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Case No. 1451-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN W. MITCHELL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 1451-VCN**
	:	**Consolidated**
JAMES REYNOLDS of Senior Partner Inc., in his capacity as successor trustee of the Revocable Trust of Ruth H. Mitchell u/t/a dated August 21, 1998, last amended on August 4, 2005, and in his capacity as personal representative of the Estate of Ruth H. Mitchell,	:	
and	:	
DONNA BRIGGS,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: September 16, 2008
Date Decided: January 6, 2009
Date Revised: January 7, 2009

Paul G. Enterline, Esquire, Georgetown, Delaware, Attorney for Plaintiff.

Basil C. Kollias, Esquire and Eric M. Andersen, Esquire of Cooch and Taylor, P.A., Wilmington, Delaware, Attorneys for Defendant Donna Briggs.

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NOBLE, Vice Chancellor

These actions, consolidated for trial, raise questions about a now-deceased mother's interactions with her two children, a son and a daughter, and the proper disposition of property belonging to trusts established by their mother and late father. The son brings suit, alleging that certain *inter vivos* transfers to his sister were procured by undue influence. He also questions the validity of amendments to his mother's trust, as well as the disposition of proceeds from the sale of a family home and the treatment of a nursing home reimbursement. After trial, the son and daughter first debated the proper division of certain tangible personal property. The Court now sets forth its post-trial findings of fact and conclusions of law in this memorandum opinion and determines that relief is warranted for a set of transfers induced by undue influence; otherwise, the son's claims are denied. The Court declines to resolve definitively the disposition of the tangible personal property on the current record.

I. INTRODUCTION

Plaintiff John W. Mitchell ("John") filed a complaint on June 22, 2005, against his mother, Defendant Ruth H. Mitchell ("Ruth"), in her capacity as trustee of both the Ruth H. Mitchell Trust (the "Ruth Trust") and the Donald G. Mitchell Trust (the "Donald Trust"), and against his sister Defendant Donna Briggs ("Donna").[1] Following Ruth's death in the summer of 2006, the Court granted

[1] Members of the Mitchell family are referred to by their first names.

John's motion to substitute Defendant James Reynolds of Senior Partner, Inc. ("Senior Partner"), as successor trustee of the Ruth Trust and as personal representative of Ruth's estate.[2] Senior Partner filed a petition for instruction.

II. BACKGROUND

A. *The Original Trust Agreements*

John and Donna are the children of Ruth and Donald G. Mitchell ("Donald"). On August 21, 1998, Ruth and Donald executed revocable trust agreements creating the Ruth Trust and the Donald Trust, respectively. David W. Baker, Esquire, drafted the original agreements. He had been recommended by David N. Rutt, Esquire, who had drafted a will for the Mitchells in 1995 and served as Ruth and Donald's primary counselor thereafter.

The Donald Trust designated Donald as trustee and Ruth as substitute trustee and became irrevocable upon his death on January 14, 1999.[3] It was funded by a one-half interest in Donald and Ruth's home in Milford Delaware (the "Milford Property"), a house in Camden, Delaware (the "Camden Property"), and the funds in their Merrill Lynch accounts. The Donald Trust provided that after his death, Ruth was to receive all trust income, if she survived him. After the death of the survivor, the Milford Property was to be distributed to John, along with Donald's

[2] Ruth's death has rendered any issue concerning her disqualification as trustee moot.
[3] *See* PX A (the Donald Trust agreement).

vehicle; the Camden Property was to be distributed to Donna, along with Ruth's vehicle; $7,500 of the remaining trust property was earmarked for distribution to charity; and any balance after that was to be distributed equally between John and Donna.

As originally established, the Ruth Trust was structured to interlock with the Donald Trust.[4] Ruth created the Ruth Trust, naming herself as trustee with Donald as substitute trustee; it was revocable until her death on August 7, 2006.[5] The Ruth Trust was funded with the remaining one-half interests in the same assets that formed the corpus of the Donald Trust. On Ruth's death, if she survived Donald, the Ruth Trust similarly provided that the Milford Property and Donald's vehicle would go to John; the Camden Property and Ruth's vehicle would go to Donna; $7,500 would go to charity; and John and Donna would split any remaining trust property. As described below, Ruth amended her trust several times after Donald's death.

Donald and Ruth executed a bill of sale contemporaneously with the trust instruments that transferred an undivided one-half interest in their joint personal

[4] *See* DX A (the Ruth Trust agreement).

[5] On Ruth's death, John became the successor-trustee of the Donald Trust. The caption suggests that John brought this action in his individual capacity and arguably not as trustee. Because the Court's determination will have consequences for the administration of the Donald Trust and because the parties have fairly joined issue with respect to matter affecting the Donald Trust, the Court will not dwell upon the particular capacity in which John has asserted various claims and contentions.

property to each trust.[6] Donald also executed a separate bill of sale providing that all his tangible personal property not jointly owned would flow to his trust.[7] Ruth did likewise.[8] The bills of sale did not enumerate or otherwise describe the items.

B. *The Credit Cards and the Alleged Fabrications*

In 2000 or 2001, not long after Donald's death, John discovered that Donna had taken out credit cards in their parents' names. John learned about the cards while their mother was recuperating from a hip procedure in the hospital, and he referred the matter to Delaware's Adult Protective Services. Donna had charged between $5,000 and $10,000 on the cards. Ruth learned about the incident later, but she and Donna quickly reconciled;[9] however, she was "very upset" that John had contacted Adult Protective Services.[10] Although John had reported the incident anonymously, Ruth discovered that he was the source. This caused a rift between the two, and afterwards, John was distant from his mother.[11]

John alleges that around this time, he learned that Donna had been employing a series of fabrications to solicit money from Ruth (forming the basis of

[6] Suppl. DX D.
[7] Suppl. DX F.
[8] Suppl. DX E.
[9] Donna agreed to work off the debt. Thereafter, Ruth considered the incident resolved and in the past. Ruth had previously given John's family money and did not view Donna's conduct as an unforgivable transgression.
[10] Tr. at 142 (John's testimony).
[11] *Id.* at 144-45 (John's testimony).

what the Court refers to as the "Fabrication Claims"). While investigating the credit cards, John found a letter to Ruth claiming that Donna's husband, Grayson Briggs ("Grayson"), had died (the "Grayson Letter").[12] The letter purports to be authored by an attorney, but John contends its authenticity is dubious. Grayson was alive at all times pertinent to this action; John and his wife, Terri Mitchell ("Terri"), testified that the Grayson Letter was part of Donna's attempt to create the impression that Grayson had died, and that Ruth had indeed thought that he was deceased at some point.[13] Donna denies this, and Sylvia Gilmore, Ruth's best friend, testified that, although Ruth was aware of the letter, she never thought Grayson was dead.[14] The Reverend John Gilmore, Mrs. Gilmore's husband and Ruth's former pastor, testified similarly.[15]

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[12] PX E (the Grayson Letter).

[13] John has also pointed to a report prepared by Adult Protective Services to show that Ruth believed Grayson had died. In the report, the investigator noted,

> [Ruth] said the only concern she has is that her daughter may be doing something illegal by receiving [Social Security] benefits from her deceased husband. . . . She says she has a letter from a lawyer saying that [Grayson] is dead and that her daughter is not doing anything illegal. She verified that her daughter has used four (4) different names.

PX C (June 26, 2000, entry). The parties have debated the propriety of admitting PX C under D.R.E. 803; however, the Court need not resolve this evidentiary issue. *See infra* note 72.

[14] Mrs. Gilmore and Ruth's friendship became closer after Donald's death. Typically, by 2001, Mrs. Gilmore would visit Ruth at least once a week. Mrs. Gilmore has stated that she disapproves of John's decision to bring this suit.

[15] Reverend Gilmore also testified that Grayson attended Ruth's ninetieth birthday celebration on June 6, 2005.

John also claims that Donna misled Ruth in other ways. He maintains that Donna told Ruth that she and Grayson were divorced, that her daughter Cathy had ovarian cancer, and that her son Freddie was attending culinary school at the University of Delaware, all contrary to fact. Donna has denied doing so, and the Gilmores' testimony again supports her position.

John does not dispute that Ruth was competent and had her faculties during this period, but asserts that these fabrications led her to transfer considerable sums to Donna from her Wilmington Trust checking account.[16] He claims that Ruth wrote Donna thirty-five checks in 1999 totaling $8,994.30 and twenty-one checks in 2000 for $4,828.00.[17] He also questions checks written to Donna for $2,268 in 2001, $5,426 in 2002, and $11,519 in 2003.

Although the Gilmores testified that Donna was not pressuring Ruth for money, Mrs. Gilmore did state that Ruth felt John and Terri were pressing her. Sometime before John contacted Adult Protective Services, Ruth had drawn roughly $75,000 through a home equity loan against the Milford Property, which was titled in the Ruth and Donald Trusts. Some of the money was used for repairing the house, an effort in which John assisted, but much of it was given to

[16] John argues that Ruth lacked capacity as of the spring and summer of 2005.

[17] PX M; *see* PX H. In presenting these annual checking activity summaries, the Court does not endeavor to provide a definitive transactional history and instead relies on John's account as presented in PX M. In total, John disputes checks written for $54,963.30 to Donna and checks totaling $3,875.48 for taxes and insurance on the Camden Property, Donna's residence.

John and Terri. Between April 4, 2000, and July 21, 2001, Ruth wrote Terri thirteen checks totaling $24,500, and on May 2, 2002, she wrote a check for $23,711.40 to a local car dealership to help John purchase a new truck.[18] Terri testified that some of the checks were payments and reimbursements for work on Ruth's home and that some were gifts.[19] John admits receiving $75,000 from Ruth, claiming that it was a gift intended as an advancement on his inheritance. Ruth characterized the transfers as a loan.[20]

C. *The Move to Westminster and the First Amendment to the Ruth Trust*

Ruth resided in the Milford Property, a home that she and Donald had built in 1964 after moving to Delaware from Massachusetts, until early 2001 when her health, despite round-the-clock care, persuaded her that her days of living in her home were limited and that she needed additional assistance. She decided to sell her home and to move to Westminster Village ("Westminster"), a continued care retirement community in Dover. The Milford Property had been the home of John's youth, and he was very upset that his mother had decided to sell it. John was, in Mr. Rutt's words, "very angry."[21] John's reaction upset Ruth who had

[18] DX B (cancelled checks).
[19] Ruth also took $15,000 out of the home equity line on March 20, 2000. John, Terri, and Donna have all denied receiving the proceeds of this draw.
[20] In her Counterclaim, Ruth asserted that she had loaned John $75,000 before moving to an assisted living community in Dover, *see infra* Part II.C, and that he had failed to repay the sum. Ruth's Countercl. ¶¶ 2-3.
[21] Tr. at 225.

concluded that the move was necessary.[22] The deposit for Westminster was paid through checks written on January 29, 2001, and February 20, 2001. The January check was from the Donald Trust for $40,000; the February check was from Ruth's trust for $75,500.[23] After Ruth's death, the Ruth Trust received $81,749.60 in reimbursements.

It is unclear how often John saw Ruth before she moved to Westminster;[24] While still in Milford, Terri had daily contact with her mother-in-law, and the two visited regularly. Afterwards, Terri saw Ruth less frequently, perhaps two or three times a month. She testified that she would visit Ruth whenever she was in Dover or whenever Ruth was hospitalized, and that they frequently spoke by telephone. [25] John kept his distance from Ruth, seldom visiting.[26]

The Milford Property sold on August 28, 2001, for $265,000, leaving $171,116.84 after paying expenses and the home equity loan's balance.[27] Although a good portion of trial was directed at tracing these proceeds,

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[22] Mr. Rutt was present when Ruth informed John. He stated that Ruth was still extremely upset over this incident years later in 2005. Reverend Gilmore also testified about a meeting at the Milford Property among Ruth, John, and Mr. Rutt; he had been invited by Ruth as a calming presence so that John would not speak explosively to Mr. Rutt. At about this time, Ruth revoked John's power of attorney.

[23] John does not contend that Ruth's use of these funds was improper.

[24] Ruth had accompanied his family on a vacation to Massachusetts in the summer of 2000.

[25] Terri also stated that she took her children to see their grandmother often.

[26] Tr. at 145 (John's testimony). John did have some contact with his mother. In 2001 and 2002, Ruth accompanied John and his family to funerals in Massachusetts. John also visited Ruth at Westminster on at least two occasions, one in May of 2005 and the other in the summer of 2006.

[27] PX L. John does not contest Ruth's power to have sold the Milford Property.

supplemental information has revealed that $85,558.42 was deposited in each trust.[28]

Ruth amended her trust agreement for the first time in 2002.[29] With the Milford Property sold, she deleted the provision distributing her interest in it to John and provided that he was to be given $75,000 instead. She also added Donna as a substitute co-trustee—under the original agreement, John had been named as the sole substitute trustee.

Mr. Rutt drafted the amendment in consultation with Ruth, and she executed it in his presence on October 1, 2002. He had no doubt that she had capacity. As with many attorneys assisting elderly clients in ordering their affairs, Mr. Rutt typically would engage clients in conversation to assess their capacity. In this instance, his general familiarity with Ruth, her family relationships, and her financial situation is undisputed.

At the same time, Ruth also executed a second codicil to her will inserting a pour-over provision providing that all property that she owned at death was to be distributed to her trust.[30] She also executed a durable springing power of attorney naming John and Donna as co-attorneys-in-fact in the event she became disabled

[28] PX O.
[29] Suppl. DX C (the first amendment).
[30] Suppl. DX B (the second codicil).

or incapacitated,[31] and at some point, she granted Donna a separate medical power of attorney.[32]

D. *Ruth's Deteriorating Health and the Illness Claims*

By early 2004, Ruth's health had begun to decline. She was hospitalized briefly in May with bronchitis/pneumonia and congestive heart failure.[33] By December, her health had deteriorated further, and from that point until June 2005, she was very ill. Ruth was hospitalized again on February 20, 2005, once again for congestive heart failure. She was also having severe kidney problems. In the hospital, a renal specialist found Ruth pleasant and cooperative, but stated that her speech was somewhat slow and that it took her a while to find words. Another consulting physician noted that she was functionally limited and had frequent falls. Ruth was discharged to Westminster on February 23, and Donna took a leave of absence to help care for her.

Back at Westminster, Ruth was considered terminal for a time and received hospice visits. She was expected to die from kidney failure. During this period, the acute phase of Ruth's illness from late February until June of 2005, she could not take care of her daily living activities and was given Ativan, an anti-anxiety

[31] PX N. The record does not reveal who, if anyone, held powers of attorney for Ruth from early 2001, when she terminated John's power of attorney, until this point.
[32] This may have occurred in 2002.
[33] Ruth was also suffering from anemia, hypertension, osteoporosis, macular degeneration, and vertebral compression fractures.

sedative, and morphine sporadically.[34] Ruth also had vision and hearing problems. In fact, Mr. Rutt testified that he would place his finger above the signature line on documents so that Ruth could see where to sign; because of her deteriorating eyesight, her signature differed each time. As to Ruth's mental capabilities, although a brief mental examination conducted in late September 2005 indicated that Ruth had "independent ability,"[35] two witnesses testified that she had "good days" and "bad days" during her illness.[36] When asked if he was worried at the time that Ruth might make a mistake managing her finances, Garrett Grier, Ruth's longtime financial consultant at Merrill Lynch, responded, "Maybe so."[37]

Donna spent a significant amount of time with Ruth from March until June of 2005. Although Ruth continued to receive nursing care at Westminster, Donna provided Ruth with emotional support and also attended to some of her daily needs. As discussed below, Donna had some responsibility over Ruth's finances

[34] *See* PX F.

[35] *See* DX E (the mini-mental exam). A mini-mental exam is a baseline test of cognitive functioning. On the September 2006 exam, Ruth scored 24 out of a possible 26. Ruth had undergone other cognitive evaluations at times relevant to this action. She took similar mini-mental exams on June 26, 2000, scoring 29 out of 30; on July 12, 2004, scoring 26 out of 26; on April 13, 2006, scoring 26 out of 26; and two weeks before her death, on July 24, 2006, scoring 25 out of 26. *See* DX C, D, G, H. Two neurological flow sheets, tests assessing a patient's neurological status, from 2006 likewise indicated no impairments. *See* DX F, I.

[36] Tr. at 297 (Garrett Grier's testimony); *Id.* at 345 (Donna's testimony). In contrast, the Gilmores testified that Ruth was competent during this period. Given that Donna's testimony was against her interest in this litigation and that Mr. Grier's attention was perhaps more focused on Ruth's competency than the Gilmores', the Court credits Donna and Mr. Grier's assessments on this point.

[37] *Id.* at 297.

and even helped Ruth write checks. During this interval, Donna has implied that she was regularly by Ruth's side, save for brief intervals when she was relieved by her daughter.[38]

Concerned about Ruth's health, comprehension, and decision-making abilities, John had contacted Ruth's doctor, Deborah Kirk, M.D., in March. John's worries were driven by what he described as past issues of financial exploitation. Ruth initially agreed to see Dr. Kirk, but cancelled the appointment after learning the purpose of the visit was to assess her competency. Between her February hospitalization and August 2005, Ruth did not see Dr. Kirk. Daniel Coar, M.D., Ruth's renal specialist, found this "surprising and alarming."[39]

At about this time, Mr. Grier became concerned about Ruth's finances. Mr. Grier was contacted by Westminster in early June and informed that Ruth's account was sixty days overdue. Donna was responsible for making Ruth's Westminster payments, and although she paid the overdue balance immediately, Mr. Grier counseled cancelling Ruth's Wilmington Trust checking account.[40] That was done, and Mr. Grier set up another account for direct payment of her

[38] *See id.* at 132.
[39] PX E.
[40] There is some disagreement as to whether Donna was solely, partially, or at all responsible for the Westminster account. *Compare* Tr. at 115-16 (Donna's testimony disclaiming responsibility), *with* PX I (email from a Westminster manager noting Donna's sole responsibility). The better view is that Donna was responsible for keeping the account current.

expenses.[41] Mr. Grier worried that Ruth was giving Donna too much money and might be forced to invade her principal.[42] He told John as much, who once again contacted Adult Protective Services.[43]

In 2004, John alleges that Ruth wrote Donna seventeen checks from the Wilmington Trust account totaling $5,719, eight checks from the Ruth Trust totaling $2,494, and one check from the Donald Trust for $645.[44] For 2005, John questions thirty-nine checks from the Ruth Trust totaling $13,735.[45] Among these, Ruth wrote Donna three checks on April 15, one for $380, one for $365, and another for $260; two checks on April 21, one for $365 and another for $250; and one check on May 27 for $365 and another on the following day for the same

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[41] Before Mr. Grier initiated the automatic draft, Donna most likely paid the Westminster bills out of Ruth's Wilmington Trust account.

[42] *See* Tr. at 303 ("It just seemed a bit excessive to me." (Mr. Grier's testimony)).

Mr. Grier agreed that Ruth at this time was able to handle her own finances:

> Q (by Mr. Enterline): Did you have any concerns about Ruth Mitchell's ability to manage her financial affairs at this point?
>
> A: No.

Id. at 288. Mr. Grier's testimony spanned several years and the record—certainly not his fault—is not particularly helpful as to the timing of his perceptions about Ruth's capacity. It ranges from she had "good days" and "bad days" to having no concerns about her ability to manage her finances. His testimony about someone he knew reasonably well, when taken as a whole, is consistent. During the last few years of Ruth's life, he was uneasy about her ability to deal with her finances and to make judgments regarding such matter as gifts to Donna. Yet, during the period at issue, he never reaches the conclusion that she could not exercise the judgment necessary to manage her affairs.

Mr. Grier also suggested that Ruth execute a power of attorney in favor of her children. She declined to grant any new power of attorney, presumably because the powers of attorney she had granted in favor of John and Donna in 2002 were still effective.

[43] There is no evidence as to what, if any, ramifications this second resort to Adult Protective Services precipitated.

[44] *See* PX M.

[45] *See id.* Mr. Grier stopped payment on one check written for $1,800.

amount.[46] The checks reached a maximum number in May, were slightly less numerous in June, and dropped off considerably thereafter. In the acute phase of her illness, from late February to June 2005, Ruth wrote Donna thirty-four checks for $11,500 (forming the basis of what the Court terms the "Illness Claims"). John contends these checks, including but not limited to the Illness Claims checks, resulted from undue influence.[47] Neither he nor Terri was present when any of the checks were written.

Donna testified the checks were remuneration for her services and explained that they declined in frequency after June because she had returned to work. Ruth had wanted a family member to care for her and had promised to assist Donna financially in exchange for her care and affection. As with many intrafamilial arrangements, Donna and Ruth never established specific terms regarding their agreement.

Although Donna denied signing any of the checks, her testimony was inconsistent on whether she had assisted her mother in writing some of them. Eventually, Donna admitted helping her mother fill out portions of some checks,

[46] *See* PX H.

[47] John has also claimed that some of the checks are forgeries: he testified that none appeared to contain his mother's genuine signature. Tr. at 207. Terri testified similarly. *Id.* at 55-56.

including the payee line and the amount payable fields.[48] In any event, Donna testified that she did only as her mother directed.

E. *John's Action in this Court and the Final Amendments to the Ruth Trust*

John filed his action on June 22, 2005, averring, among other things, that his mother had a "weakened intellect."[49] Predictably, Ruth was upset. She was also upset that John and his family seldom contacted her, and she was still agitated by John's anger over her decision to sell the Milford Property.

On August 4, 2005, before being served with the complaint in this matter, Ruth asked Mr. Rutt to draft an affidavit stating that she was aware of John's suit and its allegations against Donna, and that any funds given to or spent by Donna were with her consent. The affidavit included the following statements:

> 6. In the exercise of my powers as Trustee, I have either spent the funds [the challenged sums from 1998 to the then-present] allegedly spent by [Donna] myself, or have authorized her to spend these funds on my behalf.
>
> 7. A portion of the funds spent were paid to [Donna] to compensate her for her time, effort and consideration given to me during periods when I was physically ill and in need of a caregiver.

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[48] *Compare id.* at 114 (Q: Did you help write any of the checks? A: No.), *and* Donna's Answer to Interrog. 6(a) ("Did you write, or did you assist Ruth Mitchell in writing, any part of the handwriting appearing on the front of [any of the checks in Exhibit H]? ANSWER: No."), *with* Tr. at 332-33 ("Q: So you did fill out your name on part of these checks? A: Yes, and she filled out the rest. Q: She filled out the amount? A: Yes. Q: Both in numbers and in letters? A: Most of the time, yes."). To the extent that John seeks sanctions based on Donna's inconsistent responses, the Court concludes that sanctions are not warranted because Donna's conduct did not amount to a "deliberate scheme to directly subvert the judicial process." *Smith v. Williams*, 2007 WL 2193748, at *6 (Del. Super. July 27, 2007).

[49] Compl. ¶ 32.

> Had she not provided her time and care to me, I would have had to hire a third-party stranger to do the things [Donna] did for me.
>
> 8. All checks for funds paid from the Trust(s) were personally signed by me.[50]

Ruth signed the affidavit in Mr. Rutt's presence; he testified that she had her faculties and understood the document. He did indicate, however, that he was unsure if she had actually investigated the checks in question.

That same day, Ruth amended her trust agreement a second time, deleting the provision leaving John $75,000.[51] According to Mr. Rutt, Ruth's decision was based on John's conduct over six or seven years, and the instigation of this litigation was a precipitating cause. The second amendment also named Senior Partner as the lone substitute trustee, replacing John and Donna as co-trustees. Mr. Rutt drafted the second amendment and stated that Ruth had capacity to execute it and that it was consistent with her intent; there was no reason to think that Donna was pressuring her.[52]

In September, Ruth executed a durable power of attorney in favor of Mr. Reynolds, revoking John's and Donna's powers of attorney from 2002.[53] Ruth was engaged and had full awareness.

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[50] DX L (the affidavit).
[51] Suppl. DX C (the second amendment). The Ruth Trust's residuary clause continued to provide that John was to receive one-half of any remaining trust property after the enumerated distributions.
[52] Tr. at 239. Donna was not present in the room when Ruth executed the second amendment.
[53] *See* DX P.

On March 28, 2006, Ruth amended her trust a final time, directing that all tangible personal property be distributed to Donna.[54] Mr. Rutt drafted the amendment after receiving a fax listing items that Ruth wanted Donna to have following her death. The fax was sent by Donna but signed by Ruth. Mr. Rutt called Ruth to discuss the list, and she confirmed it reflected her intentions. Mr. Rutt suggested it be formalized, and he drafted the final amendment.[55] Ruth executed the document in Mr. Rutt's presence, and again, he confirmed her understanding.

F. *Tangible Personal Property*

At the time of her death, Ruth had several items of tangible personal property in her Westminster apartment. Some of the items, including furniture, decorations, jewelry, and small incidentals, were valued by an appraiser at approximately $3,540 (the "Valued Items"). A few items were not included in the appraiser's valuation (the "Unvalued Items").

III. CONTENTIONS

John contends that Ruth's *inter vivos* transfers to Donna from August 22, 1998, to the date of this action's commencement were the products of fraud and

[54] DX Q (the third amendment); Suppl. DX I. Ruth had also executed a separate writing presumably pursuant to 12 *Del. C.* § 212 providing similarly on February 21, 2006. Suppl. DX H.

[55] Unlike the fax, the amendment does not enumerate items in list form, instead providing, "I direct that all tangible personal property which I have bequeathed to my Revocable Trust dated August 21, 1998, as amended, to be given to my daughter, DONNA G. BRIGGS." DX Q.

undue influence, and he asks that a constructive trust be imposed. Further, he contests the validity of the Ruth Trust's amendments, arguing that they were executed either without capacity or under undue influence.[56] Alternatively, he contends they should be denied effect as a form of wrongful retaliation for actions taken to protect his mother and his beneficial interests in the trusts. John also asserts that he is entitled to recoup the net proceeds from the sale of the Milford Property under the trust agreements and that a portion of the Westminster reimbursement should be returned to the Donald Trust. Finally, he submits that half of the tangible personal property belongs to the Donald Trust. Donna disagrees on all scores.

IV. ANALYSIS

Before addressing John's claims individually, a brief contextual background to the Court's approach may prove helpful. Ruth was very generous to both her children; while she was alive, she gave Donna and John considerable sums. Although John's concern over Donna's conduct with the credit cards was natural and reasonable, the record demonstrates that Ruth forgave Donna for this wrong and continued to love her despite her flaws.[57] Ultimately, John is correct that Donna is not to be trusted. His mother, however, understood Donna for what she

[56] Arguably, his attacks implicate one or more of the three codicils to Ruth's will. *See supra* note 97.
[57] *Compare Luke* 15:11-15:32 (Parable of the Prodigal Son).

is and accepted her. In short, Ruth, for the most part, was either not a victim of Donna's devious nature or had forgiven her transgressions. John's relationship with Ruth suffered, though, because she did not approve of his decision to go outside of the family to report the matter to Adult Protective Services. John did not attempt to mend this rift; instead, his anger over Ruth's decision to sell the Milford Property and his failure to visit her more than a handful of times afterwards only widened it.

A. *Ruth's Inter Vivos Transfers to Donna and the Trust Amendments*

Generally, voluntary transfers—gifts, payments, contractual exchanges, and other transfers made on a person's prerogative and unforced by legal obligation—are valid and legally enforceable. Through a perfected *inter vivos* gift, a donor may give her property to whomever she pleases and the donee may call upon the courts to enforce the transfer.[58] In forming a trust, a settlor may pursue any purpose that is not unlawful or contrary to public policy.[59] Donors enjoy similar freedom in making testamentary gifts. A testator may order his estate "as he sees fit,"[60] and

[58] *Hill v. Baker*, 102 A.2d 923, 925 (Del. Super. 1953); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 6.1, 6.2 (2003). Rules against perpetuities, as well as impossibility or indefiniteness in identifying beneficiaries, may also constrain a donor. *See* 12 *Del. C.* § 3535.
[59] *See* RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).
[60] *In re Potter's Will*, 275 A.2d 574, 580 (Del. Ch. 1970).

courts will not second-guess unequal treatment: a "testator may be as arbitrary as he pleases in disposing of his property."[61]

Of course, various doctrines exist to protect a person's free choice to transfer property. Among them are rules requiring that the transferor have capacity[62] and that her decision be free from fraud and undue influence.[63] These doctrines, particularly undue influence, provide the legal framework for John's root contention that deception and exploitation infected every aspect of Ruth and Donna's relationship.

1. Ruth's Inter Vivos Transfers to Donna

John's challenges to Ruth's *inter vivos* transfers to Donna may be divided into two categories, the Fabrication Claims and the Illness Claims. In the Fabrication Claims, John attacks transfers in the period around 1999 as stemming from what he has framed as undue influence by false pretenses. In the Illness Claims, he questions transfers in the spring and summer of 2005 as resulting from undue influence, with a focus on Ruth's susceptibility due to her serious health

[61] *Carlisle v. Del. Trust Co.*, 99 A.2d 764, 772 (Del. 1953).
[62] *E.g.*, *Estate of Carpenter v. Dinneen*, 2008 WL 859309, at *13 (Del. Ch. Mar. 26, 2008) (gifts); *In re Will of McElhinney*, 2007 WL 2896013, at *3 (Del. Ch. Oct. 1, 2007) (wills and trusts); *Faraone v. Kenyon*, 2004 WL 550745, at *10 (Del. Ch. Mar. 15, 2004) (contracts).
[63] *E.g.*, *Gay v. Delmarva Pole Bldg. Supply, Inc.*, 2008 WL 2943400, at *7 (Del. Super. July 18, 2008) (fraud and misrepresentation); *Haase v. Grant*, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008) (same); *In re Estate of Porter*, 2007 WL 4644723, at *7 (Del. Ch. Dec. 31, 2007) (undue influence); *Clark v. Ryan*, 1992 WL 163443, at *5 (Del. Ch. June 17, 1992) (same). A transfer must also be free from duress. *Cianci v. JEM Enter., Inc.*, 2000 WL 1234647, at *9 (Del. Ch. Aug. 22, 2000). John has not argued duress, and accordingly, the Court does not consider it.

issues. Taking up these claims chronologically, the Court first turns to the Fabrication Claims.[64]

a. *The Fabrication Claims*

John has alleged that Donna caused Ruth to believe, falsely, that she and Grayson were divorced, that Grayson was dead, that her daughter Cathy had cancer, and that her son Freddie was attending the University of Delaware, all as part of a scheme to solicit money from Ruth. Donna refutes these claims.

Because John has couched the Fabrication Claims primarily in terms of undue influence, that doctrine underpins the Court's analysis. A transfer induced by undue influence vitiates the transferor's volition and may be denied effect.[65] Undue influence occurs when a party exerts immoderate influence under the circumstances that overcomes the transferor's free will, resulting in a transfer that is not of her own choice and mind.[66] It "is an excessive or inordinate influence considering the circumstances of the particular case."[67] Undue influence may be exercised in any number of ways, including by "solicitation, importunity, flattery,

[64] John has broadly attacked all transfers to Donna from the formation of the trusts onwards. The Court addresses his claims only to the extent that John has presented any credible supporting evidence.
[65] *See Clark*, 1992 WL 163443, at *5.
[66] *In re Estate of Porter*, 2007 WL 4644723, at *7; *see In re Will of Langmeier*, 466 A.2d 386, 403 (Del. 1983).
[67] *In re Will of McElhinney*, 2007 WL 2896013, at *3.

putting in fear or in some other manner."[68] Unfair persuasion is the hallmark of undue influence.[69]

Proving undue influence requires a challenger to show "(1) a person who is subject to undue influence; (2) an opportunity to exert influence; (3) a disposition to exert such influence; and (4) a result indicating the presence of undue influence."[70] Absent circumstances not implicated by the Fabrication Claims, the challenger bears the burden of demonstrating undue influence, a burden John has not carried.[71]

John's anxiety that Donna may have been less than forthright with Ruth is certainly understandable. Several facts would make a reasonable person uneasy: Ruth wrote Donna checks from 1999 to 2003 totaling some $33,035, a considerable amount that could easily be viewed with a jaundiced eye given Donna's conduct with the credit cards. Moreover, the Grayson Letter is suspicious, at best: although the Court cannot conclude by a preponderance of the

[68] *In re Langmeier*, 466 A.2d at 403.
[69] E. ALLAN FARNSWORTH, CONTRACTS § 4.20 (4th ed. 2004).
[70] *McAllister v. Schettler*, 521 A.2d 617, 623 n.4 (Del. Ch. 1986); *accord In re Will of Langmeier*, 466 A.2d at 403; *In re Peterman*, 2007 WL 2198765, at *7 (Del. Ch. July 17, 2007).
[71] The burden of proof shifts where the challenger shows by clear and convincing evidence that the parties were in a fiduciary or confidential relationship. *See infra* Part IV.A.2. John has not made this showing in regard to the Fabrication Claims; thus, the usual presumption applies.

evidence that it was written by Donna, the evidence drifts in that direction.[72] Uneasiness, however, is not the requisite showing.

Although Donna may have had the opportunity to exert undue influence over Ruth and was likely disposed to do so, John has failed to meet his burden in regard to the remaining elements.[73] The record does not show that Ruth was susceptible during this period. John admits that she had her faculties; and although capacity is a concept distinct from susceptibility, it informs the analysis.[74] Without evidence showing Ruth's dependence on Donna or a particular predisposition to accede to her demands, the Court declines to find susceptibility. As to the actual exertion of undue influence, the evidence is not persuasive. Apart from the Grayson Letter, which John discovered and has been unable to show originated with Donna, the

[72] The Court finds the Adult Protective Services report discussing Grayson's social security benefits similarly inconclusive. *See supra* note 13 (discussing PX C). Although the parties have debated whether the exhibit should be admitted, the Court need not resolve this evidentiary issue. Lacking full context, it is difficult to discern whether the report indicates (i) that Ruth thought Grayson was dead or (ii) that she thought Donna was illegally collecting survivor's benefits for a living husband but defended her as best she could by citing the Grayson Letter. Regardless, the report would primarily underscore Ruth's recognition that Donna's integrity was not beyond reproach.

[73] In reaching this conclusion, the Court does not rely on Ruth's affidavit. Although Mr. Rutt testified that Ruth intended to ratify all transfers to Donna with that document, the affidavit itself is directed primarily toward transfers that occurred during Ruth's illness.

For the same reasons John's claim for undue influence must fail, the facts as presented do not support relief on the basis of misrepresentation. Misrepresentation, whether sounding in contract or tort, requires proof of a misrepresentation inducing action or inaction, *Haase*, 2008 WL 372471, at *2 (tort), *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. 1990) (contract), a showing John has failed to make. The Court cannot conclude by a preponderance that Donna made misrepresentations and there is no evidence of inducement given that Ruth gave John significant amounts of money absent misrepresentation.

[74] *E.g.*, *In re Estate of Porter*, 2007 WL 4644723, at *8.

only evidence of the fabrications was supplied by John and Terri's testimony, which the Gilmores contradicted.[75] Finally, and perhaps most persuasively, there is no result indicating unfair persuasion. Ruth gave significant sums to John and his family during this period. These transfers, which likely included the home equity loan proceeds that John has admitted receiving as a gift from Ruth, support the inference that she would have been likely to make similar transfers to Donna absent undue influence.

b. *The Illness Claims*

John next contests transfers to Donna during Ruth's illness as the result of undue influence. He offers that Ruth wrote Donna checks for significant amounts during that span, a time in which her health was poor and her functioning impaired. Donna replies that that the transfers were compensation for assisting in Ruth's care.

As touched on above, a challenging party usually bears the burden of demonstrating undue influence, but in certain circumstances, this typical presumption in favor of validity of the gift dissipates.[76] The presumption against undue influence tainting an *inter vivos* transfer may be rebutted by clear and

[75] The Court does not blindly rely on the Gilmores' testimony: it is uncertain they would have necessarily been made aware of any alleged fabrications.

[76] *See, e.g.*, *In re Will of Melson*, 711 A.2d 783, 786 (Del. 1998) (citing *In re Norton*, 672 A.2d 53, 55 (Del. 1996)); *Singh v. Batta Envtl. Assocs., Inc.*, 2003 WL 21309115, at *6 (Del. Ch. May 21, 2003).

convincing evidence showing that the parties were in a fiduciary or confidential relationship.[77] In those instances, the proponent must demonstrate the absence of undue influence and the transfers' fairness by a preponderance of the evidence, rebutting a presumption of fraud.[78]

A number of circumstances may give rise to a fiduciary relationship. Formal fiduciary relationships exist between general partners, guardians and wards, and attorneys and clients.[79] Trustees are also fiduciaries,[80] and estate executors are charged with fiduciary obligations,[81] as are agents.[82] "Generally, [a] fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another."[83]

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[77] *See Hudak v. Procek*, 806 A.2d 140, 147 n.12 (Del. 2002); *Robert O. v. Ecmel A.*, 460 A.2d 1321, 1323 (Del. 1983) (establishing the fiduciary and confidential relationship exceptions in the contract setting), *overruled on other grounds by Sanders v. Sanders*, 570 A.2d 1189 (Del. 1990); *Coleman v. Newborn*; 948 A.2d 422 (Del. Ch. 2007) (applying these exceptions in the gift setting). For a description of how the burden-shifting framework operates in the will context, see *infra* Part IV.A.2.

[78] *Coleman*, 948 A.2d at 429; *Swain v. Moore*, 71 A.2d 264, 267 (Del. Ch. 1950).

[79] *E.g., Keith v. Sioris*, 2007 WL 544039, at *7 (Del. Super. Jan. 10, 2007).

[80] *E.g., Law v. Law*, 1997 WL 633293, at *2 (Del. Ch. Oct. 2, 1997) ("Trustees owe a duty of loyalty to all classes of beneficiaries."), *aff'd in part, rev'd in part on other grounds*, 753 A.2d 443 (Del. 2000).

[81] *Vredenburgh v. Jones* 349 A.2d 22, 32 (Del. Ch. 1975).

[82] *E.g., Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999); *Estate of Carpenter*, 2008 WL 859309, at *12; *Coleman*, 948 A.2d at 429; *Faraone*, 2004 WL 550745, at *11. An attorney-in-fact must discharge her duties in the best interests of her principal as dictated by the duty of loyalty. *E.g., Coleman*, 948 A.2d at 429. Unless the principal obtains independent advice from a competent and disinterested third party and consents after full disclosure, a self-dealing transaction is voidable in equity. *E.g., id.*

[83] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006) (alteration in original and quotation omitted).

Even outside a formally recognized fiduciary relationship, a relationship predicated on particular confidence or reliance may give rise to fiduciary obligations. Eschewing a formalistic approach, Delaware courts have declined to establish set bounds for such relationships, in favor of a pragmatic, fact-driven inquiry.[84] Typically, though, a confidential relationship is said to exist where "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."[85] This Court has frequently looked to the transferor's extensive or exclusive reliance on another for physical, emotional, or decisional support, a query informed by the transferor's disposition and mental and physical capabilities, as well the existence and extent of any additional support network.[86] Kinship by blood or marriage is also a factor, but is not itself determinative.[87]

[84] *E.g.*, *Swain*, 71 A.2d at 267 ("The courts have consciously refused to delineate those situations where a fiduciary relationship may exist. . . . because in the ramifications of human activity, it is undesirable to fix a rigid limitation on the application of such a salutary principle.").
[85] *In re Will of Wiltbank*, 2005 WL 2810725, at *6 (Del. Ch. Oct. 18, 2005) (quoting *In re Szewzcyk*, 2001 WL 456448, at *5 (Del. Ch. Apr. 26, 2001) (quotations omitted)).
[86] *See Faroane*, 2004 WL 550745; *Coleman*, 948 A.2d 422; *Tucker v. Lawrie*, 2007 WL 2372616, at *7 (Del. Ch. Apr. 17, 2007); *In re Wiltbank*, 2005 WL 2810725, at *6; *In re Szewzcyk*, 2001 WL 456448, at *5 (Del. Ch. Apr. 26, 2005); *White v. Lamborn*, 1977 WL 9612 (Del. Ch. Mar. 15, 1977); *Swain*, 71 A.2d 264; *accord* 38A C.J.S. *Gifts* § 34 ("Factors to be taken into consideration are degree of kinship, if any, disparity in age, health, mental condition, education and business experience . . . , and the extent to which the allegedly servient party entrusts the handling of his business and financial affairs to the other and reposes faith and confidence in him.").
[87] *In re Will of Wiltbank*, 2005 WL 2810725, at *6.

Ruth and Donna did enjoy a confidential relationship from late February through June 2005. During her sickness, Ruth was considered terminally ill and could not manage her daily living activities; she had severe vision and hearing problems; in sum, she was infirm. Donna had a good deal of contact with Ruth during this period; Donna took a leave of absence from her work to assist in her mother's care, and Ruth relied on her extensively. Even assuming the absence of a formal attorney-in-fact relationship, Donna was responsible for paying Ruth's bills at Westminster and helped fill out checks on her behalf. Donna also held a springing durable power of attorney and a medical power of attorney, the latter of which she used on occasion. At the same time, Ruth was isolated from the rest of her family. Although she would eventually call on others to assume a larger role in managing her affairs, until at least June 2005 that responsibility rested primarily with Donna.

Accordingly, Donna bears the burden of demonstrating the absence of undue influence and the fairness of the transfers, a showing she has not made. In reaching this conclusion, the Court is mindful that in many instances gifts and payments made within a confidential relationship are legitimate and natural. Ruth was an uncommonly generous mother who loved her daughter and had forgiven her for past wrongs, and in addition to her usual generosity, she had promised to

assist Donna financially in exchange for her affection and aid. Nevertheless, given Ruth's physical and perhaps mental infirmities, her reliance on Donna, and the number and frequency of the checks, the Court remains unconvinced.[88]

Considering the elements of undue influence once again, the Court first turns to susceptibility and the opportunity to exert undue influence. To a great extent, the same facts giving rise to Ruth and Donna's confidential relationship satisfy these elements. Ruth was sick and required assistance in her daily living. Although Ruth had other nursing care, she relied on Donna, who spent considerable time with her at Westminster. While the Court has some doubt that Donna's presence was as constant as she has implied, it concludes that Donna probably spent at least five hours a day with her mother.[89] Moreover, Ruth was isolated from significant contact with John and Terri, not because of any act of Donna but as a result of the distance which John chose to keep. Ruth was also nearly blind, a significant fact given that the Illness Claims concern checks that Donna admits filling out in part. Also, Mr. Rutt and Mr. Grier both had some doubt as to Ruth's ability to manage her finances consistently. Under these facts, Donna cannot show that Ruth was not susceptible and that she did not have the opportunity to exert undue influence.

[88] The Court need not reach the question of fairness.

[89] *See supra* text accompanying note 38. The Court finds this figure based upon its sense of the record, albeit the evidence on this point is sparse.

Donna has likewise failed to refute the remaining elements. Given the credit card incident and her inconsistent testimony concerning the checks, her integrity remains in doubt, and therefore, her disposition to exert undue influence stands. She has also failed to dispel the presumption of unfair persuasion. Finally, the collection of checks, some thirty-four checks in a little over four months, including several instances where multiple checks were written on the same day, and their cumulative amount, $11,500 evidence a result suggesting undue influence.

Ruth's affidavit, despite weighing somewhat against a remediable claim of undue influence, does not alter this result. The affidavit could be viewed in two ways. First, leaving the question of undue influence open, it could be seen as evidence directly rebutting fraud. But because Ruth swore to the affidavit on August 4, 2006, before she had been served with John's complaint and before the facts had been fully developed, the Court is troubled that she may not have been aware of the extent of the challenged transfers.[90] Second, considering undue influence established, the affidavit could be viewed as a consent or ratification. A settlor's consent and a donor's ratification each requires awareness of all material

[90] Mr. Rutt's testimony supporting the inference that Ruth did not review the contested checks bolsters this result.

facts.[91] In this second context, the Court is again troubled that Ruth might not have been aware of all the relevant facts.[92]

c. *The Remedy*

With undue influence proven, the Court turns to the extent of the injury.[93] John has established the invalidity of checks totaling $11,500, but because Donna did spend roughly five hours per day with Ruth during the 128 day span from February 23 through June 2005, the amount of the Ruth Trust's recovery will be reduced to reflect the value of Donna's services.[94] The hourly value of non-skilled family care at that time can reasonably be estimated at $10 per hour.[95] Thus, the Ruth Trust's recovery should be reduced by $6,400 in *quantum meruit*, leaving $5,100.[96]

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[91] See generally RESTATEMENT (THIRD) OF TRUSTS § 74 (2003) (recognizing the ownership-equivalent powers of a revocable trust's settlor, the settlor may limit or eliminate beneficiaries' interests or give binding consent on their behalf), for a revocable trust settlor's consent power. For discussion of ratification, see generally RESTATEMENT (SECOND) OF CONTRACTS § 380 (1981); FARNSWORTH, *supra* note 69, at § 4.15 (ratified contract cannot be avoided); 38A C.J.S. *Gifts* § 60 (ratified gift may not be avoided).

[92] Also, the Court recognizes in passing the natural desire to support one's own capacity and to protect one's children.

[93] Having determined that transfers during the time of Ruth's illness require remedy, the Court need not consider whether Donna was Ruth's attorney-in-fact. Similarly, the Court need not decide whether she lacked capacity to make the transfers or resolve John's forgery allegations.

[94] *See In re Mellinger*, 2007 WL 2306956, at *5 (Del. Ch. Aug. 13, 2007), *confirmed in pertinent part*, C.M. No. 2315-K (Del. Ch. Aug. 21, 2008).

[95] *See id.* Given Ruth and Donna's agreement as to her services, the Court concludes her services cannot be regarded as officious. *See* RESTATEMENT (FIRST) OF RESTITUTION §§ 1, 2 (1937).

[96] Of course, because the Ruth Trust's residuary clause provides John and Donna will split evenly any remaining balance, John will effectively recover only approximately $2,550.

John has failed to establish that any transfer to Donna was intended as a testamentary advancement or that Ruth's insurance and tax payments for the Camden Property, a property that

2. The Trust Amendments

In a similar vein, John has challenged amendments to the Ruth Trust based on incapacity and undue influence.[97] Additionally, he attacks the amendments as motivated by retaliation, offering arguments grounded in public policy and tort. The Court holds the amendments valid.

A challenger bears the burden of proving a settlor's incapacity, as well as the exertion of undue influence. As with *inter vivos* transfers, this burden shifts to the proponent under certain circumstances. The Delaware Supreme Court's decision in *In re Will of Melson* provides that for a will,

> [T]he presumption of testamentary capacity does not apply and the burden on claims of undue influence shifts to the proponent where the challenger of the will is able to establish, by clear and convincing evidence, the following elements: (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.[98]

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she owned, should be recouped. Additionally, John has failed to show that sums once deposited in a certain T. Rowe Price account should be recovered as belonging to his father's trust.

[97] John broadly challenges Ruth's actions in the final years of her life that had the effect of decreasing his inheritance. Her amendments to the Ruth Trust are squarely attacked. The codicils to Ruth's will, however, are largely collateral to these challenges, because disposition of her assets is primarily controlled by the Ruth Trust. The second codicil to Ruth's will provided that her personalty was to go to her trust for distribution. At that time, this change would have seemed benign because personalty in the Ruth Trust would be divided equally between John and Donna. When the final amendment to the Ruth Trust, however, directed that all personalty be distributed to Donna, the importance of the second codicil to Ruth's will changed. *See infra* Part IV.C. To the extent that this and the other codicils are implicated by John's challenges, the Court's analysis of the amendments to Ruth's trust applies equally to the codicils to Ruth's will.

[98] 711 A.2d at 788 (quotation omitted).

As a revocable trust designed to dispose of assets outside of probate following the trustor's death, the Ruth Trust is a will substitute subject to the *Melson* framework.[99] Under *Melson*, the usual presumptions and burdens obtain because Mr. Rutt drafted the trust amendments.[100] Because the challenged amendments effectuate the disposition of Ruth's property, the testamentary standards for capacity and undue influence are apposite.[101]

Beginning with capacity, only a basic level of competence is required to execute a testamentary instrument. This Court has said that a testator need only know that she is disposing of her property by will and to whom she is giving it.[102] Mr. Rutt, who had enjoyed a long relationship with Ruth and knew something of

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[99] A will substitute is "is an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor." *Tucker*, 2007 WL 2372616, at *6. The *Melson* burden-shifting framework has been applied to a will substitute. *Id.*

[100] Delaware Lawyers' Rules of Professional Conduct, by Rule 1.8(c), prohibits a lawyer from taking under an instrument he or she drafted except in limited circumstances. For this reason, *Melson* teaches that where a lawyer drafts a will in the course of a normal attorney-client relationship, the typical presumptions apply. *In re Will of Melson*, 711 A.2d at 787.

[101] *In re Will of McElhinney*, 2007 WL 2896013, at *3.

[102] *In re Langmeier,* 466 A.2d at 402. The relevant principles, have been summarized:

> [O]ne who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act. One challenging the capacity of a testatrix must also address our understanding that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will.

In re Will of McElhinney, 2007 WL 2896013, at *3 (citations and quotations omitted).

her personal life and finances, testified that all amendments to the trust were executed in his presence and with Ruth's full understanding. No medical or other evidence was presented that casts serious doubt on this perception, and in any event all of the amendments were executed outside the acute phase of Ruth's illness, which lasted only from late February until July of 2005.[103] For these reasons, the Court relies in large part on Mr. Rutt's evaluation in finding Ruth competent.

Turning to undue influence, in this instance John must prove, among other things, the exertion of undue influence and a result demonstrating its effect. He has failed to do so. The Court concludes that the dispositive scheme accomplished by the trust as amended reflects Ruth's intent, not undue influence. Though it need not be reprised at length here, Ruth enjoyed a good relationship with Donna but was unhappy with her son. As a consequence, the effect of the amendments—reducing John's benefit under the trust—cannot be viewed as irregular. Moreover, that Ruth executed the amendments in consultation with Mr. Rutt, a competent and independent counsel, only adds support to this conclusion.[104] Mr. Rutt testified

[103] *Cf. In re Rick*, 1994 WL 148268, at *5 (Del. Ch. Mar. 23, 1994) (declining to rely on an attorney's assessment in the face of contradictory circumstances unknown to the attorney).
[104] *Cf. Schock v. Nash*, 732 A.2d 217, 230 (Del. 1999) (underscoring the sanitizing effect of competent and impartial third party advice); *Estate of Carpenter*, 2008 WL 859309, at *12 n.159 (same); *In re Will of Wiltbank*, 2005 WL 2810725 (finding undue influence where a son drafted and facilitated the execution of his father's will); RESTATEMENT (SECOND) OF AGENCY § 390 cmt. c (1958) (underscoring the benefits of third party advice).

that the amendments reflected Ruth's considered judgment in view of John's conduct over six or seven years, and John has supplied no persuasive reason for the Court to reject Mr. Rutt's observations.

Alternatively, John objects to the amendments as sanction for his actions taken to prevent his mother's exploitation and to ensure the trusts' integrity. In support, he attacks the amendments based on Delaware's legislatively articulated public policy protecting the elderly; analogy to criticisms of will *in terrorem* clauses; and other states' recognition of an action for tortious interference with inheritance.

The Court begins with the fundamental proposition that the settlor of a revocable trust may amend its terms freely in any way that is not unlawful or in contravention against public policy.[105] Our State has upheld a wide variety of dispositive schemes; there is no presumption against distributive plans that do not closely track the intestacy statutes.[106]

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[105] *E.g.*, RESTATEMENT (THIRD) OF TRUSTS § 29 (2003) (freedom of purpose in forming trust); *Id.* § 63 (revocable trust settlor may revoke or amend); *Id.* § 63 cmt. a ("[T]he trust property is generally to be treated in the same manner as if it were still owned by the settlor."); *Id.* § 63 cmt. g (power to revoke encompasses lesser-included power to modify); *Id.* § 74 (settlor may reduce or eliminate beneficial interests); GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 47 (6th ed. 1987) (freedom of purpose in forming trust).

[106] *See, e.g.*, *In re Will of McElhinney*, 2007 WL 2896013; *In re Estate of Porter*, 2007 WL 4644723; *In re Estate of Justison*, 2005 WL 217035, (Del. Ch. Jan. 21, 2005); *In re Will of Patton*, 2004 WL 3030543 (Del. Ch. Dec. 22, 2004); *In re Estate of Bickling*, 2004 WL 1813291 (Del. Ch. Aug. 6, 2004).

John has argued that Delaware's public policy, as expressed in 31 *Del. C.* § 3910, counsels against giving effect to the Ruth Trust amendments. Section 3910(a) provides that "[a]ny person having reasonable cause to believe that an adult person is infirm or incapacitated . . . and is in need of protective services . . . shall report such information to the Department of Health and Social Services."[107] Based on this provision and its underlying concern for the elderly, John contends the amendments constitute wrongful retaliation for John's efforts to protect Ruth, as well as the Ruth and Donald Trust property. Without more direct guidance from the legislature, the Court disagrees.

Section 3910 does impose a duty to report suspicions of misconduct toward the elderly in certain instances. For purposes of this analysis, the Court will assume that John acted pursuant to this duty when he contacted Adult Protective Services. Nonetheless, given the great freedom Delaware's citizens have traditionally been afforded in ordering the disposition of their property following death, the Court declines to impose a limitation based upon a statutory provision that does not touch on dispositive instruments or acts. The same analysis holds to the degree John's challenge depends on Ruth's alleged retaliation for the

[107] 31 *Del. C.* § 3910(c) immunizes anyone making a good faith report from civil or criminal liability. John, of course, has not been subjected to criminal or civil judicial action based on his reports to Adult Protective Services.

instigation of this suit.[108] Moreover, the Court is reluctant to adopt a rule judicially that would require it to inquire into a donor's subjective motivations.[109] In this case, the evidence shows that Ruth was motivated to modify her trust not only because of John's resort to Adult Protective Services, but also because of, for example, his displeasure with her for selling the Milford Property and not visiting her regularly.

John's recourse to arguments based on will *in terrorem* clauses and tortious interference with inheritance is also unavailing. To the extent that John analogizes the current controversy to the operation of an *in terrorem* clause, the Court is unpersuaded. Delaware law generally enforces no-contest clauses absent certain exceptions not implicated here.[110] To the extent his challenge is based on tortious interference with inheritance, Delaware's recognition of that cause of action is open to question and the facts of this case are outside the bounds of that tort as presented.[111]

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[108] The Court recognizes that Ruth, as settlor-trustee of her trust, was in a position to sanction John for challenging her *qua* trustee of the Donald Trust. Although one may fairly question the wisdom of Ruth's arguably vindictive decision, this circumstance does not allow the Court to ignore well-established principles.

[109] *Cf.* Jeffrey G. Sherman, *Hairsplitting Under I.R..C. § 2035(d): The Cause and the Cure*, 16 VA. TAX REV. 111, 117-18 (1996) ("[The] absurd hunt for a donor's subjective motive waste[s] valuable judicial resources.").

[110] *See* 12 Del. C. § 3329(a).

[111] *See Golden ex rel. Golden v. Golden*, 382 F.3d 348, 364 (3d Cir. 2004) ("In Pennsylvania, the elements of tortious interference with inheritance are: (1) The testator indicated an intent to change his will to provide a described benefit for plaintiff; (2) The defendant used fraud, misrepresentation or undue influence to prevent execution of the intended will; (3) The defendant was successful in preventing the execution of a new will; and (4) But for the

B. *The Milford Property Proceeds and the Westminster Reimbursements*

Next, John questions the disposition of the Milford Property proceeds, asserting that he was entitled to the entire amount remaining after settlement expenses and retiring the home equity loan.[112] This contention misapprehends John's interest in the property. The Donald Trust provided that its one-half interest in the home was to be distributed to John. After its sale, one-half of the sale proceeds—representing the Donald Trust's one-half interest—was deposited in the Donald Trust. John is entitled to this amount because of his rights under the Donald Trust in the Milford Property at the time of his father's death.[113] The Ruth

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Defendant's [sic] conduct, the testator would have changed his will."). The *Golden* Court went on to note the tort is not recognized in all states, specifically citing Delaware. *Id.* at 364 n.16. *See also Moore v. Graybeal*, 550 A.2d 35, 1988 WL 117520 (Del. 1998) (TABLE).

The changes made by Ruth were the product of her judgment, a judgment exercised with adequate capacity and not the product of any undue influence. One may reasonably conclude that it was unfair for Ruth to have "punished" John because he took his complaints to Adult Protective Services. One may also reasonably conclude that Donna's actions were inconsistent with the generosity that Ruth bestowed upon her. It is not for the Court, however, to second-guess the wisdom of wealth transfer decisions. If Ruth did act unfairly, that, ultimately, was her right. In this instance, John seems to be accusing his mother of having interfered with his inheritance. She did nothing that she was not otherwise entitled to do. She was free to change the disposition of the assets in the Ruth Trust, and John has not shown either that she was unable to sell the Milford Property or that she could not use the proceeds from that sale (and, more specifically, from the Donald Trust) to fund her stay at Westminster.

[112] Although John does not contest the decision to sell the home or the sale process, he was very unhappy about his mother's decision.

[113] After trial, Donna argued, for the first time, that the sale of the Milford Property should cause the loss of that specific gift by ademption. If this contention were successful, the funds in the Donald Trust that can be traced to the Milford Property would be divided equally between John and Donna as part of the residue. Not only does this argument come too late to be considered, it also misapprehends the nature of ademption. Ademption results from an act done, *during the testator's lifetime*, evincing an intent to revoke a devise. 96 C.J.S. *Wills* § 1176; *Matter of Hobson's Estate*, 456 A.2d 800, 802 (Del. Ch. 1983). Because the Donald Trust held a one-half interest in the Milford Property at Donald's death, the disposition of the Milford Property did not

Trust, however, held the remaining one-half interest in the Milford Property, and as its settlor, Ruth amended its terms to eliminate any specific distribution to John flowing from that property. Thus, any proceeds from the sale of the Milford Property remaining in the Ruth Trust are to be divided equally between John and Donna pursuant to the Ruth Trust's residuary clause.[114]

John has also expressed concern over the disposition of the Westminster reimbursements. The reimbursements were deposited entirely in the Ruth Trust, even though a portion of the Westminster deposit had been paid from funds traceable to the Donald Trust. The Court sees no need for remedy on this point: John and Donna are to share equally in the trusts' remaining balances under the residuary clauses, rendering the *situs* of the Westminster reimbursement inconsequential.[115]

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adeem in the sense of depriving John of any rights to the proceeds from its sale. In general, in these circumstances, a sale of trust property "destroys the trust as to the property sold, but substitutes another res, namely, the proceeds of the sale." MARY F. RADFORD, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 995 (3d ed. 2006). In the context of an irrevocable trust, the beneficiary of a specific gift is an equitable owner of the property. *See id.* § 921. A "change in form does not change . . . ownership," and an owner in equity is entitled to that which "arises out of the trust property by sale, exchange, or otherwise." *Id.*; *accord* RESTATEMENT (FIRST) OF RESTITUTION § 205 (1937). Therefore, because the Donald Trust irrevocably held a one-half interest in the Milford Property for John's benefit, he is entitled to the monetary proceeds of its sale as substitute *res*.

[114] In August 2005, Ruth amended her trust agreement to delete a gift of $75,000 to John. Presumably, Ruth had made this gift to compensate John for the sale of the Milford Property. As noted above, John has no viable challenge to this amendment.

[115] This assumes, as has been implicated in the parties' arguments, sufficient funding for the other conclusions reached in this memorandum opinion.

C. *Tangible Personal Property*

Finally, following trial, John and Donna voiced disagreement over the disposition of the tangible personal property in Ruth's possession at the time of her death. John contends the property is owned jointly by both trusts and should be distributed according to the residuary clauses. Donna asserts the items belong to the Ruth Trust alone, and pursuant to the second codicil to her will, should be distributed to her.

Donna is correct that she is to receive Ruth's tangible personal property,[116] but the root question is essentially one of timing, its resolution depending on when the items were acquired. Donald and Ruth generally transferred their personalty to their trusts in 1998. The second codicil to Ruth's will provided that all of the personal property that she held would pour over into the Ruth Trust upon her death. In 2006, Ruth amended her trust, leaving the Ruth Trust's tangible personal property solely to Donna.[117] Thus, John is entitled only to share in personal property held by the Donald Trust. The personalty held by the Donald Trust appears to be only a one-half interest in those items transferred to the two trusts at or near the time they were established in 1998. Uncertainty exists as to what personalty was acquired when. Although John has submitted a conclusory

[116] *See* Suppl. DX B (the second codicil); DX Q (the third trust amendment). *See also supra* note 97.
[117] DX Q (the third amendment).

affidavit on this issue, the Court is confronted with the issue in something of an evidentiary vacuum. Donna has asked for an evidentiary hearing; John opposes further fact finding proceedings. Given the paucity of any factual record, the Court declines to determine the proper division of the tangible personalty at this time.[118]

V. CONCLUSION

For the foregoing reasons, John's claims, except for a portion of the Illness Claims, are denied. The Court declines to resolve the tangible personal property question and Senior Partner's petition is resolved in accordance with these holdings. The parties shall bear their own costs.

Counsel shall confer and submit an implementing order within ten days.

[118] In light of John's reasonable concerns about the cost of further litigation, however, the Court does offers the following guidance, but with the caveat that the parties are free to develop the record further— although the Court is skeptical of the utility of such an endeavor—and to pursue formal consideration. Based on John's general credibility and the nature of the articles, the better view seems that, save for certain Unvalued Items that John has conceded were acquired by Ruth after Donald's death, the Valued Items and the balance of the Unvalued Items were acquired by Ruth and Donald before the creation of the trusts and were household goods and furnishings, which were presumptively jointly held. *duPont v. duPont*, 98 A.2d 493, 496 (Del. Ch. 1953) and, thus, transferred to the two trusts. *Cf.* 13 *Del. C.* § 1513. Therefore, each trust would appear to hold an undivided one-half interest in those items pursuant to the joint bill of sale, and Donna would obtain a three-quarter interest (all of the Ruth Trust's interest plus one-half of the Donald Trust's interest) and John would obtain a one-quarter interest (one-half of the Donald Trust's interest).