IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE PURPORTED WILL AND TRUST AGREEMENT OF MARIE B. CAUFFIEL, DECEASED	:	**C.A. No. 721-VCN**

MEMORANDUM OPINION

Date Submitted: May 22, 2009
Date Decided: December 31, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

This post-trial memorandum opinion addresses a challenge to an estate plan adopted by Marie B. Cauffiel (the "Decedent") in 1996.[1] Petitioners are the Decedent's granddaughters: Mary Saunders ("Mary") and Patricia Shotton ("Patricia") (collectively, "the Petitioners"). The Petitioners claim that the Decedent lacked testamentary capacity to execute estate documents in 1996; in the alternative, they argue that these documents were the product of undue influence exerted by the Decedent's son, Respondent Charles S. Rowe, Jr. ("Charles Jr."), and her grandson, Respondent Charles S. Rowe, III ("Bear"). Petitioners have also asked the Court to declare that a prior will applies or that the Decedent died intestate.

For the reasons that follow, the Court concludes that the Decedent possessed testamentary capacity to execute the challenged estate documents, which also were not the product of undue influence. Judgment, accordingly, will be entered in favor of Respondents.

[1] Specifically, the Decedent executed a Last Will and Testament on January 25, 1996, and executed a materially identical Last Will and Testament on May 9, 1996. TX 1, 8. She had executed a Revocable Trust on September 3, 1985, and supplemented or amended this trust on March 10, 1988, February 10, 1989, January 25, 1996, May 9, 1996, and September 7, 2000. TX 2, 4, 5, 6, 10-11. Petitioners seek invalidation of the May 1996 Will and "any and all restatements to the 1985 Trust." Pretrial Stip. and Order at 11. The range of challenged documents was limited by the Petitioners in their opening brief to the May 1996 Will and the trust restatements or amendments made in 1996 and 2000. Pet'rs' Opening Br. at 1.

II. FACTS

A. *The Parties and their Relationships*

The Decedent died on March 13, 2004, at the age of 97.[2] She was predeceased by her husband, Daniel Cauffiel, who died on April 25, 1984. The Decedent had two children: Charles Jr., who survived her, and a daughter, Janine Rowe Saunders ("Janine"), who predeceased her. Janine had two daughters: the Petitioners. Charles Jr. has one child, Charles Rowe III, whom the Decedent called "Bear." Respondent Wilmington Trust Company (Delaware) ("WTC") is a party because of its role as trustee of the Revocable Trust.

Janine was diagnosed with endometrial cancer in or around May 1987 and died of that disease in January 1988.[3] The Decedent temporarily moved from her home in Delaware to Montreal, Canada to live with Janine during the last several months of her life. Mary also moved to Montreal to live with her mother during this time, while Patricia visited for long stretches. The Petitioners, both of whom were and still are Canadian residents, had grown closer with the Decedent during this difficult period.[4]

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[2] Pretrial Stip. & Order at 6. The facts are either those agreed upon by the Parties in the pretrial stipulation or those found by the Court after trial.
[3] Tr. I at 12.
[4] *Id.* at 17, 100. Janine's husband, and the Petitioners' father, died unexpectedly of an aortic aneurysm only six days after Janine's death, further compounding this family tragedy.

After Janine's death, the Decedent returned to her home in Delaware; Mary stayed in contact with her by sending greeting cards and visiting for a few days each (or almost every) year during the Easter holiday.[5] Patricia exchanged letters with the Decedent for a time after Janine's death; she also spoke with her regularly on the phone and visited her a few times a year, often on Thanksgiving or Easter and also when in the area for business.[6]

The Decedent was in more frequent contact with Charles Jr. and Bear. Charles Jr., a resident of Williamsburg, Virginia, visited the Decedent once or twice a month from 1993 to late 2000. On these visits, he would typically stay with her for several days, occasionally as long as a week.[7] Bear, a resident of Hockessin, Delaware, saw the Decedent regularly for Sunday brunch with his family.[8]

B. *The Decedent's Condition*

In the years following Janine's death, the Decedent's health started to deteriorate, in part due to depression over her daughter's death as well as poor eating habits. She needed assistance, but still essentially lived on her own. She hired Creamel Livingston ("Livingston") in 1993 to cook her healthier meals,

[5] *Id.* at 19. Mary's family, which included her husband and two daughters, accompanied her on these visits.
[6] *Id.* at 100-01.
[7] Tr. III at 644. Charles Jr. retired in 1990. *Id.* at 616.
[8] Tr. I at 272-73. Bear's family included his wife, two children, and his mother who had divorced Charles Jr. many years before.

provide transportation, and carry out general housekeeping duties.[9] Livingston, however, worked only on weekdays from 10 a.m. to 6 p.m. Although the Decedent required some daily assistance—as would be expected from someone of her age—she still fed and bathed herself, kept track of her own medical appointments, opened her mail, and most importantly, had her own opinions and made decisions for herself.[10]

The Decedent's memory and mental acuity, however, continued to decline. During a visit with her primary care physician, Dr. Gilani, on September 30, 1994, he noted that the Decedent was having memory problems, which led him to conclude that she was suffering from "some degree of dementia."[11] Further, Mary became more concerned about her grandmother because the Decedent began to repeat stories and confuse the names of Mary's two daughters, and she stopped sending birthday and Christmas gifts to the girls after 1994—something she had done in previous years.[12] Patricia observed that the Decedent repeated the "same

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[9] Tr. II at 425. Mary testified that the Decedent's condition improved during the time period immediately after Livingston was employed. Tr. I at 75.

[10] Tr. II at 426-28, 431.

[11] Dep. of Javed Gilani, M.D. ("J.G. Tr.") at 17. Dr. Gilani is board certified in internal medicine; providing geriatric medical services comprises a significant portion of his practice. Dr. Gilani described dementia as a collection of symptoms resulting in impairment of cognitive function. He explained that lack or impairment of memory is only one aspect of dementia, which "also encompasses judgment and insight." *Id.* Dr. Gilani ordered a CT scan of the Decedent's brain in 1998, "which was significant only for generalized atrophy, consistent with dementia and ruling out a stroke as the cause . . . ." Pretrial Stip. & Order at 8. By 2000, the Decedent's mini-mental status exam rating was 8 out of 30, which indicated a severe case of dementia. Tr. I at 180.

[12] Tr. I at 22-25.

stories of long ago over and over again" on a particular visit in or around 1996.[13] By 1996, the Decedent had generally become more withdrawn and less communicative.[14]

Bear also testified that the Decedent had become frail and weak by 1996, and had been suffering some memory loss.[15] Indeed, Charles Jr. eventually took some responsibility in helping the Decedent to write checks and pay bills, and he arranged for several of Livingston's friends to watch over the Decedent at night; the Decedent, however, had these individuals dismissed almost immediately after they were hired.[16] Livingston as well testified to the Decedent's mental and physical decline, but stated that her memory loss and confusion were no different from that experienced by many individuals as they age.[17]

The Decedent suffered a stroke in 1998, but nonetheless, lived alone with limited assistance until the fall of 2000, when she fell and broke her hip.[18] After a stay in the hospital, she was admitted to the dementia unit in a nursing home in Williamsburg, Virginia, where she died almost four years later.

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[13] *Id.* at 104.
[14] *Id.* at 235.
[15] *Id.* at 319.
[16] Tr. III at 650-51 (testifying that he thought "it might be a good idea to try and get some people to sit with her" when Livingston was not present, but further explaining that the Decedent "had fired them" only after three days). Both Mary and Livingston place the efforts to hire additional help in 1998, after the Decedent had suffered a stroke. Tr. I at 29; Tr. II at 443.
[17] Tr. II at 441 ("Forgetfulness comes to us all. But it wasn't to a degree that you would be terribly concerned.").
[18] Pretrial Stip. & Order at 8.

C. *The Contested Estate Plan*

Before execution of the contested estate documents, the Decedent's estate plan called for disposition of her assets on a mostly per stirpes basis. Upon the Decedent's death, a significant portion of her assets would have gone into a trust. Charles Jr. would receive income from this trust for his life, and the trust's income would be distributed per stirpes upon his death, with more complex provisions providing for a gradual distribution of the principal.[19] The remainder of the Decedent's estate would have been distributed per stirpes upon her death, with Charles Jr. taking a one-half share and Mary and Patricia each taking a one-quarter share, assuming all three were then still living. In addition, Bear was to receive $50,000, subject to certain conditions.[20]

In May and September 1995, the Decedent and Charles Jr. met with Richard Nenno, Esquire ("Nenno") who at the time worked as a WTC attorney responsible for developing estate plans and drafting estate documents at the request of clients and their outside counsel.[21] During the September meeting, the Decedent expressed to Nenno her desire to revise her estate plan so that the income of the

[19] Tr. II at 368; TX 20.
[20] Tr. II at 366-69; TX 7. The Decedent had amended her estate plans in 1988 to leave three-quarters of the estate's residue to Charles Jr. and one-quarter to the Petitioners, with a $50,000 cash distribution to Bear. TX 5. This plan was amended in 1989 to provide for the distribution described above.
[21] Tr. II at 360, 371; TX 20 at WT087. Decedent's relationship with WTC goes back to at least 1985. Tr. II at 363.

trust described above would be distributed to both Charles Jr. and the Petitioners during Charles Jr.'s lifetime.[22] Nenno wanted to have outside counsel "get involved" before he drafted the revised estate documents; his concern was consistent with WTC policy at the time.[23] As the Decedent had no outside counsel, Nenno sent her a letter recommending three Delaware attorneys. Bobbi Cottrell (now Kent) ("Kent"), the WTC trust officer assigned to the Decedent's account, also sent her a letter recommending Kevin O'Brien, Esquire ("O'Brien") as outside counsel.[24]

O'Brien met with the Decedent at her home in December 1995. At this meeting, which included only O'Brien and the Decedent, the Decedent asked for an estate plan materially different from the one she had discussed with Nenno several months earlier: the Decedent now wanted to exclude the Petitioners completely while distributing a significant portion of her estate to Bear. The Decedent told O'Brien that the Petitioners were "very well off," having received an inheritance from their parents, and that they would receive funds on her death from

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[22] Tr. II at 376.
[23] *Id.* at 360-62, 381.
[24] *Id.* at 382. O'Brien was not on Nenno's list, and Nenno testified that he would not normally have recommended O'Brien because he had not previously worked with him on estate planning; Nenno, however knew O'Brien, "thought that he was very nice," and "may not even have been aware at the time that he was in private practice." *Id.* at 383. Kent had worked with O'Brien, and she informed the Decedent that she found him to be "friendly" and "knowledgeable"; she also apparently recommended him because his office was close to the Decedent's home. TX 20 at WT046. She affirmed her opinion of O'Brien at her deposition. Dep. of Bobbi Lynn Kent at 8-9.

a trust established by the Decedent's husband; she explained to O'Brien that the Petitioners "travel, buy horses" and thus "do not seem to need additional funds."[25] She also told him that she wanted to "help her grandson more than them," because Bear would have to take care of his mother and his two children, one of whom suffers from diabetes.[26] O'Brien brought up how hurtful it could be for the Petitioners to be left out of the estate plan, but the Decedent reaffirmed that they would be receiving money from her husband's trust, and made clear that she wanted to exclude the Petitioners.[27]

O'Brien thereafter prepared the estate documents as the Decedent instructed and met with her, at his office, on January 25, 1996. O'Brien presented a letter he had prepared explaining the documents' terms; he then went through the key provisions with the Decedent, who was viewing the documents for the first time.[28] In keeping with the Decedent's instructions, the documents excluded the

[25] Tr. II at 497; TX 21 at 70. Indeed, the Petitioners received about a million Canadian dollars upon the death of their parents (roughly $700,000 U.S.), and Mary assumed that the Decedent would know of their inheritance. Tr. I at 85. Mary and Patricia also each received $349,000 from Daniel Cauffiel's trust upon the Decedent's death, although it may be that Decedent told O'Brien they would receive $250,000 each. *Id.* at 86; TX 21 at 70. The Decedent told O'Brien that she had "probably close to $ 3 million" in assets. Tr. II at 492.

[26] Tr. II at 500; TX 21 at 70. Bear's daughter was diagnosed over fifteen years ago with Type I diabetes, of which the Decedent was aware. His mother divorced his father, Charles Jr., over twenty years ago; she was over eighty years old at the time of trial and had never remarried. Tr. I at 267-68, 270. There is also some reason to believe that the Decedent was displeased with either Mary or Patricia's husband. She told O'Brien "that one of their husbands had been a bit too curious about her estate plan." Tr. II at 500, 542.

[27] *Id.* at 540, 548.

[28] *Id.* at 519, 524; TX 20 at WT035-WT038.

Petitioners from her estate, and expressly stated that "although I have great affection for my granddaughters, I have intentionally made no provisions for them in [these documents]."[29] She also provided for a considerable distribution to Bear.[30] The Decedent executed her Will in the presence of two disinterested witness with whom she was unfamiliar.[31] Before signing, and as was his custom, O'Brien had the Decedent either "recite a speech from a printed card stating her name and telling the witnesses that she's over 18 and of sound mind," or affirm while he read this speech on her behalf.[32]

The Decedent returned to O'Brien's office on May 9, 1996, to sign estate documents materially similar to the ones signed on January 25 of that year, but modified in several technical respects to accommodate requests made by Nenno and WTC.[33] They met again in September 2000, when revisions were made to the Decedent's revocable trust to account for changes to the federal tax laws.[34] At each subsequent meeting, O'Brien and the Decedent met alone, although

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[29] TX 8 at R-00081; *see also* TX 10 at R00209.
[30] TX 8, 9, 10.
[31] Tr. II at 526. O'Brien explained that one of the witnesses was an engineer and the other a secretary for a brokerage firm; both worked in nearby offices.
[32] *Id*. at 527. O'Brien could not recall which method was used.
[33] *Id.* at 562. Decedent's execution of the second set of documents was also witnessed by individuals located in nearby offices, and O'Brien briefly reviewed the changes, however minor, with the Decedent prior to signing.
[34] *Id.* at 586-88. O'Brien testified that he contacted the Decedent to arrange this meeting; however, he may have been prompted by a call from Charles Jr. who was concerned with revisions to the tax code, which would have had the potential effect of consuming his inheritance. *Id.* at 587. O'Brien also prepared estate-planning documents for Bear in 2000, but had only met him that year. *Id.* at 574-75.

Charles Jr. may have dropped her off at O'Brien's office or been present at the Decedent's home.[35]

III. CONTENTIONS

The Petitioners claim that the Decedent lacked testamentary capacity to execute the contested documents, and they rely heavily upon the expert testimony of Stephen Mechanick, M.D., which will be discussed in detail below. The Petitioners also argue that Dr. Gilani's 1994 dementia diagnosis and testimony are further evidence of a lack of capacity. Finally, they contend that the Decedent's known forgetfulness, age, depression, and physical fragility all circumstantially demonstrate a lack of capacity. Specifically, but not exclusively, they cite misinformation she provided to O'Brien at their December 1995 meeting, her arguably mistaken belief that the Petitioners were wealthy, and her confusion over the role of WTC in estate planning.

The Petitioners further claim that the estate documents executed in 1996 were the product of undue influence. They contend that the Decedent was susceptible to outside pressure, and that Charles Jr. and Bear had both the opportunity and the disposition to persuade the Decedent to revise her estate plans. Mary and Patricia also assert that the evidence adduced at trial, although circumstantial, demonstrates the actual exercise of improper persuasion, which

[35] *Id.* at 575.

induced the Decedent to exclude the Petitioners from her estate plan to Bear's benefit.

IV. ANALYSIS

A. *Testamentary Capacity*

The standard for testamentary capacity under Delaware law is well-settled. Duly executed wills are "presumptively valid," and the burden of proving lack of testamentary capacity is therefore imposed upon the challenging party.[36] To possess testamentary capacity, one who makes a will must, "at the time of execution," be able to exercise "thought, reflection, and judgment," understand "what he or she is doing and how he or she is disposing of his or her property," and "possess sufficient memory and understanding to comprehend the nature and character of the act."[37] Boiled down, the relevant inquiry is whether the testator understands that he or she is "disposing of her estate by will, and to whom."[38] The

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[36] *In re Last Will & Testament of Melson*, 711 A.2d 783, 786 (Del. 1998). The Court in *Melson* held that the "presumption of testamentary capacity does not apply," and the burden of proving the requisite capacity shifts to the will's proponent, when the challenger of the will can prove the following elements by clear and convincing evidence: "(a) the will was executed by 'a testatrix or testator who was of weakened intellect'; (b) the will was drafted by a person in a confidential relationship with the testatrix; and (c) the drafter received a substantial benefit under the will." *Id.* at 788 (quoting *In re Estate of Reichel*, 400 A.2d 1268, 1270 (Pa. 1979)). The Petitioners have not argued that the burden should shift under the *Melson* test, nor can they, as nothing in the evidence indicates that O'Brien—the will's drafter—received a substantial benefit under the will or enjoyed a relationship with the client beyond that of attorney-client. *See Melson*, 711 A.2d at 787 ("We are thus satisfied that, where the drafter of the will is a lawyer acting in a lawyer-client relationship, sufficient safeguards exist to permit the application of the usual presumptions and proof.").

[37] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).

[38] *Id.*

burden of overcoming the presumption of testamentary capacity has been described as "significant,"[39] as a testator needs only a "modest" amount of competence to execute a valid will.[40]

The Petitioners contend that the Decedent lacked testamentary capacity, relying most strongly upon the medical testimony of Drs. Mechanick and Gilani. Dr. Mechanick, a board-certified psychiatrist, testified—to a reasonable degree of medical probability—that the Decedent lacked testamentary capacity to execute the estate planning documents in 1996.[41] He based his opinion, in part, upon Dr. Gilani's 1994 dementia diagnosis, and reasoned that, because the dementia had become severe by 2000, "she must have had dementia in 1996, at the time of the signing."[42] He also considered the Petitioners' testimony, which emphasized the physical deterioration and change in behavior that the Decedent began to exhibit in the early 1990's.

The value of Dr. Mechanick's testimony, however, is impaired because of what he either could not, or chose not, to consider when making his determination. Dr. Mechanick had never met the Decedent, and thus had no opportunity to perform his own medical evaluation; he instead based his opinion entirely upon

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[39] *Melson*, 711 A.2d at 786.
[40] *West*, 522 A.2d at 1263.
[41] Tr. I at 184. The Decedent executed documents in January and in May 1996. The evidence tended to focus on the January events even though the documents executed then were superseded by the May documents. Significantly, the dispositive scheme challenged here was first implemented in January.
[42] *Id.* at 185.

review of her medical records as well as the testimony of only select witnesses.[43] Specifically, Dr. Mechanick, however, discounted the testimony of all those individuals who claimed that the Decedent had little or no memory problems or cognitive impairment. He included O'Brien, Livingston, Charles Jr., and Bear among those excluded.[44] In addition, Dr. Mechanick did not have the opportunity to review all of the witnesses' testimony, including that of Deborah Harris and Louisa Sellers (now Wright), WTC account managers who both affirmed that the Decedent possessed testamentary capacity several months before she executed the challenged estate documents.[45]

Of particular concern is Dr. Mechanick's failure to give appropriate consideration to O'Brien's observations. Dr. Mechanick concluded that O'Brien lacked credibility because he did not testify to any of the Decedent's memory loss and confusion when she signed her Will in 1996 or the technical amendment in 2000.[46] O'Brien, however, was a disinterested attorney, present at the Will's signing, which gives his assessment considerable force; in addition, his inability to detect some memory loss or confusion on the Decedent's part does not necessarily undermine his ability to decide whether she possessed testamentary capacity,

[43] *Id.* at 184-87; 221.
[44] *Id.* at 185.
[45] Tr. II at 218-19, 607; Tr. III at 624-26.
[46] Tr. I at 179-80 (testifying that, based upon her medical records, the Decedent must have had severe dementia by September 2000, which caused him to doubt O'Brien's original capacity determination in both 1996 and 2000).

which can exist even when there is some memory loss or confusion.[47] The Court believes that the complete exclusion of O'Brien's testimony weakens the weight of Dr. Mechanick's medical opinion.

Dr. Mechanick also declined to use Livingston's observations. He explained the emotional difficulty individuals have in acknowledging the declining mental ability of a loved one, and he believed Livingston had trouble recognizing the Decedent's dementia due to "her strong sense of loyalty and, really, love for this woman."[48] Dr. Mechanick also emphasized Livingston's positive remarks regarding the Decedent's health in 2000 when she had symptoms indicating severe advanced dementia as further reason to discount Livingston's testimony.

Dr. Mechanick's concerns are not unreasonable: Livingston's ability to perceive (or acknowledge) the Decedent's declining health was likely obscured by affection and fondness for her, and thus her favorable testimony regarding the Decedent's health was likely unduly optimistic. It does not follow, however, that

[47] A comment about Dr. Mechanick's concerns regarding the 2000 amendment may be necessary. Both he and the Petitioners have used O'Brien's testamentary capacity assessment in 2000 to impeach his testimony. Tr. I at 179; Pet'rs' Opening Post-Trial Br. at 17. O'Brien testified that the Decedent's health had declined drastically by September 2000, and he believed "she might be getting close to the edge" when she signed the trust agreement that year. Tr. II at 588. Nonetheless, he allowed her to execute the amendment. The 2000 Amendment, a one page document, simply updated the estate plan to account for changes in the federal tax code, specifically the exemption amount of the federal generation-skipping tax. O'Brien testified that he believed the Decedent understood that this amendment served that essentially ministerial function. *Id.* at 589.

[48] *Id.* at 190.

because Livingston was unable to appreciate the full extent of the Decedent's decline, she was also incapable of perceiving that degree of memory loss and confusion that might deprive one of testamentary capacity.

Further, Livingston never testified that the Decedent was of an entirely sound mind. Indeed, in response to a question about whether the Decedent had exhibited signs of dementia, Livingston answered that "forgetfulness comes to us all," and that the Decedent had "normal forgetfulness," but nothing that made her "terribly concerned."[49] Livingston also testified that her understanding of dementia differs from the medical definition because a condition that might be called dementia, she would call "forgetfulness," and that she believes one has dementia only when the memory loss reaches a point that she considers harmful.[50] Thus, for Dr. Mechanick to testify that Livingston failed to recognize any dementia may have been an overstatement. While the accuracy of Livingston's positive opinions regarding the Decedent's health—especially those related to her health in 2000—should certainly be tempered by the prevailing dementia diagnosis, these opinions—or more accurately, her factual observations of the Decedent's daily activities—are still helpful to addressing the baseline inquiry of testamentary capacity.

[49] Tr. II at 441, 457
[50] *Id.* at 477-78.

In addition to Dr. Mechanick's expert testimony, the Petitioners recite a substantial collection of facts regarding the Decedent's declining physical state and her advancing age to support their contention that she lacked testamentary capacity. They cite their own testimony that the Decedent appeared weak and frail when they visited in the early 1990's, the increasing difficulty they had carrying a conversation with her, and the Decedent's confusion regarding family names. They also cite Charles Jr.'s efforts to provide the Decedent with more live-in help as she aged, confusion she had regarding the role of WTC in drafting the estate documents, and the fact that Livingston accompanied the Decedent to her doctor's appointments to keep abreast of any medical developments and changing prognoses. Lastly, they refer to possible inconsistencies with what the Decedent told O'Brien at their December 1995 meeting;[51] specifically, they cite incorrect statements she may have made about the circumstances surrounding her daughter or son-in-law's death, the size of the Petitioners' respective families, Bear's age, her own age and place of birth, and the Petitioners' financial status.

While these facts indicate that the Petitioner was struggling with her memory and becoming increasingly confused, they do not overcome the

[51] The inconsistency here may be as much the responsibility of O'Brien as of the Decedent. According to O'Brien, he may have forgotten exactly what the Decedent had told him during the December 1995 meeting because many of the inconsistencies were not written in his notes. *Id.* at 500.

presumption that she possessed testamentary capacity at the time she executed the estate documents in 1996.[52] O'Brien, who was present with the Decedent when she signed the documents in January and May 1996, testified that he would decline an individual as a client if he had doubts about his or her competency, and that he does in fact decline clients for this reason several times a year.[53] He also testified that he has "referred clients to neurologists and psychiatrists on many occasions when I thought there was a question about their competency."[54]

O'Brien made clear that he believed that the Decedent possessed the requisite capacity to sign the estate documents, and he made this determination after having a preliminary meeting with her before she signed the Will.[55] O'Brien's testimony should be given significant weight due to his position as a

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[52] Petitioners seek to make much of Decedent's comments to O'Brien regarding their supposed wealth. They do not consider themselves "wealthy" and argue that the Decedent's belief that they were "very well off" demonstrates misunderstanding and confusion on her part, and thus a lack of capacity. Pet'rs' Opening Br. at 13-14, 29. Whether one is "wealthy" is a relative and somewhat subjective notion. Certainly, it would be fair to characterize the Petitioners as affluent. The Decedent knew that they had received a substantial inheritance from their parents and that they would be receiving additional funds from her husband's trust on her death. It was therefore reasonable for her to believe that they were in a comfortable financial position. Testamentary capacity cannot turn on a linguistic debate between affluence and wealth. Indeed, in the eyes of many, the Petitioners would be considered "well off." Moreover, the Decedent's concerns about Bear's longer term financial burdens are supported by the record. Even Mary acknowledged that it would not be unfair for Bear to be included in Decedent's estate plan given his obligations and financial position compared to those of the Petitioners. Tr. I at 88-89.

[53] Tr. II at 573.

[54] *Id.* at 544.

[55] *See Norton v. Norton*, 672 A.2d 53, 55 (Del. 1996) ("[D]irect communication which precedes testamentary drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence.")

disinterested attorney, and because he was with, and therefore could observe, the Decedent on the relevant dates.[56] In addition, O'Brien is experienced in testamentary matters. Lastly, his reading of the letter to the Decedent that summarized and explained the Will's substantive provisions, and his review of the Will with the Decedent before signing, demonstrate that the Decedent would have understood the disposition of her estate, even if she (as with many such clients) did not fully understand the complex tax law-driven trust provisions. Those efforts further buttress his testimony and provide additional assurance that the Decedent did, in fact, appreciate the consequences of her estate plan.

Although relied upon by Petitioners, Dr. Gilani's testimony is actually consistent with, and tends to support, a finding of capacity. Dr. Gilani diagnosed the Decedent with dementia in 1994, but he explained that the deterioration was "very, very slow"; he further observed that in the several years following his diagnosis, the Decedent was able to carry on meaningful conversations, was "appropriate in her behavior," and could live alone but with assistance "because she was physically failing."[57] Dr. Gilani believed that, if prompted or explained to her, the Decedent could understand how much money she had in 1996.[58] And

[56] *See id.* (emphasizing the importance for an attorney who drafts the will, especially for an aged or infirm testator, to be satisfied concerning competence and to be sure that the will represents the testator's intentions).
[57] J.G. Tr. at 21-23.
[58] *Id.* at 25.

while Dr. Gilani doubted whether she could understand the intricacies of the estate planning documents, he testified that, "simply put, she would be able to understand her net worth, how much money she had and whom she wanted to give it to."[59] This statement amounts to an affirmation that the Decedent possessed testamentary capacity in 1996.[60]

Lastly, representatives from WTC believed that the Decedent possessed the requisite capacity when they worked with her in 1995.[61] Nenno testified that the Decedent "certainly had a sense of what we were doing," and stated that his "sense was that she had testamentary capacity."[62] Deborah Harris testified that she would never allow a client whom she believed lacked testamentary capacity to execute estate documents.[63] Louisa Wright remembered the Decedent as "lucid" and had a

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[59] *Id.*

[60] Dr. Gilani's testimony was far from focused. At one point, he contended that even on her good days, the Decedent would have been incapable of "changing her estate plans, revising her beneficiaries, and executing a new will and a new trust agreement. . . ." J.G. Tr. at 29. At virtually the same time, however, Dr. Gilani stated that the Decedent would have been capable of independent thought in May 1996, "on the days when she was not confused." *Id.* at 31. In light of all of his comments, the Court assesses Dr. Gilani's testimony as supporting testamentary capacity.

[61] Petitioners attempt to draw too much from the Decedent's apparent confusion regarding the role of WTC in planning her estate. Pet'rs' Opening Br. at 26. She apparently believed that WTC no longer provided estate planning services, which is why she had to retain O'Brien. *Id.* It is more likely that the Decedent was confused over the need to obtain outside counsel; that confusion which, frankly, is understandable, does not indicate a lack of testamentary capacity. The cogent reasons underlying WTC's policy of encouraging its trust clients to retain the services of outside counsel are not necessarily obvious to those individuals not trained in the law or familiar with trust company practices.

[62] Tr. II at 413.

[63] *Id.* at 607.

meaningful conversation with her regarding her estate.[64] She also stated that the Decedent understood the amount of her assets, and that she understood the advice being given to her.[65]

In light of all the credible evidence, the Petitioners have failed to rebut the presumption that the Decedent lacked testamentary capacity at the time she executed the challenged documents. The Decedent lived alone, with limited assistance, for approximately four years after she executed the challenged 1996 estate documents. The attorney who witnessed the documents' signing testified that he believed she possessed the requisite competency at the time she signed the Will, while her treating physician believed that she would be able to understand her net worth and to whom she wanted to leave her assets. The testimony of these two witnesses presented strong evidence indicative of testamentary capacity—it fortifies a presumption that Dr. Mechanick's testimony and the Petitioners' circumstantial evidence simply do not overcome.

In short, the Petitioners have failed to prove that the Decedent lacked testamentary capacity when she executed her estate planning documents in 1996.[66]

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[64] Tr. III at 624-25.
[65] *Id.* at 625-26.
[66] Even if the Decedent lacked testamentary capacity in 2000 and the 2000 trust amendment were set aside, it would not assist Petitioners. The 2000 trust amendment did not affect the allocation between the Petitioners on the one hand and Charles Jr. and Bear on the other. The Petitioners did not separately argue for invalidation of the 2000 amendment and the Court declines to do so. The Decedent's status in 2000, however, is not irrelevant to the Court's inquiry because when

B. *Undue Influence*

As with testamentary capacity, the party attacking a contested will "carries the burden of proving undue influence."[67] Undue influence "is an excessive or inordinate influence considering the circumstances of the particular case."[68] To be considered undue, the amount of influence exerted over the testator's mind "must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to impel him to make a will that speaks the mind of another and not his own."[69] There is no prescribed manner in which such pressure must be applied; however, regardless of the means employed, the influence "must have been in operation upon the mind of the testator at the time of the will's execution."[70]

To succeed on a claim of undue influence, the challenging party must establish the following five elements: 1) a susceptible testator; 2) the opportunity to exert influence; 3) a disposition to do so for an improper purpose; 4) the actual exertion of such influence; and 5) a result demonstrating its effect.[71]

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she executed the 1996 documents, she was on that unhappy path to that point, reached no later than 2000, where she would be unable to handle any of her affairs.

[67] *Melson*, 711 A.2d at 786.

[68] *In re Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983). This burden may also be shifted upon satisfaction of the test articulated in *Melson*. *See supra* note 36. Once again, burden shifting under *Melson* has not been argued, nor can the test be met given O'Brien's involvement in drafting.

[69] *Langmeier*, 466 A.2d at 403.

[70] *Id.*

[71] *Norton*, 672 A.2d at 55.

Proving susceptibility involves many of the same issues that are present when challenging testamentary capacity.[72] Establishing this element, however, presents a lower threshold than proving a lack of competency.[73] The Court finds that the Decedent was indeed susceptible to undue influence based in large part upon her dementia diagnosis and memory problems. Dr. Gilani testified to a reasonable degree of medical probability that the Decedent was susceptible to being influenced.[74] Dr. Mechanick made the same determination, but without discounting the testimonies of O'Brien and Livingston, which he had done when he found a lack of capacity.[75] Additionally, the Decedent was over ninety years old at the time she signed both the January 1996 and May 1996 documents, and was growing increasingly more fragile and physically weak during the 1990's, up until (and beyond) the time she signed the relevant documents. Upon these facts, the Court concludes that the Petitioners have satisfied their burden of proof as to susceptibility.

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[72] *See Mitchell v. Reynolds*, 2009 WL 132881, at *9 (Del. Ch. Jan. 6, 2009) ("[A]lthough capacity is a concept distinct from susceptibility, it informs the analysis"). Indeed, a finding of "weakened intellect" under the first prong of the *Melson* test, discussed in note 36 *supra*, will often conclusively support a finding of susceptibility. *See Sloan v. Segal*, 2009 WL 1204494, at *16 (Del. Ch. Apr. 24, 2009) ("As a person with a weakened intellect, Patricia was a susceptible testator."); *Tucker v. Lawrie*, 2007 WL 2372616, at *8 (Del. Ch. Aug. 17, 2007) (finding susceptibility because the testatrix suffered from a weakened intellect); *In re Wiltbank*, 2005 WL 2810725, at *8 (Del. Ch. Oct. 18, 2005) (same).

[73] *See Lingo v. Lingo*, 2009 WL 623720, at *7 n.10 (Del. Ch. Feb. 26, 2009) ("A testatrix may be susceptible to undue influence as a result of weakened intellect, while retaining testamentary capacity sufficient to create a will.").

[74] J.G. Tr. at 19.

[75] Tr. I at 184; TX 17 at 29.

The Court also finds that Charles Jr. and Bear had opportunity to influence the Decedent. Charles Jr. visited the Decedent once, sometimes twice, a month, and would typically stay with her for several days, perhaps up to a week. He often drove her to doctor's appointments and other meetings, including the meeting she had with O'Brien when she signed the contested documents. Bear saw the Decedent once a week for Sunday brunch with his family, and would sometimes go to the Decedent's home if she asked him for assistance. The Petitioners, on the other hand, saw the Decedent at most a few times each year on visits to Delaware from their homes in Canada.[76] The frequency with which Charles Jr. and Bear saw the Decedent, contrasted with the infrequency of such visits by the Petitioners and their comparative inability to counteract any influence, establishes opportunity.[77]

The facts also establish that Bear had a disposition for an improper purpose.[78] Prior to the 1996 revisions, the Decedent's estate plan, by and large, called for a per stirpes distribution between her children. One-half of her assets would therefore be distributed to Charles Jr. and one-quarter each would be

[76] Mary and her family visited the Decedent for Easter, while Patricia visited the Decedent for Thanksgiving or Easter and/or when in the Delaware area on business. There is doubt in the record over whether the Petitioners visited every year or once every couple of years.

[77] *See In re Boyd*, 2003 WL 21003272, at *6 (Del. Ch. Apr. 24, 2003) (finding opportunity when the testator was visited often by the party benefiting from the challenged will, and was not "constantly supervised" by family members who could prevent the influence).

[78] The Petitioners do not expressly argue that Charles Jr. had a disposition for an improper purpose. Pet'rs' Opening Post-Trial Br. at 37-38. It is reasonable to infer, however, that Charles Jr. would act in his son's best interests.

distributed to Mary and Patricia. Other than a cash distribution in the amount of $50,000, Bear was excluded from the Decedent's estate plans entirely. Bear would therefore have to wait until Charles Jr.'s death to receive any assets distributed to his father from the Decedent, assuming of course that Charles Jr. makes such provision in his will and that there are assets left to distribute.[79] Bear therefore would have been disposed to have himself included in the Decedent's will, and likely would have preferred such inclusion to be at the expense of cousins instead of his father.

Furthermore, the Court also finds that the 1996 documents did in fact benefit Bear, and all to the Petitioners' detriment. The Petitioners were entirely excluded from the Decedent's estate plan while Bear received a significant portion of her estate.

The Petitioners, however, have failed to prove actual influence. Although circumstantial evidence may be used to prove facts at trial and "can have probative value equal to that of direct, or testimonial, evidence,"[80] the actual exercise of undue influence may not be "inferred from the fact [that] the party charged with undue influence may have had the opportunity and the motive to exert influence."[81]

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[79] There is, of course, no guarantee that any assets left outright to Charles Jr. would eventually reach Bear.
[80] *Langmeier,* 466 A.2d at 402.
[81] *In re Rick*, 1994 WL 148268 (Del. Ch. Mar. 23, 1994) (citing *West*, 522 A.2d at 1264-65).

The challenging party must prove more, and is unable to carry its burden when there exist "two equally plausible reasons" for the manner of distribution, and when one such reason does not involve undue influence.[82] This rule embodies the law's disfavor toward invalidating a will "without strong evidence mandating such drastic action."[83]

Although one cannot exclude the possibility that the Decedent was influenced by Charles Jr. and Bear to revise her will, there exists an equally plausible explanation for her decision. The main reason for O'Brien's initial meeting with the Decedent "was to draft documents that excluded [the Petitioners]."[84] Although the Decedent did not disclose to O'Brien the basis for her decision in detail, he understood that she was "irritated a little bit with them," particularly because either Mary or Patricia's husband "had been too curious about her estate plan and her financial resources, and she was quite put off by that."[85] The Decedent also made it known to O'Brien that the Petitioners had sufficient resources and she expressed concern that the Petitioners would not use her bequest

[82] *West,* 522 A.2d at 1265.
[83] *Id.*
[84] Tr. II at 547.
[85] *Id.* at 542.

constructively.[86] She further informed him that Bear had greater need for her assets.[87]

This explanation was likely the product of the Decedent's own thought process. When asked whether he believed that the Decedent's estate plan was not the product of her own independent will, O'Brien "assure[d]" the Court that the plan was "completely . . . all her idea."[88] Moreover, he "had no reason to believe that [the Decedent] was being encouraged to do this by anyone else." He also observed that "she had a lot of backbone," and "wanted to do it her way."[89] The Court further notes that, even though Charles Jr. might have dropped the Decedent off at O'Brien's office or was in the Decedent's home when she met with O'Brien, Charles Jr. always made a point of either leaving the office or going into a different room.[90] Thus, the Decedent and O'Brien always met without the presence of Charles Jr. (and Bear). Lastly, O'Brien explained that testators often change their minds regarding their estate plans, and thus it was not unusual for the Decedent to

[86] *Id.* at 540-41. This latter statement is supported by an internal WTC memorandum dated May 30, 1995 from Deborah Harris, the Decedent's trust administrator, to Richard Nenno in which Harris discussed "concern on Mrs. Cauffiel's part as to her granddaughter Patti's ability to handle money." TX 20 at WT087. Harris testified that she could not remember this conversation, but affirmed the document's veracity. *Id.* at 605 ("I wouldn't have put them there if they weren't verbatim what she told me.").
[87] *Id.* at 541.
[88] *Id.* at 589.
[89] *Id.* at 521, 589; *see also id.* at 545 ("[T]his client appeared to be quite consistently adamant in her desire to exclude her granddaughters from her estate plan").
[90] *Id.* at 575.

request one particular estate plan in September 1995 and another several months later.[91]

Livingston presented a similar explanation. She and the Decedent had a conversation about her estate plan in which the Decedent expressed concern for Bear and his financial obligations, which included caring for his diabetic daughter and elderly mother.[92] Livingston did not believe that someone else had given the Decedent the idea to leave money to Bear, and testified that the Decedent was not one to allow others to make decisions for her.[93] The Decedent also had told Livingston of the attempt of John Rattray, Mary's husband, to "get her to sign some papers" and to influence her estate plan.[94]

The Court finds the explanation offered by O'Brien and corroborated by Livingston, to be a reasonable and plausible explanation for the Decedent's decision to exclude the Petitioners from her estate plan. Considerable weight is to

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[91] *Id.* at 581.
[92] *Id.* at 433.
[93] *Id.* at 435, 437; *see also id* at 444 (explaining that the Decedent did not approve of Charles Jr.'s idea to hire her more help, and that she discontinued the services, and "had the last say" in the matter).
[94] *Id.* at 440. Livingston placed the date of this interaction in November 1996, during the time of the Decedent's ninetieth birthday party. The Petitioners point out that the Decedent signed the challenged documents in January and May of 1996, before the alleged encounter. They also claim that it may have been O'Brien, and not John Rattray, to whom the Decedent referred. Pet'rs' Opening Post-Trial Br. at 26. Livingston, however, stated that she was confused on the exact date but was confident that the supposed interaction occurred several weeks before the Decedent signed her estate documents. Whether John Rattray attempted to influence the Decedent is uncertain on the record before the Court, but it is certainly possible, especially given O'Brien's interlocking testimony.

be afforded to the testimony of a disinterested, independent attorney regarding lack of undue influence.[95] O'Brien was bound to act consistently "with the high ethical standards required of" [him] to ensure that the Decedent's "actions were the product of her own free will."[96] O'Brien discussed the Petitioners' exclusion with the Decedent at their initial meeting and included two paragraphs in his summary letter that addressed their removal, which he presented to the Decedent on the day she signed the Will.[97] He also demonstrated his independence and advanced his client's interests by resisting certain changes to the estate documents recommended by WTC that he believed curbed her testamentary power.[98] In sum, the Court

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[95] *See West,* 522 A.2d at 1264 (relying upon the testimony of two disinterested attorneys who both claimed that the testatrix "exhibited an independent mind and clearly stated her reasons for changing the beneficiaries).

[96] *Id.*

[97] *See* Tr. II at 580. The paragraphs read as follows:

> Your trust makes no provision for your granddaughters Mary and Patricia. A sentence in the final paragraph of your trust states that this was intentional, but not motivated by any lack of affection for them.
>
> Before deciding to leave Mary and Patricia out of your trust and will, we discussed their situation at length and in complete privacy. You advised me that your granddaughters received very large inheritances when their parents died, and do not really need additional funds to make them financially secure. In sum, your decision to benefit your son and grandson springs from a desire to put your resources where they will make the greatest difference.

Id.

[98] *Id.* at 402; TX 20 at 000012. WTC encouraged and anticipated this result. Tr. II at 361 ("We [Nenno & WTC] tried to involve counsel as early as possible, and would provide them with asset information for the client, and to make sure that outside counsel was fully informed and able to watch out for the interests of the client."). Indeed, while Nenno testified that he was surprised that the estate documents had been revised to exclude the Petitioners, he did not question O'Brien on these substantive changes due to a WTC policy that emphasized deferring to outside counsel "in matters like this." *Id.* at 392 ("Whenever outside counsel stepped in, we very much—pretty quickly stepped to the background.").

concludes that O'Brien was acting in accordance with his professional and ethical obligations.

The Court also finds O'Brien's explanation of the Decedent's decision plausible based upon the totality of credible testimony offered at trial. The Decedent knew of the inheritance the Petitioners received from their parents; and she knew of the assets they would receive from her husband's trust. The Decedent also knew of Bear's obligations to his family and therefore, notwithstanding any inheritance that Bear's wife might have received, understood his greater needs. This reason, perhaps supported by Mary's husband's irritating efforts to influence her, is as likely—if not more likely—an explanation for her dispositive choices as the possibility that Charles Jr. and Bear unfairly persuaded her to make the revisions. In short, the better conclusion is that the Decedent decided to exclude the Petitioners from her estate plan on her own volition.[99] The Petitioners have simply failed to meet their burden with respect to their undue influence claim.

V. CONCLUSION

For the foregoing reasons, the Court will enter judgment in favor of the Respondents and against the Petitioners.

[99] In fact, the Decedent had briefly amended her estate plan in 1988 to provide for a distribution favoring Charles Jr. and disfavoring the Petitioners. *See supra* note 20. This amendment suggests that the Decedent had considered an unequal distribution in the past, at a time when there was no question of diminished capacity or undue influence.