnosed with cancer

Shortly after the construction contract was signed and work began on the addition, Ms. Bennett received a call from Dr. Berkowitz, the Decedent's primary care physician, regarding test results from a follow-up visit after the Decedent's second carotid artery

[63] *Id.* at 359 (Bennett).
[64] *Id*.
[65] JX 23.
[66] *Id.* This addendum also provided for masonry work associated with the addition. Ms. Bennett testified that the Decedent paid for the additional masonry work.
[67] Tr. Vol. II at 360-362 (Bennett); Tr. Vol. III at 496-97 (Mace).
[68] *See* JX 21, p. 2 (detailing a total of $43,680 in payments from the Decedent's account to J.K. Harrington, LLC, the contractor who built the addition); JX 23 (showing total construction costs of $48,830).
[69] JX 23.
[70] *See* JX 21.

surgery in January 2008.[71] The test results showed a "suspicious area" on the Decedent's lung, possibly indicative of cancer.[72] Ms. Bennett immediately contacted Ms. Minieri, and both parties expressed shock regarding the diagnosis. During that call, Ms. Bennett also raised the concern that substantial work on the addition already had begun, and, if the Decedent passed away before the work was completed, Ms. Bennett had no way to pay for the addition herself.[73]

Ms. Minieri then suggested that Ms. Bennett alleviate her concerns by drawing up a contract for the Decedent to sign, reflecting the Decedent's agreement to pay for the addition.[74] At the time, the parties had no understanding of the Decedent's precise diagnosis, the stage of the cancer, or the Decedent's prognosis or life expectancy.[75] Ms. Bennett drafted an agreement, without the assistance of an attorney, which stated that the Decedent's funds would be used for the construction of the addition on Ms. Bennett's

[71] Tr. Vol. II at 372-73 (Bennett). In their post-trial briefs, the petitioners presented a newly-minted theory that Ms. Bennett was aware of the test results and cancer diagnosis months before she revealed it to Ms. Minieri or Mr. Bearor, but that Ms. Bennett hid the diagnosis until after the addition contract was signed. There is nothing in the record that supports this conclusion, other than the irregular X-ray after the July 2007 surgery, and petitioners have not pointed to any medical records indicating the Decedent was diagnosed with, or treated for, cancer (other than throat cancer in the 1990s) before April 2008. In other words, the petitioners ask the Court to conclude that either (1) Ms. Bennett somehow prevented her mother from being treated for cancer, or (2) the Decedent was diagnosed with cancer before April 2008, but the diagnosis does not appear in her medical records. To say this conclusion would be entirely unreasonable and inconsistent with the record is something of an understatement.
[72] Tr. Vol. II at 372-73 (Bennett).
[73] *Id*.
[74] Tr. Vol. I at 125 (Minieri); Tr. Vol. II at 373-75 (Bennett).
[75] Tr. Vol. II at 375-76 (Bennett).

home, even if the Decedent passed away before the addition was completed.[76] The Decedent signed this agreement on April 1, 2008 (the "Addition Contract").

At trial, Ms. Minieri testified that she and Mr. Bearor believed that the funds used to finance the addition would be an "early distribution" to Ms. Bennett from the Decedent's estate, that is, that Ms. Bennett would use her "one-third of her impending inheritance" to pay for the addition.[77] Although Ms. Minieri apparently expected that the contract she suggested would reflect her belief that the funds were an early distribution of Ms. Bennett's inheritance, it is not clear that she ever suggested that to Ms. Bennett. Ms. Minieri equivocated about whether she ever discussed this belief with Ms. Bennett, and she did not testify that she ever discussed the issue with the Decedent.[78] Ms. Bennett testified that she never discussed that idea with Ms. Minieri at any time.[79] The more reasonable conclusion is that, whatever Ms. Minieri's belief at the time, she never discussed the "early distribution" idea with the two parties to the contract: Ms. Bennett and the Decedent. Her private expectations therefore are not relevant to my analysis.

Ms. Bennett testified that the Decedent read and understood the Addition Contract, and agreed that it was a good idea to memorialize the agreement in light of the recent test results.[80] Although Ms. Minieri testified that the Decedent knew that her funds were

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[76] *Id.*; JX 25.
[77] Tr. Vol. I at 121, 125 (Minieri)
[78] Tr. Vol. I at 121 (Minieri) ("And Gary and I said we thought [the proposed addition] was great, too, and we thought that it was a good use of [Ms. Bennett's] one-third of her impending inheritance. We all assumed, *I guess maybe just Gary and I*, that that's what the $42,000 was going toward.") (emphasis added).
[79] Tr. Vol. II at 365 (Bennett).
[80] Tr. Vol. II at 375-76 (Bennett).

being used for the addition,[81] and never testified that the Decedent suggested that the amount should later be subtracted from any inheritance Ms. Bennett would receive upon the Decedent's death, the petitioners now contend that the Decedent was suffering from diminished capacity during this period, and urge me to conclude that the Decedent's agreement to fund the addition was the product of undue influence exerted upon her by Ms. Bennett.

In support of that argument, the petitioners place particular emphasis on two e-mails exchanged between the parties during the period in which the addition was discussed and the Addition Contract was signed. In the first e-mail, sent in February 2008, Ms. Bennett described to Ms. Minieri some of the Decedent's recent behaviors, which suggested that she was experiencing difficulties with certain activities of daily living.[82] Although the petitioners made much of this e-mail at trial, it does not support the sweeping conclusions petitioners would have me draw about the Decedent's declining mental state. In the e-mail, Ms. Bennett recounted that Mr. Mace had observed the Decedent using a stainless steel bowl, rather than a pan, to heat soup for lunch, and that the Decedent later stored the leftovers in a cup rather than a plastic container.[83] Ms. Bennett also reported that the night before, the Decedent either lied or misremembered whether she had brushed her teeth.[84] In the second e-mail, sent on March 24, 2008, Ms. Bennett took Mr. Bearor to task for failing to visit or contact their mother for two

[81] Tr. Vol. II at 225 (Minieri).
[82] JX 14.
[83] *Id.*
[84] *Id.*

months.[85] Ms. Bennett stated that the Decedent's "memory is slipping away by the day," and that during one conversation with Ms. Bennett, the Decedent did not recognize Mr. Bearor's name when it came up in conversation. At trial, one of Ms. Bennett's witnesses confirmed the accuracy of that statement.[86] Although this e-mail and testimony reflects that the Decedent may have had some memory problems, it also recounts that the Decedent was cognizant of which members of the family visited her, questioned why certain family members did not visit or call her, and remembered "for days" when family members placed calls to her.[87]

Other testimony and evidence provided a more complete picture than these discrete e-mails, and show that it was not until the fall of 2008 that the Decedent began experiencing significant problems with her memory. Mr. Mace testified that the Decedent participated in choosing how she wanted the addition to be laid out and decorated, and that she refused to consider adding recessed lighting even after Ms. Bennett and Mr. Mace suggested it.[88] It was not until September 2008 that Mr. Mace observed the Decedent having significant memory problems.[89] Even the petitioners concede that, after the addition was completed in June 2008, the Decedent was excited to move into her "little apartment," and would offer tours to visitors.[90] As Mrs. Bearor recounted to Ms. Minieri in September 2008, when Mr. and Mrs. Bearor came to visit in

[85] JX 33.
[86] Tr. Vol. III at 519-520 (E. Ward).
[87] JX 33.
[88] Tr. Vol. III at 484, 486 (Mace).
[89] *Id.* at 483 (Mace).
[90] JX 35; Tr. Vol. II at 366, 370 (Bennett).

mid-September, the Decedent "showed [them] around her little apt., she [was] so proud of it" … and asked Mr. Bearor to hang a picture for her.[91] After the visit, Mrs. Bearor reported that the Decedent was "in great spirits," seemed happy to see them, and only seemed to forget "a little."[92] Ms. Minieri agreed with Mrs. Bearor's perception, responding that the Decedent still had her sense of humor and appetite, and that her Alzheimer's was in a "manageable stage."[93]

To support their contention that the Decedent was susceptible to undue influence, the petitioners offered a report and testimony from Edward S. Wilson, III, Ph.D. ("Dr. Wilson"), who offered his view of whether the Decedent was susceptible to undue influence based on a "postmortem evaluation" of "whether the decedent possessed the 'capacity' to alter her expressed wishes stated in her 2002 'Last Will and Testament.'"[94] Dr. Wilson earned his Ph.D in psychology from Duke University in 1979, and is a licensed psychologist who has testified about a variety of matters both inside and outside Delaware.[95]

Dr. Wilson had never performed a postmortem evaluation of capacity before, and therefore sought to develop a "construct" to analyze capacity in a person he could not observe first hand.[96] He developed this "construct" by reviewing Delaware case law,

[91] JX 35.
[92] *Id.*
[93] *Id.*
[94] JX 2 at 1.
[95] JX 1; Tr. Vol. I at 30-32 (Wilson).
[96] Tr. Vol. I at 34-35 (Wilson).

particularly this Court's opinion in *Stone v. Stant*,[97] and by considering a California statute that defines mental capacity.[98] For purposes of his report and findings, Dr. Wilson defined "capacity" as "[o]ne's ability to respond to a particular situation with appropriate appreciation, and subsequently act in one's own best interest."[99] The California statute on which he relied identified four "domains" of capacity, and Dr. Wilson therefore evaluated the Decedent's functioning within each domain.[100]

The data Dr. Wilson relied upon in reaching his conclusions consisted of medical reports from the Decedent's neurologists, and a series of e-mails among the parties between February 2007 and March 2008.[101] Dr. Wilson did not interview anyone who observed the Decedent during her lifetime, including either the medical practitioners who treated her or the parties in this case.[102] It also does not appear that Dr. Wilson reviewed any of the depositions of any witness in forming his opinion in this matter.

The four "domains" of capacity used by Dr. Wilson were: (1) alertness and attention, (2) information processing, (3) thought processes, and (4) ability to modulate mood and affect.[103] As to the first domain, alertness and attention, Dr. Wilson concluded that it was "evident from the data" that the Decedent's orientation, attentiveness, and concentration were impaired.[104] Although Dr. Wilson found some suggestion in the

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[97] 2010 WL 27344144 (Del. Ch. July 2, 2010).
[98] Tr. Vol. I at 34 (Wilson).
[99] JX 2 at 1.
[100] JX 2 at 2; Tr. Vol. I at 39 (Wilson).
[101] Tr. Vol. I at 37 (Wilson).
[102] Tr. Vol. I at 66-67 (Wilson).
[103] JX 2 at 2.
[104] JX 2 at 3.

neurologist reports that the Decedent was having some trouble with alertness and attention, his conclusion that these problems had progressed significantly by March 2008 was based entirely on the e-mail record.[105] Similarly, in the second domain, Dr. Wilson concluded that the data showed that the Decedent was impaired in her memory, language competence and production, recognition of familiar objects and people, organization and planning, and use of logic. Other than the "word find" problems noted in the neurologist reports, Dr. Wilson's conclusions in this domain were based entirely on the e-mail record, and his assumption that the e-mail record was not exaggerated and reflected the Decedent's typical behaviors.[106] Dr. Wilson found that there was no evidence that the Decedent's thought processes were impaired, and therefore concluded that the Decedent did not suffer any deficiencies in the third domain of his capacity construct.[107] Finally, as to the fourth domain, ability to modulate mood and affect, Dr. Wilson found that the Decedent "experienced florid anxiety and depressive symptomatology between February 2007 and March 2008."[108] Dr. Wilson also evaluated the Decedent's independence and self reliance, and concluded that "it appears evident from the data that [the Decedent] lost independence and self reliance" during the same period.[109] Again, this conclusion was based almost entirely on the e-mail record.[110] Based on these findings, Dr. Wilson concluded that:

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[105] Tr. Vol. I at 57 (Wilson).
[106] *Id.* at 60-61 (Wilson).
[107] *Id.* at 41, 61-62 (Wilson).
[108] JX 2 at 6.
[109] JX 2 at 7.
[110] Tr. Vol. I at 64 (Wilson).

> Ms. Bennett's continued oversight of her mother as [the Decedent] progressively lost capacity, in the domains of information processing, ability to modulate mood and affect, and alertness and dependence appeared [sic] to have created a true dependency. This dependency in and of itself creates a vulnerability for undue influence to be initiated and to flourish. Therefore[,] as [the Decedent's] condition progressed to the point of significant cognitive, emotional[,] and physical impairment[,] she was dependent upon Ms. Bennett by March 2008. Conversely, it appears that by March of 2008, [the Decedent] was unable to be independent or self reliant.[111]

Although the respondent did not submit her own expert report, or offer any expert testimony to rebut Dr. Wilson's findings, the respondent questioned Dr. Berkowitz about Dr. Wilson's findings and whether they were consistent with Dr. Berkowitz's observations of the Decedent. Dr. Berkowitz testified that he disagreed with Dr. Wilson's conclusions regarding the Decedent's alertness and attention, memory, language competence and production, or recognition of familiar objects and people.[112] Dr. Berkowitz testified that the Decedent did not, in his office, exhibit any of the problems that Dr. Wilson concluded were "evident from the data." Dr. Berkowitz did not observe the Decedent being led around, and felt that she was oriented to and aware of her surroundings.[113] Although Dr. Berkowitz acknowledged that the Decedent was being treated for depression, he did not witness her "pining away" or being "non-communicative."[114] Contrary to Dr. Wilson's conclusions, Dr. Berkowitz did not observe the Decedent progressively losing capacity.[115]

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[111] JX 2 at 7.
[112] Berkowitz Dep. at 30-33.
[113] Berkowitz Dep. at 37, 59.
[114] Berkowitz Dep. at 35.
[115] Berkowitz Dep. at 40-41.

H. The Decedent's declining health forces Ms. Bennett to take a leave of absence

The Decedent's cancer diagnosis ultimately was confirmed, and the doctors could not identify a successful treatment. It appears, based on the record, that her condition was relatively stable through summer 2008, but her health had declined substantially by mid to late September 2008. By this time, the Decedent was having noticeable trouble with her memory, frequently repeated herself, and was forgetting to take her medication.[116] Rather than hire a nurse during the day when Ms. Bennett was at work, the parties agreed that Ms. Bennett would take a leave of absence from her job to stay home and care for the Decedent. To make up for the lost wages during the leave of absence, and to cover expenses, Ms. Bennett paid herself $400 a week from the Decedent's funds.[117] The petitioners do not seek reimbursement of these weekly payments.

By November 2008, it was clear to the parties that the Decedent would not live much longer. Around Thanksgiving, the Decedent indicated that she wanted a new television in her bedroom, because she had difficulty seeing the small set she used in that room. The Decedent picked out the television that she wanted and asked Mr. Mace to hang it on the wall in her bedroom.[118] The Decedent's funds were used to purchase the television for her room. With the end rapidly approaching, many family members and friends began visiting the Decedent. Ms. Bennett used the Decedent's funds to purchase

[116] Tr. Vol. III at 483 (Mace); JX 15.
[117] Tr. Vol. II at 366-80 (Bennett); JX 21.
[118] Tr. Vol. II at 371-72 (Bennett); Tr. Vol. III at 486 (Mace).

groceries to feed the visitors and groceries for family members who were visiting the Decedent and staying in a friend's home. The groceries amounted to approximately $1,500 spent in the six weeks leading up to the Decedent's death.[119]

I. The Decedent's Death

The Decedent passed away on December 16, 2008. After taking some time to grieve, Ms. Minieri and Ms. Bennett met at Ms. Bennett's home in mid-February 2009 to begin sorting through the Decedent's personal property so that Ms. Minieri, as executrix, could inventory the property. By the time of the meeting, Ms. Bennett had moved into the addition.[120] Although the mood initially was relaxed and laid back, it later devolved into a dispute between Ms. Bennett and Ms. Minieri, after Ms. Minieri accused Ms. Bennett of covertly taking possession of certain pieces of the Decedent's jewelry and other personal property, namely a piano and a curio cabinet. Ms. Minieri ultimately took the remaining jewelry and left Ms. Bennett's home, leaving all of the Decedent's remaining property, including her furniture, in Ms. Bennett's possession.

There are a number of items of property that the petitioners contend belonged to the Decedent and that were not with her possessions when Ms. Minieri received them: (1) a 2 carat diamond ring, (2) a 1 carat diamond solitaire necklace, (3) a pair of 1 carat diamond stud earrings, (4) a diamond tennis bracelet, (5) the pendant Ms. Bennett contends the Decedent gave her before the second carotid artery surgery, (6) "several watches" of unknown value, (7) bracelets of unknown value, (8) other pieces the

[119] JX 21.
[120] Tr. Vol. I at 131 (Minieri).

petitioners don't remember but would recognize if they saw them, (9) a piano, and (10) a curio cabinet.[121]

When asked about these items, Ms. Bennett explained that the diamond ring and diamond earrings referenced by petitioners were Ms. Bennett's jewelry, given to her by her husband around 2000 or 2001.[122] Mr. Mace confirmed that he gave this jewelry to Ms. Bennett, and petitioners did not cross examine either Ms. Bennett or Mr. Mace on these points. Ms. Bennett testified that the Decedent gave her the pendant just before her second surgery,[123] and that the diamond solitaire necklace actually is a cubic zirconium that the Decedent gave to Ms. Bennett. Ms. Bennett testified:

> My mother had given [the necklace] to me, and we laughed about it because she gave me the paperwork to it and she said 'Don't ever tell anybody, but this is a CZ because I have told everybody forever that it was a big diamond.' She gave me the necklace and the CZ paperwork with it. *… But she continued to wear it after that. … After she had given it to me, I didn't take possession of it. We both wore it at different times*.[124]

Ms. Bennett testified that the tennis bracelet was an item that Ms. Minieri told Ms. Bennett she could have after the Decedent passed away.[125] Ms. Bennett had no knowledge about any remaining items of jewelry, such as watches or bracelets, which the petitioners contend were missing from the Decedent's jewelry box, but she has additional items of "costume" jewelry in the Decedent's jewelry box, which is stored at Ms. Bennett's home.[126] Ms. Bennett testified that the Decedent gave her the piano when she

[121] JX 19.
[122] Tr. Vol. II at 390-91 (Bennett); Tr. Vol. III at 478-79 (Mace).
[123] Tr. Vol. II at 393-94 (Bennett).
[124] *Id.* at 391-92 (Bennett) (emphasis added).
[125] *Id.* at 392-93 (Bennett).
[126] *Id.* at 395 (Bennett).

moved from Florida to Delaware, and that the curio cabinet was something the Decedent gave Ms. Bennett before she moved from Maryland to Florida.[127] Even the petitioners' testimony and the e-mails on which they rely reflect the fact that the curio cabinet was a gift from the Decedent many years before the events in question.[128]

J. The fallout begins

The relationship between the parties quickly deteriorated after the February 2009 meeting at Ms. Bennett's house. In March 2009, Ms. Bennett sent a letter to Ms. Minieri and Mr. Bearor, providing a list of the Decedent's property that was stored at Ms. Bennett's home, and asking that they claim whatever furniture and other possessions they wanted.[129] The letter further indicated that much of the Decedent's property was placed in storage after she moved to Ms. Bennett's home, and that those items would need to be removed from storage.[130] Ms. Minieri, the executrix of the Decedent's estate, refused to take possession of the Decedent's property or use estate funds to pay the costs of the storage unit. Ms. Bennett therefore has paid the storage costs for the Decedent's property since her death in 2009, at an approximate cost of $115 a month. She continues to pay the costs of that storage unit.[131]

K. The lawsuit and the parties' contentions

The petitioners filed this lawsuit in August 2009, seeking an accounting of Ms. Bennett's handling of the Decedent's property and a constructive or resulting trust over

[127] *Id.* at 395-97 (Bennett).
[128] Tr. Vol. I at 127 (Minieri); JX 15.
[129] JX 20.
[130] *Id*.
[131] Tr. Vol. II at 383-84 (Bennett).

Ms. Bennett's interest in the Decedent's estate. After many fits and starts, trial was completed on January 25, 2013. The parties then submitted post-trial briefs explaining their positions and contentions.

LEGAL ANALYSIS

From the foregoing factual background, the petitioners argue that the "gifts" the Decedent made to Ms. Bennett during the Decedent's lifetime – including funding the addition, naming Ms. Bennett as the beneficiary of most of the Decedent's bank accounts, and transferring certain jewelry, personal property, or other funds to Ms. Bennett – were not of the Decedent's own volition, but instead were the product of undue influence exerted on the Decedent by Ms. Bennett. The petitioners contend that, because Ms. Bennett was in a confidential relationship with the Decedent at the time the transfers were made, the usual presumption that an *inter vivos* transfer was not tainted by undue influence does not apply, and Ms. Bennett bears the burden of establishing the absence of undue influence. The petitioners seek an accounting of funds expended from the Decedent's two Bank of America Accounts and the Decedent's DNB savings account, and contend that the balance in those accounts should be paid to the Decedent's estate because Ms. Bennett has not established that the accounts were right of survivorship accounts. The petitioners also contend that Ms. Bennett should return to the estate all personal property allegedly gifted to her by the Decedent, including the jewelry, piano, curio cabinet, and any other items that Ms. Bennett contends were gifts from the Decedent or that Ms. Bennett gifted to third parties after the Decedent's death. Finally, the petitioners contend that a total of $59,488.93, transferred from the Decedent's

accounts to or for the benefit of Ms. Bennett should be returned. Those amounts include the funds used to build the addition, payments for groceries or restaurant bills, transfers directly to Ms. Bennett's account, and other "questionable" purchases from the Decedent's accounts.[132] The petitioners also contend that they are entitled to their attorneys' fees in prosecuting this action.

Ms. Bennett maintains that the petitioners have not carried their burden of proving that the gifts were tainted by undue influence, and have not succeeded in rebutting the presumption against undue influence by proving by clear and convincing evidence that Ms. Bennett was in a confidential relationship with the Decedent at the time of the transfers. Ms. Bennett also contends that she should be reimbursed by the estate for the funds she paid to maintain the Decedent's property in storage after Ms. Minieri, the executrix, refused to take possession of the property. Ms. Bennett contends that the petitioners or the estate should pay her attorneys' fees in this action.

I. The petitioners have not established the necessary elements of undue influence

There is a presumption under Delaware law that both *inter vivos* transfers of wealth, and wills and other testamentary documents, are the product of the donor's or testator's free will and are not tainted by undue influence.[133] The petitioners are challenging only the transfers the Decedent made during her lifetime, as the terms of the Will divide the Decedent's estate equally between her three living children. If the

[132] Pet'rs' Post-Trial Opening Br. at 39.
[133] *In re Will of Melson*, 711 A.2d 83, 86 (Del. 1998); *Mitchell v. Reynolds*, 2009 WL 132881, at *9 (Del. Ch. Jan. 7, 2009).

transfers at issue were induced by undue influence, they may be set aside by this Court.[134]

In the context of a will, undue influence has been defined as:

> [A]n excessive or inordinate influence considering the circumstances of the particular case. The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own. It is immaterial how that is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will.[135]

Unfair persuasion is the "hallmark" of undue influence.[136]

Challenges to *inter vivos* gifting or testamentary dispositions of property based on claims of undue influence require the Court to evaluate five elements: (1) the susceptibility of the donor to undue influence, (2) the opportunity to exert undue influence, (3) disposition or motive to do so for an improper purpose, (4) actual exertion of undue influence, and (5) a result demonstrating its effect.[137] The party challenging a transfer as tainted by undue influence ordinarily bears the burden of proving these elements by a preponderance of the evidence.[138] As will be discussed below, however, the burden shifts if the challenging party shows by clear and convincing evidence that the

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[134] *Mitchell*, 2009 WL 132881, at *8.
[135] *In re Estate of West*, 522 A.2d 1256, 1263-64 (Del. 1987) (quoting *Matter of Langmeier*, 466 A.2d 386, 403 (Del. 1983)).
[136] *Mitchell*, 2009 WL 132881, at *8.
[137] *Stone v. Stant*, 2010 WL 2734144, at *8 (July 2, 2010) (citing *In re Estate of West*, 522 A.2d at 1264).
[138] *In re Estate of West*, 522 A.2d at 1264.

party allegedly inducing the transfer was in a fiduciary or confidential relationship with the donor.[139]

I begin with what I believe the petitioners have established in this case. Ms. Bennett cannot reasonably dispute that she had both the opportunity and the motive to exert undue influence over the Decedent once the Decedent moved from Florida to Delaware. Ms. Bennett saw the Decedent at least five days a week, took primary responsibility for transporting her to appointments and for recreational activities, and assisted the Decedent in managing her finances. Ms. Bennett also concedes – as she must in light of the e-mails entered into evidence – that she felt burdened and frustrated by the fact that her siblings left her with the responsibility of meeting their mother's needs. The petitioners have shown by a preponderance of the evidence that Ms. Bennett had the opportunity to exert undue influence and the disposition to do so for an improper purpose.

The petitioners have not, however, established the other three elements of undue influence by a preponderance of the evidence. First, the petitioners have not shown that the Decedent was susceptible to undue influence before September 2008. There is no single definition or defining feature of susceptibility, but the analysis is informed by the subject's capacity.[140] Evidence of a subject's dependence on another, or a particular predisposition to accede to the demands of another person, may be sufficient to show

[139] *Stone*, 2010 WL 2734144, at *8.
[140] *Mitchell*, 2009 WL 132881, at * 9.

susceptibility.[141] In support of their contention that the Decedent was susceptible to Ms. Bennett's influence, the petitioners rely primarily on the opinion offered by Dr. Wilson that, by March 2008, the Decedent's condition had deteriorated to the point she was unable to be independent and self-reliant. The petitioners also point to the same e-mail communications on which Dr. Wilson relied as evidence that the Decedent's memory and physical health had deteriorated and that she was dependent on Ms. Bennett to assist her in self-care and in managing her finances.

Although Ms. Bennett has not provided a sufficient legal basis for this Court to reject Dr. Wilson's methodology or conclusions as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[142] it became clear during cross-examination that Dr. Wilson's conclusions were based almost exclusively on the e-mail communications exchanged between the parties, and on his assumption that those e-mail communications were both entirely accurate and portrayed the Decedent's typical mental state. At trial, however, even the petitioners revealed that they believed Ms. Bennett exaggerated issues,

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[141] *Id.*

[142] 509 U.S. 579 (1993). Delaware courts follow the United States Supreme Court's decision in *Daubert*. *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579 (Del. 2007). When Ms. Bennett's counsel objected at trial to the admission of Dr. Wilson's report and testimony, I permitted Dr. Wilson to testify and instructed counsel to brief his *Daubert*-based objections in post-trial briefing. Tr. Vol. I at 36. Ms. Bennett's post-trial brief does not contain any type of legal argument regarding Dr. Wilson's qualifications or the admissibility of his testimony under *Daubert*. Ms. Bennett therefore has waived any argument that Dr. Wilson's analysis is not admissible under Delaware Rule of Evidence 702. *See Roca v. E.I. DuPont de Nemours & Co.*, 842 A.2d 1238, 1243 n.12 (Del. 2004) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. … It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work. … Judges are not expected to be mindreaders. Consequently, a litigant has some obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.")

made things sound worse than they were, and generally portrayed the Decedent as worse than she was in order to evoke sympathy and cajole her brother and sister to take a more active role with their mother. Even more importantly, the evidence presented at trial showed that, although she may have had memory lapses and occasional difficulties with self care, and although she plainly felt more comfortable living in Ms. Bennett's home than by herself, the Decedent remained opinionated, strong-willed, and independent until the last few months of her life. Ms. Bennett and her husband testified credibly that, even as she was deteriorating physically from the effects of two surgeries and cancer, the Decedent made her own decisions about attire, shopping purchases, the construction and fitting out of the addition, and the management of her finances. This testimony is borne out by other evidence, including (i) contemporaneous e-mails between Ms. Minieri and Mrs. Bearor regarding the Decedent's spirits and her memory, (ii) testimony by the Decedent's primary care physician, Dr. Berkowitz, (iii) the fact Ms. Minieri believed the Decedent had capacity to execute a legal agreement in March 2008, and (iv) the fact the parties felt comfortable leaving the Decedent at home unattended for large periods of time until fall 2008.

It does not appear that Dr. Wilson either reviewed any of the other evidence in this case, or reviewed any of the deposition transcripts that might have revealed this information. Rather, he relied on a limited e-mail record hand-selected by the petitioners' counsel, and drew important assumptions from that record. For that reason, I accord very little weight to Dr. Wilson's analysis, which places undue emphasis on

isolated events, and appears to have been slanted by his incomplete review of the record.[143]

Aside from Dr. Wilson's report, the evidence offered by the petitioners shows that the Decedent was elderly and experiencing some health problems during the period in question, but does not prove she was dependent on Ms. Bennett or particularly susceptible to her influence before September 2008. In September 2008, the parties agreed that the Decedent could not be left alone and required frequent monitoring and assistance, and Ms. Bennett therefore took a leave of absence from her job. At that point, the Decedent became dependent on Ms. Bennett and was a susceptible donor. Although it is possible that the Decedent became susceptible in the weeks leading up to Ms. Bennett's leave of absence, the petitioners have not offered anything concrete, other than the March 2008 date or the September 2008 date, from which I can pinpoint when the Decedent became dependent and suggestible.

The petitioners also have not shown by a preponderance of the evidence either that Ms. Bennett actually exerted influence on the Decedent or a result demonstrating the effect of such influence. The Delaware Supreme Court has made clear that "opportunity and motive, standing alone, do not establish a charge of undue influence."[144] That a beneficiary of a transfer had opportunity or motive to exert undue influence raises no

[143] *See, e.g. Stone*, 2010 WL 2734144, at *7 (rejecting expert's conclusion about subject's susceptibility because it placed excessive emphasis on isolated instances, and did not account for the cognitive skills available to the subject); *Sloan v. Segal*, 2009 WL 1204494, at *15 (Del. Ch. Apr. 24, 2009) (limiting reliance on expert's conclusions because it was based almost entirely on what expert was told by her client).

[144] *In re Estate of West*, 522 A.2d 1256, 1264 (Del. 1987).

presumption that she did so.[145] Although it is beyond dispute that Ms. Bennett felt frustrated and burdened by her siblings' lack of assistance, the petitioners did not present a single piece of evidence or any witness's testimony that Ms. Bennett communicated those feelings to her mother. Although the Decedent may have recognized that Ms. Bennett was shouldering an unequal load, or felt grateful and thankful for the care and attention she received from her daughter, and desired to show her gratitude, she was perfectly free to do so. Nothing in the record shows that the gifts were motivated by anything other than the Decedent's appreciation for the time Ms. Bennett spent entertaining and assisting the Decedent. As the Delaware Supreme Court has recognized, transfers that are "the outcome of kindness, induced by acts of attention or service" to another, are not gifts procured by undue influence.[146] In short, the petitioners have not shown by a preponderance of the evidence that the Decedent was susceptible to undue influence before September 2008, and have not shown, whether before or after that time, that Ms. Bennett actually exerted such influence or received gifts demonstrating the effect of such influence.

II. The petitioners have not shown by clear and convincing evidence that the Decedent and Ms. Bennett were in a confidential relationship before September 2008.

The petitioners contend that the traditional presumptions regarding *inter vivos* transfers do not apply, and the burden should be on Ms. Bennett to establish that the transfers in question were not tainted by undue influence, because Ms. Bennett was in a

[145] *Id*.
[146] *Id*. at 1265.

confidential relationship with the Decedent at the time the transfers were made. Ms. Bennett argues the petitioners have not made the showing necessary to shift the burden of proof and, even if they have, she has shown that the transfers were not the product of undue influence.

As an initial matter, the parties dispute what the petitioners must establish in order to shift the burden to Ms. Bennett. The petitioners contend they need only establish that Ms. Bennett was in a fiduciary or confidential relationship with the Decedent for the burden to shift. Ms. Bennett, on the other hand, contends that, in addition to establishing a fiduciary or confidential relationship, the petitioners also must prove the Decedent was of "weakened intellect" at the time of the challenged transfers. The case law on this point is less than clear, but the better view is that the burden shifts if the donor and the beneficiary were in a fiduciary or confidential relationship, but a donor's weakened intellect often is a critical factor in determining whether a confidential relationship existed.

It is undisputed that, in a will contest, the burden on claims of undue influence shifts to the proponent of the will if the party challenging the will is able to establish, by clear and convincing evidence, that (1) the will was executed by a testator who was of "weakened intellect;" (2) the will was drafted by a person who was in a confidential relationship with the testator; and (3) the drafter achieved a substantial benefit under the will.[147] Ms. Bennett contends the same elements must be established by a person challenging *inter vivos* transfers of property, but two decisions of this Court state that all

[147] *In re Will of Melson*, 711 A.2d 783, 788 (Del. 1998).

a party challenging an *inter vivos* gift need establish is that the beneficiary of the gift was in a confidential relationship with the donor.[148] Whether the person challenging an *inter vivos* transfer must establish the additional elements required in a testamentary case largely is academic here, however, because this Court's decisions make clear that the existence of a confidential relationship typically depends on whether the donor was of weakened intellect,[149] and the petitioners' argument that a confidential relationship existed between Ms. Bennett and the Decedent is based on the Decedent's alleged susceptibility or weakened intellect.

The existence of a formal, documented fiduciary relationship, such as that of agent and principal under a power of attorney, would be sufficient to shift the burden of proof, but a confidential relationship may exist even where a formal fiduciary relationship has not been established. Although Ms. Bennett was the Decedent's agent under a power of attorney, the petitioners have not argued that this fiduciary relationship shifts the burden in this case, probably because Ms. Bennett did not utilize the power of attorney to facilitate any of the transfers in question. Accordingly, in order to shift the burden to Ms. Bennett, the petitioners must prove by clear and convincing evidence that the Decedent and Ms. Bennett were in a confidential relationship at the time of the challenged transfers.

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[148] *Stone v. Stant*, 2010 WL 2734144, at *8 (Del. Ch. July 2, 2010); *Mitchell v. Reynolds*, 2009 WL 132881, at *8, n.71 (Del. Ch. Jan. 7, 2009).

[149] *See, e.g. Stone*, 2010 WL 2734144, at *8; *Mitchell*, 2009 WL 132881, at *9; *Faraone v. Kenyon*, 2004 WL 550745, at *8 (Del. Ch. Mar. 15, 2004).

Although courts have been reluctant to delineate a precise point at which a confidential or fiduciary relationship arises, the "rule of thumb" is that such a relationship exists when "circumstances make it certain the parties do not deal on equal terms, but on one side there is an overmastering influence or on the other weakness, dependence or trust, justifiably reposed."[150] The petitioners' burden is to show that the existence of such a relationship is highly probably, reasonably certain, and free from serious doubt.[151] The evidence presented must produce in the Court's mind an "abiding conviction" that the Decedent and Ms. Bennett operated on this unequal footing.[152]

Far from an "abiding conviction," there remains in my mind serious doubt that Ms. Bennett and the Decedent were in a confidential relationship before September 2008. In fact, I find it more probable than not that no such relationship existed before or during most of the critical transfers in this case, including when the Decedent established the DNB Accounts and signed the Addition Contract. As set forth in Section I, above, the petitioners have not shown that the Decedent's faculties were substantially impaired before the fall of 2008, or that she was particularly dependent on Ms. Bennett before that time. Although it is undisputed that the Decedent lived with Ms. Bennett, and that Ms. Bennett assisted the Decedent in managing her finances and her personal care, it is also plain from the record that the Decedent had regular access to other family members and friends from whom she could have sought assistance, remained independent and strong-

[150] *In re Will of Wiltbank*, 2005 WL 2810725, at *6 (Del. Ch. Oct. 18, 2005). *See also Faraone*, 2004 WL 550745, at *8.
[151] *Hudak v. Procek*, 806 A.2d 140, 147 (Del. 2002).
[152] *Id*.

willed despite being physically weakened by health problems, and continued to make her own decisions about her health care and her lifestyle.

This Court's decision in *Stone v. Stant* arose under similar factual circumstances: an elderly woman who had a particularly close relationship with one daughter and the daughter's family, eventually moved into that daughter's home and paid for improvements to the daughter's home, and made a number of *inter vivos* gifts to the daughter, the daughter's husband, and the daughter's children.[153] The Court in *Stone* concluded that the daughter's assistance to her mother during a period when the mother was not mentally impaired did not place the parties in a confidential relationship.[154] Rather, the Court concluded that "[t]he increase in dependence upon and trust placed in [the daughter and her family] occurred at roughly the same time as her mental faculties fell to the level where she was 'susceptible' to undue influence."[155]

Similarly, in this case, the petitioners have not established that the Decedent was of weakened intellect, and thereby dependent upon Ms. Bennett, until September 2008, when the parties determined that it was necessary for Ms. Bennett to take a leave of absence from her job so that she could care for the Decedent full-time. Again, although it is possible that the Decedent's mental faculties diminished to the point of susceptibility in the weeks leading up to that leave of absence, there is nothing in the record from which I can pinpoint an earlier date on which the Decedent was impaired such that she was in a confidential relationship with Ms. Bennett.

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[153] 2010 WL 2734144.
[154] *Stone*, 2010 WL 2734144, at *8.
[155] *Id*.

Even if the petitioners had established by clear and convincing evidence a confidential relationship before September 2008, Ms. Bennett would have succeeded in demonstrating that the transfers before that time were not the product of undue influence. When a party challenging an *inter vivos* transfer succeeds in shifting the burden of proof to the beneficiary of the transfer, the beneficiary may defeat the undue influence claim by showing by a preponderance of the evidence that one of the five elements of undue influence has not been met.[156] Ms. Bennett has succeeded in demonstrating that she did not exert actual undue influence over the Decedent before September 2008.

There was no evidence at trial that Ms. Bennett undertook or suggested to her mother that she should be compensated for that work. Significantly, at no time did Ms. Bennett act surreptitiously with respect to the major transactions challenged by the petitioners. To the contrary, Ms. Bennett informed Ms. Minieri about, among other things, the Decedent's decisions to establish new bank accounts in Delaware and to fund the addition to Ms. Bennett's home. Ms. Minieri believed, based on her conversations with the Decedent, that the Decedent understood that she was financing the addition and had agreed to that arrangement. It is undisputed that, after the addition was finished, the Decedent treated the new rooms as her own, showed them off to visitors, and was pleased to have her own space in Ms. Bennett's home. Finally, although the petitioners argue that these *inter vivos* gifts demonstrate undue influence because they are inconsistent with the Decedent's testamentary plan of dividing her estate evenly among the three children, it

[156] *Stone*, 2010 WL 2734144, at * 8-9; *Tucker v. Lawrie*, 2007 WL 2372616, at *8 (Del. Ch. Aug. 17, 2007).

would be natural for the Decedent to provide some financial benefit to Ms. Bennett during her lifetime, when Ms. Bennett was providing care, lodging, and transportation to the Decedent at no cost. The Decedent also took steps during her lifetime, and well before any alleged mental impairment, to name Ms. Bennett as the beneficiary on certain life insurance policies and on the Raymond James Account, which also was inconsistent with what petitioners contend was the Decedent's testamentary scheme. It therefore appears that the Decedent intended to benefit Ms. Bennett in excess of the funds to be received from the estate by the three children.

III. Additional evidence is necessary regarding the transfers from the Decedent's accounts from September 2008 to December 2008

The effect of the foregoing is that any gifts to Ms. Bennett before September 2008 were not the product of undue influence and should not be reversed by this Court. Frankly, the record of transfers after September 2008 is less than clear. There were a number of purchases with the Decedent's funds, including groceries, restaurant tabs, a television, and other transfers or debits for unknown purposes. All of these purchases, however, were made from accounts on which Ms. Bennett apparently was joint account holder with right of survivorship. At post-trial argument, the petitioners conceded that, if all the accounts were survivorship accounts naming Ms. Bennett as beneficiary, and the Decedent was not unduly influenced at the time she determined the survivorship status of the accounts, the petitioners lack standing to challenge these transfers.[157] They contend,

[157] I already have concluded that the Decedent was not susceptible to undue influence at the time the accounts were established.

however, that Ms. Bennett has not shown that the Bank of America Accounts or the DNB savings account were survivorship accounts that named her as beneficiary.

The most reasonable conclusion is that those accounts were, in fact, survivorship accounts. The record shows that the DNB checking account was a survivorship account, and both Bank of America and DNB paid the funds in all the accounts to Ms. Bennett, rather than to the Decedent's estate. It is reasonable to presume that the bank personnel verified the status of those accounts before paying over any funds. Nonetheless, for the sake of removing all possible doubt, I recommend that the Court order Ms. Bennett to request documentation from DNB and Bank of America regarding the survivorship status of the accounts in question. If she is unable to obtain sufficient evidence regarding the survivorship status of the accounts, I will consider additional letter briefs from the parties regarding what additional relief, if any, may be appropriate.

IV. Ms. Bennett must return certain items of personal property to the estate

There are a number of items of personal property that Ms. Bennett must return to the estate, because she has not shown that they were gifts from the Decedent. These items are: the diamond or cubic zirconium necklace, the tennis bracelet, any items of jewelry Ms. Bennett gifted to friends or relatives after the Decedent's death, and the Decedent's jewelry box and its contents, located at Ms. Bennett's home. As to all of the other transfers of personal property challenged by the petitioners, Ms. Bennett has shown either (1) the property in question never belonged to the Decedent, or (2) the Decedent gifted the property to Ms. Bennett.

As to the first item, the solitaire necklace, Ms. Bennett's testimony that the Decedent gifted this item to her was not credible. Indeed, by Ms. Bennett's own admission, she did not take possession of the necklace at the time it was gifted to her, and the Decedent continued to wear the necklace long after she allegedly gave it to Ms. Bennett. Because I cannot conclude that the Decedent actually intended to give this property to Ms. Bennett, it should be turned over to the estate. On the other hand, Ms. Bennett credibly testified that the Decedent gave her a piano and the pendant to which both Ms. Bennett and Ms. Minieri attribute a great deal of sentimental value. Ms. Bennett is entitled to keep those items.

The remaining items Ms. Bennett must return to the estate all are items of property that Ms. Bennett took possession over after the Decedent's death. She contends that Ms. Minieri "gave" her the Decedent's tennis bracelet after the Decedent's death, and that the other items were of nominal value. As executrix, however, Ms. Minieri was not empowered to distribute the Decedent's property before listing it on the estate inventory, and Ms. Bennett was not entitled to give away any property, regardless of value. Similarly, Ms. Bennett was not entitled to take possession of the Decedent's jewelry box just because it was in Ms. Bennett's home and allegedly did not contain items of value. All these items must be turned over to the estate for proper administration.

V. The estate must reimburse Ms. Bennett for the storage fees

As the executrix of the estate, Ms. Minieri was charged with gathering and securing the Decedent's personal property, and the costs of doing so appropriately are borne by the estate, rather than one of its beneficiaries. In March 2009, Ms. Bennett

notified Ms. Minieri that much of the Decedent's personal property was in storage, but Ms. Minieri refused to take possession of that property, and the petitioners' previous attorney apparently informed Ms. Bennett that she had a "fiduciary responsibility" to continue paying the storage costs until the parties' disputes were resolved.[158] Although petitioners argue that "Respondent has shown no basis for recovery" of the storage expenses,[159] Ms. Bennett has shown that these expenses should be borne by the estate, because the estate should have taken action to secure the property promptly after the Decedent's death.

VI. Fee-shifting is not appropriate in this case

Finally, both parties contend that attorneys' fees and costs should be paid by the opposing party. Under the American Rule, prevailing parties are responsible for their own attorneys' fees, unless they can establish an exception to that rule.[160] At post-trial argument, petitioners' counsel conceded that no such exception applied in this case, and that there was no basis to shift petitioners' fees to Ms. Bennett, even if the petitioners prevailed in this case. Ms. Bennett's counsel weakly argued that "a statute," unspecified, gives this Court discretion to award attorneys' fees where a party is helpful to the administration of an estate. Even if this unnamed statute exists, however, it is unclear how this case, or Ms. Bennett's part in it, has been helpful to the administration of the

[158] JX 20 (marginalia written by Nancy Minieri).
[159] Petitioners' Post-Trial Reply Br. at 27.
[160] *Zimmerman v. Crothall*, 2013 WL 5630992, at *6 (Del. Ch. Oct. 14, 2013).

Decedent's estate. Again, it is not incumbent on this Court to divine a party's arguments or the legal basis therefore.[161] Both parties' requests for attorneys' fees should be denied.

CONCLUSION

For the foregoing reasons, I recommend that the Court (1) enter judgment in favor of Ms. Bennett with respect to all transfers of property before September 2008, (2) order Ms. Bennett to obtain additional documentation regarding the survivorship status of the Bank of America Accounts and the DNB savings account, (3) order Ms. Bennett to return to the estate the diamond/CZ solitaire necklace, the tennis bracelet, the Decedent's jewelry box, and any items of property gifted to third parties after the Decedent's death, (4) order the estate to reimburse Ms. Bennett for the expenses associated with maintaining the storage unit after March 2009, and (5) deny both parties' requests for attorneys' fees. This is my final report and exceptions may be taken in accordance with Rule 144.

[161] *See* n. 142, *supra*.