IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE ESTATE OF	)	
ELIZABETH M. JUSTISON, DECEASED.	)	C.A. No. 20054

MEMORANDUM OPINION

Submitted: December 30, 2004
Decided: January 21, 2005
Revised: January 24, 2005

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LAMB, Vice Chancellor.

The petitioners seek to invalidate the last will and testament of their deceased mother. They claim that the will is invalid because the decedent lacked testamentary capacity, or that the will is the product of undue influence. In the alternative, the petitioners seek to reform the will as, they claim, it does not reflect their mother's wishes. Finally, they contend that their brother—who is the sole beneficiary under the will—orally agreed to split the estate evenly among the four siblings, and they seek specific performance of that agreement.

Trial was held on December 8-9, 2004. Having reviewed and considered the record and the parties' post-trial briefs, the court concludes that the petitioners failed to meet their burden of proving that the will was invalid, and failed to prove their claims for breach of contract or reformation.

I.

The court begins with the undisputed facts in the record. The decedent, Elizabeth M. Justison ("Mrs. Justison"), died on June 30, 2002. Her four children, the petitioners Joseph S. Justison, Jr., Elizabeth Justison Dunn, and David J. Justison, and the respondent, Robert J. Justison, survived her.[1] Mrs. Justison was predeceased by her husband, Joseph S. Justison, Sr. ("Mr. Justison"), who died on December 9, 1999.

[1] When discussing individuals with the same last names, the court relies on first names for convenience. *See, e.g., Capano v. State*, 781 A.2d 556, 582 n.2 (Del. 2001) ("We usually refer to the brothers by their first names."); *Johnson v. Bell*, 2003 WL 23021932, at *1 n.1 (Del. Ch. Dec. 11, 2003) ("[F]or convenience, I use their first names for, as will shortly become apparent, there are numerous individuals with the surname of Bell who have a role in this litigation.").

On February 17, 1988, Mr. and Mrs. Justison executed reciprocal wills leaving their estates to the survivor of them and, in the case of the survivor, leaving the family home to their daughter Elizabeth on the condition that Elizabeth pay one-fourth of the value of the home to each of her brothers. The family home makes up the bulk of the value of the joint estates.

In 1995, Robert and his wife, Cheryl Lowery, moved from Florida to live with Mr. and Mrs. Justison in order to assist in caring for them. In 1998, Lowery left Robert, and did not ever see Mrs. Justison in person again. Robert and Lowery divorced shortly thereafter.

On September 24, 1999, Mr. and Mrs. Justison executed new reciprocal wills which, in the case of the survivor of them, left the family home to Robert without any condition concerning payment to his siblings (the "Will"). At the time she executed the Will, Mrs. Justison was 78 years old.

It is undisputed that for several years before the Will was executed, Mrs. Justison had been experiencing some memory impairment. Moreover, her internist made a diagnosis of Alzheimer's disease no later than 1997. The central dispute at trial was the extent to which this disease affected Mrs. Justison's mental state at the time that she executed the Will. The evidence adduced at trial consisted mainly of Mrs. Justison's medical records and the testimony of family and friends who saw

Mrs. Justison in the months and years surrounding the time she executed the Will. Both sides also presented the testimony of medical experts.

A. The Petitioners' Evidence

The petitioners contend that, as a result of advancing dementia, Mrs. Justison had become incompetent long before she executed the Will. To prove this, the petitioners each testified at trial and also introduced the testimony of five other witnesses. Two of those, their expert witness, David A. Simpson, M.D., and Anna Reiter, a neighbor of Mrs. Justison, appeared at trial. The others, Stephanie Boyanek (Mrs. Justison's sister), Cheryl Lowery (Robert's ex-wife), and Erin Wieber (a granddaughter) were deposed and the transcripts of their testimony admitted into evidence.

Joseph, Elizabeth, and David all testified as to their observations of Mrs. Justison's condition around the time she executed the Will. They testified that Mrs. Justison told each of them that she had Alzheimer's disease. They testified that they each had regular phone contact with Mr. and Mrs. Justison as well as numerous in-person visits. According to them, Mrs. Justison was forgetful, often did not know who they or their families were, and would tell the same stories repeatedly. Joseph, Elizabeth, and David also testified that Mrs. Justison was confused at Mr. Justison's funeral that took place just a few months after the Will was signed. They each testified that at the funeral she did not know where she was

and did not understand that her husband had died. Joseph testified that he was aware of Mrs. Justison wandering away on at least two occasions. However, when she "wandered away," she visited neighbors next door. They also testified that Mrs. Justison's mental condition deteriorated over time.

Generally, the petitioners testified that Mr. and Mrs. Justison said their estate would be split evenly among their children. However, Joseph testified that Mr. Justison told him that he was going to cut Elizabeth out of his will because Mr. and Mrs. Justison did not approve of the man Elizabeth was dating. The petitioners also testified that they were not aware of the change in estate plans or the preparation of new wills and that they did not learn of the new wills until after Mrs. Justison's death. Joseph, Elizabeth, and David all testified that they believe Mrs. Justison was not competent in September of 1999 to execute a will.

Dr. Simpson provided expert testimony in support of the petitioners' position. Dr. Simpson is licensed to practice medicine in Delaware and board certified in family medicine and geriatrics. Dr. Simpson regularly treats patients suffering from dementia. In formulating his opinion, Dr. Simpson reviewed Mrs. Justison's medical records,[2] the Will, summaries of the testimony of Lowery, Wieber and Boyanek, Robert's deposition testimony, the Bayada Nurses social worker's note,[3] and the amended petition. He never met Mrs. Justison.

[2] Joint Trial Ex. 4-8.
[3] Joint Trial Ex 11.

Dr. Simpson testified that Alzheimer's disease starts slowly and can go undetected for some time, that the average progression for the disease is eight to ten years, and that it is possible for someone with Alzheimer's disease to seem fine to those who do not know her. He also said that it is possible for one with Alzheimer's disease to sign her name but not know what she was signing. Dr. Simpson stated that the various observations of Mrs. Justison's behavior described in the documents he reviewed would be consistent with advanced Alzheimer's disease. Dr. Simpson testified that he was aware of the standard required to be competent to make a will in Delaware and opined that Mrs. Justison was not competent to make a will in September of 1999.

The petitioners also called Anna Reiter, Mrs. Justison's long-time neighbor. Reiter lived across the street from Mrs. Justison for 23 years, although the two had only occasional contact and did not go inside each other's houses. Reiter testified that Mrs. Justison did not recognize her or Reiter's husband and would ask her if they were her neighbors. On at least one occasion, Mrs. Justison took Reiter's mail.

Cheryl Lowery, Robert's ex-wife, testified by deposition. Lowery is a registered nurse now working in Kentucky. She testified that from the time she and Robert moved to Delaware until the time they separated in May of 1998, she was primarily responsible for caring for Mr. and Mrs. Justison. Lowery stated that

she did all the cooking, cleaning, shopping, and took care of the bills because Mrs. Justison was no longer capable, and that she understood that Mrs. Justison had been diagnosed with Alzheimer's disease.

Lowery testified to her observations of Mrs. Justison's condition from 1995 to 1998. She stated that Mrs. Justison was having problems with her daily tasks even before Lowery and Robert moved in. She also stated that when they first moved in, Mrs. Justison was extremely forgetful, could not maintain her train of thought, was repeating the same stories over and over, and was misplacing things. Lowery further testified that, over time, Mrs. Justison's condition worsened and she failed to recognize family members in pictures and would forget her children's and grandchildren's names. Based on Mrs. Justison's condition at the time Lowery left in the spring of 1998, Lowery opined that Mrs. Justison was not capable of making changes in her estate plans. Lastly, Lowery testified that she was told on many occasions by Mr. and Mrs. Justison that their home would be split equally among their children and one of them could purchase it if he or she paid the others.

Mrs. Justison's sister, Stephanie M. Boyanek, also testified by deposition regarding Mrs. Justison's mental condition during the last years of her life. Boyanek testified that she spent a good deal of time with Mrs. Justison and that she stayed with Mrs. Justison on weekends when Robert was away. Boyanek stated that when she visited, Mrs. Justison did not bathe and did not want to change her

clothes. According to Boyanek, Mrs. Justison sometimes did not recognize her children and grandchildren and did not know what was going on at Mr. Justison's funeral. After that, according to Boyanek, there were many occasions when Mrs. Justison did not remember that her husband had died. On cross-examination, however, Boyanek testified that, at least until Mr. Justison's death, Mrs. Justison knew Boyanek and knew Mr. Justison. It is also apparent from Boyanek's testimony that, even after Mr. Justison's death, Mrs. Justison was able to make decisions and converse about contemporaneous events.[4]

Erin Wieber, Mrs. Justison's granddaughter, testified by deposition. Wieber is a nurse with experience in caring for patients suffering from Alzheimer's disease. Wieber testified that she spoke with Mrs. Justison on the phone at least once a month and saw Mrs. Justison about six times from 1997 until the time of Mrs. Justison's death. Wieber testified that there were many occasions on which Mrs. Justison did not recognize her children or other grandchildren. She also stated that Mrs. Justison did not want to take baths, was exhibiting childlike behavior, and had lost most of her short-term memory.

Wieber further testified that, at Mr. Justison's funeral, Mrs. Justison thought Robert was her husband and could not understand that Mr. Justison had died. She

[4] In particular, Boyanek testified about Mrs. Justison discussing with her Robert's plan to travel to Germany and his request for a $600 loan. She recalled Mrs. Justison saying: "He wants to take a girl to Germany and he wants $600." Joint Trial Ex. 18, Boyanek Dep. At 16. She also testified that, when asked if she would give Robert the $600, Mrs. Justison said that she would not. *Id.*

stated that Mrs. Justison had become increasingly belligerent and had become violent. She stated that on one occasion Mrs. Justison tried to strangle Wieber's youngest cousin and on another occasion slapped Wieber's two-year old nephew.

Wieber stated that, from a nursing standpoint, she would not have accepted a consent form from a patient who behaved the way Mrs. Justison did, as she believed Mrs. Justison unfit to make important decisions. Wieber also testified that she had several prior discussions with Mrs. Justison about the disposition of her estate and that Mrs. Justison had always told her that she would divide the estate four ways.

B. The Responent's Evidence

The respondent testified and also presented three other witnesses, as follows: John Weaver, Jr., Esquire, who prepared the Will; Napoleon Manubay, M.D., Mrs. Justison's family doctor since 1988; and Richard Sharbaugh, D.O., the respondent's expert witness.

Robert testified that, around the time the Will was executed, his mother had bad moments, but that she was generally coherent and lucid. Specifically, Robert testified that, after Lowery left, Mrs. Justison resumed doing some of her normal chores around the house, including some food preparation for both herself and her husband, and light cleaning. He stated that she also bathed and dressed herself regularly.

Robert also described the circumstances of the initial meeting between his parents and Weaver relating to the drafting of the Will. Robert testified that Mrs. Justison asked him to arrange a meeting with an attorney and she asked by name for Mr. Keith, the attorney who prepared the 1988 wills. After learning that Keith had died, Robert made an appointment with Weaver, who used to work with Keith. Robert stated that he told his mother about the appointment and brought her to meet Weaver at the nursing home where Mr. Justison was staying. Robert testified that his mother was bathed, dressed appropriately, knew what was going on, and made no indications that she was confused or not lucid. Robert's parents met with Weaver without Robert being present.

Robert then testified as to Mrs. Justison's condition on the day, several months later, when the Will was actually signed. He took her back to the nursing home. He, again, did not participate in the meeting with Weaver and was not present when the Will was signed. According to Robert, his mother was bathed, dressed appropriately, knew what was going on, and made no indications that she was confused or not lucid. He testified that he did not see the Will until shortly before his mother died.

Robert called Dr. Napoleon Manubay, who was Mrs. Justison's treating internist from 1988 through 2001. Dr. Manubay saw Mrs. Justison on at least 14 occasions from 1994, when she first started to complain of short-term memory loss

and forgetfulness, through February of 2000. This included an appointment in February of 1999 and one in February 2000. Dr. Manubay first noted Mrs. Justison's memory problems in 1994 and first diagnosed her with Alzheimer's disease on April 24, 1997.[5] Dr. Manubay prescribed Aricept to slow or retard the progress of her disease. He did not increase her level of Aricept until May 25, 2000 and ultimately switched to another form of dementia medication, Exelon, on February 21, 2001. However, Dr. Manubay was clear in his testimony that Mrs. Justison's forgetfulness was limited to short-term memory. He also testified that on each of the 14 occasions he met with her, Mrs. Justison was lucid, understood what he was saying, was able to articulate her reasons for visiting the doctor, and had appropriate hygiene and appearance. In fact, Dr. Manubay testified from his records that, in February of 2000, Mrs. Justison's memory appeared improved.[6] While he stated that she was "probably lucid on and off," he opined that she was mentally competent on most occasions. Dr. Manubay also gave his opinion that, at the time she executed the Will, Mrs. Justison would have been mentally competent.

John Weaver, Jr., the attorney who prepared the Will, also testified as to Mrs. Justison's capacity. Weaver has been a member of the Delaware bar for more than 25 years and met with Mrs. Justison on three occasions to discuss her estate planning. Weaver specializes, in part, in estate planning matters and testified that

[5] Joint Trial Ex. 15.
[6] Joint Trial Ex. 5 at 69.

he has, in the past, refused to execute wills or powers of attorney for individuals he did not believe to be competent.

Of the first meeting in June of 1999, Weaver testified that Mr. Justison initially described the couple's wishes with respect to their wills.[7] However, he specifically recalls Mrs. Justison interjecting a request to "review" the testamentary scheme, in Weaver's judgment, to ensure that he "got it," and would correctly reflect their testamentary intents and desires in the wills. Mr. Justison then reiterated their testamentary wishes. Moreover, Mr. and Mrs. Justison explained to Weaver that they had decided to change their wills to thank Robert for coming up from Florida and helping to care for them. Weaver testified that there was no question in his mind as to Mrs. Justison's competency. He stated that she was dressed appropriately, that there was initial "chit chat" as anyone would have when one is meeting clients for the first time, she interjected her request for a "review" at a proper time, and that he was satisfied either by a verbal affirmation or a nod from her that Mrs. Justison was in agreement with the testamentary scheme reiterated by her husband.

Weaver also testified as to Mrs. Justison's mental condition on the day the Will was signed. Weaver testified that he provided draft wills to Mr. and Mrs. Justison some time in advance and that neither indicated a desire to make changes.

[7] This meeting was arranged by Robert at his mother's request. Robert did not discuss his mother's mental condition or the Alzheimer's diagnosis with Weaver.

He then met with them for another 30 or 45 minutes and specifically asked each of them whether the wills accurately reflected their testamentary intent. He stated that he received an appropriate response from both. Weaver testified that it is his standard practice to always ask four questions before allowing a client to sign a will, and that he asked these questions to Mrs. Justison. The questions are the following: Do you publish and declare this to be your last will and testament? Is this the way you want your will to read? Is anyone forcing you to make this will out this way? Are you are at least 18 years of age and believe that you are of sound mind? Weaver testified that he would have had to receive an appropriate response to each of these questions from Mrs. Justison or he would not have allowed her to execute the Will. Weaver opined that Mrs. Justison was competent when she signed the Will.

Finally, Weaver testified that Mrs. Justison came to his office on September 15, 2000 in order to execute a power of attorney and that he met with her alone. He remembered that her appearance, her demeanor, her hygiene, etc., were all appropriate and not out of the ordinary. He testified that he would have taken the time, as was his standard procedure, to extensively review the power of attorney, as it was a general power of attorney providing great economic rights to another on her behalf. Weaver stated that he would have had to receive the appropriate responses

from her or he would not have gone forward with the execution of the power of attorney.

Dr. Richard Sharbaugh appeared as an expert for Robert. Dr. Sharbaugh has been a general practitioner for more than 25 years and has many elderly patients suffering from different degrees of forgetfulness and/or dementia. However, like Dr. Simpson, Dr. Sharbaugh never treated, nor personally met with, Mrs. Justison, and instead based his opinion entirely on her medical records.

Dr. Sharbaugh opined that Mrs. Justison was mentally competent to execute a will in September of 1999. Dr. Sharbaugh gave various reasons for this opinion based on his review of Mrs. Justison's medical records. First, those records do not show any significant change or loss from the date that she first complained of memory difficulties or forgetfulness through February 10, 2000. Second, there was no evidence in her medical records that Mrs. Justison's doctor determined a need to increase her Alzheimer's medication dosage until at least February of 2000, or to attempt to use some other kind of medication, because the drug she was taking at the time, Aricept, was providing assistance. Third, Mrs. Justison's records do not show any notation indicating any observations of significant or rapid mental deterioration. Fourth, Mrs. Justison's records do not reflect she was acting inappropriately with her doctor in the office visits or that she was unable to articulate any physical and mental symptoms. Fifth, Mrs. Justison did not

continually complain of forgetfulness or memory loss on each visit during the relevant time frame of 1994 until February of 2000. Sixth, Mrs. Justison's records do not show that her doctor ever conducted a mini-mental exam, something which he would expect to see if there was a significant question of competence. Finally, there is nothing in Mrs. Justison's records which indicates any observations that she was not competent or was "out of it." Dr. Sharbaugh also noted the marked similarity between Mrs. Justison's signature on the 1988 will and that which appears on every page of the Will, observing that the signature of persons in the advanced stages of Alzheimer's dementia are often quite changed.

Finally, the trial record also contains the clinical notes of a social worker from Bayada Nurses who visited the Justisons' house.[8] The social worker met with Mr. and Mrs. Justison on November 15, 1999, shortly after the Will was signed, in order to assess Mr. Justison's needs. According to the notes, the social worker drove up to the house and found Mrs. Justison outside raking leaves. Mrs. Justison introduced herself and brought the social worker into the house. The notes make no further mention of Mrs. Justison's condition.

II.

Under Delaware law, all will contests start with the presumption that a testator had the capacity to make a will at the time it was made.[9] Thus, it is the

[8] Joint Trial Ex. 16.

[9] *Melson v. Melson (In re Will of Melson)*, 711 A.2d 783, 786 (Del. 1998) (internal citations omitted).

party challenging testamentary capacity the bears the burden of proving that the decedent was legally incapable of executing a valid will.[10] Likewise, the challenger carries the burden of proving that the will was a product of undue influence.[11]

In order to be capable of executing a valid will in Delaware, an individual must, at the time of execution, be capable of exercising thought, reflection, and judgment, and must know what she is doing and how she is disposing of her property.[12] The person must also possess sufficient memory and understanding to comprehend the nature and character of the act.[13] Thus, the law requires the testator to have known that she was disposing of her estate by will, and to whom.[14] It is important to note that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will.[15] Furthermore, the evidence as to the testatrix having made her will while lacking testamentary capacity must be shown *at the time the will was executed*.[16] Therefore, in order to invalidate a will on the basis of a lack of testamentary capacity, the party contesting the will must show by a preponderance of the evidence that the decedent lacked even this minimal capacity at the time she executed the will.

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[10] *Id.*
[11] *Id.*
[12] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).
[13] *Id.*
[14] *Id.*
[15] *Id*.
[16] *In re Langmeier*, 466 A.2d 386, 389 (Del. Ch. 1983) (citing *In re Miller's Will*, 85 A. 803 (Del. 1912)).

III.

The main evidence adduced by the petitioners is their personal testimony and the testimony of Dr. Simpson, Wieber, Boyanek, and Lowery.

Joseph, Elizabeth, and David testified that they believed that their mother was not competent when she executed the Will. The court notes several factors about their testimony. First, it is self-interested. They all stand to directly benefit should the Will be invalidated. Second, they did not see Mrs. Justison on the day she described to Weaver how she wanted the Will drawn up, nor did they see her on the day that the Will was executed. Finally, all three admitted that Mrs. Justison had good and bad days. Their testimony therefore is not entirely inconsistent with Mrs. Justison being lucid at the time the Will was executed.

The petitioner's expert, Dr. Simpson, opined that Mrs. Justison would not have been lucid when she signed the Will. However, Dr. Simpson never met Mrs. Justison, never treated her, and never discussed her care or medical history with any of her treating physicians. In fact, he based his conclusion entirely on Mrs. Justison's medical records and the unsworn "summaries" of possible trial testimony, summaries which were never introduced at trial and omitted potentially important information.[17] In light of the fact that Dr. Simpson based his opinion on

[17] For instance, the summaries did not include information from Weaver documenting his observations in June and September of 1999 when he met with Mrs. Justison.

incomplete data, the court must give his opinion less weight than it otherwise would.

Wieber's testimony of Mrs. Justison's erratic and violent behavior certainly suggests someone in the late stages of Alzheimer's disease. However, the most notable aspects of Wieber's testimony were not corroborated by other witnesses. No one else testified that Mrs. Justison exhibited violent behavior. In addition, even Wieber's testimony on those subjects lacked any detail. She simply stated that Mrs. Justison tried to strangle Wieber's youngest cousin and slapped Wieber's two-year old nephew. She gave no detail about either incident and did not say whether anyone else witnessed them saw or heard about them. It would be reasonable that such events, which even Wieber said were grossly out of character for Mrs. Justison, would have been noted and discussed more thoroughly by the family. Because the testimony about them was so limited and in light of the fact that Wieber's father, David, would benefit directly if the Will is invalidated, the court gives it little weight.

The court next considers the testimony of Boyanek. Viewed as a whole, Boyanek testified that Mrs. Justison had her good and bad days and that she was very distraught and confused on the day of her husband's funeral. The court also notes that Mr. and Mrs. Justison were married for over 50 years. The fact that Mrs. Justison was distraught, confused, and unresponsive on the day of her husband's

funeral does not mean that she was incompetent when she signed her will three months earlier. Many perfectly competent people would react in the same way to the loss of a loved one. This testimony does nothing to rebut the presumptive validity of the Will. In addition, there are aspects of Boyanek's testimony that support a finding of competency.

Finally, the court addresses the testimony of Lowery, who opined that Mrs. Justison was incapable to make changes in her estate plan in 1999. However, the specifics of her testimony do not support this broad opinion. First, Lowery admits that she did not see Mrs. Justison from May 19, 1998 onward,[18] a period of more than 16 months before the Will was executed. Lowery had only one phone conversation with Mrs. Justison in 1999, the substance of which Lowery does not remember.[19] Second, Lowery acknowledged that, during the time that she was there, Mrs. Justison did not have trouble recognizing family members and had no trouble identifying people who came to see her.[20] Again, this evidence does little to rebut the presumptive validity of the Will.

In opposition to the evidence attacking Mrs. Justison's competency is substantial evidence that Mrs. Justison was lucid and coherent when she signed the Will. The only two people to testify about Mrs. Justison's mental state that day,

[18] Joint Trial Ex. 12, Lowery Dep. at 19.
[19] *Id.* at 19.
[20] *Id.* at 10-12.

Robert and Weaver, stated that they believed she was competent. They testified that she was dressed appropriately, understood what was going on, and answered questions appropriately. Moreover, while it is true that Robert's testimony is tainted by self-interest, Weaver's is not.

Weaver also testified that Mrs. Justison came to his office and asked him to prepare a power of attorney more than a year after the Will signing. He again met with her alone and considered her to be competent. A person in advanced stages of dementia would be unable to articulate properly a request for a power of attorney. Furthermore, even if Mrs. Justison was in the advanced stages of dementia and was only experiencing a lucid interval, this is evidence that she was still experiencing lucid intervals more than a year after the Will was signed.

Mrs. Justison's medical records for the relevant time frame suggest that she was often clear and coherent. On December 26, 2001, her records indicate that Mrs. Justison's long-term memory was "actually quite good" and she was described as "awake, alert and oriented."[21] In May of 1999, she was sufficiently competent that her cardiologist instructed her to obtain a diagnostic test, without the doctor feeling the need to provide this instruction to someone else on her behalf.[22] This is in addition to the numerous visits she had with Dr. Manubay, her treating physician, who opined that she was competent to execute the Will.

[21] Joint Trial Ex. 4 at 53.
[22] Joint Trial Ex. 5 at 16.

It is reasonable to conclude that Mrs. Justison was suffering from some form of memory impairment around the time she executed the Will. However, the only evidence relating to the day that Mrs. Justison signed the Will supports a conclusion that she was legally competent. Indeed, the petitioners have adduced no direct evidence that, at that time, Mrs. Justison was incompetent. This, coupled with testimony of her treating physician and the expert, Dr. Sharbaugh, who both opined that she was competent, leads the court to conclude that the petitioners have failed to meet their burden of proving that Mrs. Justison was not legally competent when she executed the Will on September 24, 1999.

IV.

In the alternative, the petitioners have alleged that, either individually or jointly, Mr. Justison or Robert exerted undue influence over Mrs. Justison to force her to execute the Will. This claims also fails.

Undue influence is an excessive or inordinate influence considering the circumstances of the particular case.[23] 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 her mind to the will of another, to overcome her free agency and independent volition, and to compel her to make a will that speaks the mind of another and not her own.[24] The essential elements of undue influence are: (1) a

[23] *Langmeier*, 466 A.2d at 403.
[24] *Id.*

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.[25]

The Delaware Supreme Court established the following guidelines for proving undue influence: (1) the party claiming undue influence has the burden of proving it by a preponderance of evidence; (2) the existence of opportunity and motive, while relevant to the inquiry, do not, of themselves, establish undue influence; and (3) the burden of proof is not met if the evidence supports two equally plausible explanations for a late change of beneficiary, one of which involves undue influence.[26]

The petitioners have adduced no evidence that either Mr. Justison or Robert actually exerted influence over Mrs. Justison. While it is true that at the original meeting with Weaver, Mr. Justison did most of the talking, this does not prove that he subjugated Mrs. Justison's will to his. Weaver opined that this was typical of a couple from their generation. Furthermore, it is quite common for spouses to execute reciprocal wills. A more reasonable inference from this fact is that Mr. and Mrs. Justison agreed on how to distribute their estate and then executed wills commensurate with their wishes.

[25] *West*, 522 A.2d at 1264.
[26] *Id.* at 1264-65

With respect to Robert, there is likewise no evidence that he exerted undue influence over his mother. He did not discuss his parents' estate plans with Weaver and was never present when they met with Weaver. Nor was Robert present when his parents executed their wills. Furthermore, there is no question about Mr. Justison's competence, nor any suggestion that Robert exerted undue influence on him. Thus, the fact that Mr. and Mrs. Justison executed reciprocal wills further erodes any suggestion that Robert unduly influenced his mother.

Additionally, the petitioners have failed to prove a result reflecting undue influence. The disposition in the Will is not irrational or illogical. In fact, it seems to conform to the wishes of Mr. and Mrs. Justison. The record is clear that Mr. and Mrs. Justison were angry with Elizabeth because she had gotten a divorce and had started a relationship of which they disapproved. On numerous occasions, both Mr. and Mrs. Justison told other family members that they were going to disinherit her. As she was the primary recipient under the preceding will, they needed to change their wills to accomplish this purpose. It also makes sense that Mr. and Mrs. Justison would leave the house to Robert, since he had no other home and they were grateful to him for having come to live with them.

The court, therefore, must conclude that the petitioners have failed to meet their burden in proving undue influence in the execution of the Will.

V.

The petitioners claim that, after the death of Mrs. Justison, they entered into a binding contract with Robert to sell the family home and split the proceeds four ways. This claim fails because the petitioners did not establish the elements of a contract. Under Delaware law, the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.[27] There has been no proof of mutual assent.

Only Joseph specifically claimed that an agreement had been reached. David stated that the petitioners asked Robert to either rent or sell the property, with a portion of the monies to go to the petitioners. David stated that Robert responded that he would think about it, but never responded to this proposal. Elizabeth was silent on any alleged proposal and/or agreement. Robert denied that the parties reached any agreement, conceding only that he had told his brothers and sister that the Will was "unfair," and that possibly he would try to do something for them because of this unfairness. Viewed as a whole, the evidence falls well short of proving the mutual assent needed to give rise to a binding contract.

[27] *Wood v. State*, 815 A.2d 350 (Del. 2003) (citing RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981)).

VI.

The petitioners also seek to reform the Will. The purpose of reformation is to make an erroneous instrument express correctly the intent of, or the real agreement between, the parties.[28] In other words, its purpose is not to make a new contract or an instrument, but to give effect to the original intent of the parties.[29] For example, an instrument will be reformed due to a mutual mistake, such as a scrivener's error.[30]

There is no evidence of a scrivener's error. In fact, Weaver testified that he discussed Mr. and Mrs. Justison's wishes, went over the wills with them, and asked them several times if the wills conformed to their wishes, to which they affirmatively responded. The petitioners introduced no evidence at trial to contradict this testimony. The court must therefore decline to reform the Will.

VII.

Finally, the petitioners request an award of fees for their unsuccessful attempt to invalidate the Will. For an unsuccessful will contestant to receive attorney's fees, she must show, initially, that she had probable cause or reasonable grounds to challenge the validity of the will and exceptional circumstances.[31] It is fair to say

[28] *In re Will of McCall*, 398 A.2d 1210, 1215 (Del. Ch. 1978).
[29] *Id.*
[30] *Millman v. Millman*, 359 A.2d 158, 159-60 (Del. 1976); *McCall*, 398 A.2d at 1215.
[31] *Ableman v. Katz*, 481 A.2d 1114, 1118-20 (Del. 1984), *rev'd on other grounds*, *Melson*, 711 A.2d at 788.

that Mrs. Justison's somewhat impaired mental condition supported the existence of "probable cause" to challenge her mental capacity to execute the Will; however, the record does not reveal the existence of any "exceptional circumstances." Instead, the plan of disposition found in the Will is neither unusual nor surprising. The record shows that the Justisons changed their wills in response to changes in Elizabeth's status and also to take care of Robert after he moved back to the family home to take care of them. As much as the petitioners were disappointed to learn about the Will and the somewhat changed plan of disposition, there is nothing unusual about the Justisons' ultimate decision to leave the family house to Robert following their deaths. Therefore, the court finds no exceptional circumstance and refuses to charge the petitioners' attorney's fees against the estate.

VIII.

For the reasons set forth above, the court finds against the petitioners and in favor of the respondent on all claims. Counsel for the respondent shall submit a form of order in conformity herewith, upon notice, within 10 days.