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Case No. 890-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RAYMOND STONE, JOHN STONE, MARY PLACZEK and MARGIE STONE,	:	
Plaintiffs,	:	
v.	:	C.A. No. 890-VCN
MARIAN STANT and JOHN STANT,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 23, 2009
Date Decided: July 2, 2010

David N. Rutt, Esquire of Moore & Rutt, P.A., Georgetown, Delaware, Attorney for Plaintiffs.

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NOBLE, Vice Chancellor

I. INTRODUCTION

Helen Stone ("Helen") was a loving, caring, generous, and devout mother of eight. She was not much interested in money, although she was a woman of means. She was always helping someone—in the family or at church. Her concerns were for those in need. Most of us—and this is generally confirmed by our rules of intestate distribution—believe in treating our children equally; when all is said and done, their respective shares should, more or less, be the same. Helen, as was her right, apparently had a different perspective. Equalizing her wealth among her children as it passed to the next generation was not a priority for her.

Although Helen clearly loved her children and, as far as a judge can tell from his distance, loved them all equally, she did, however, have a special relationship with one daughter, Defendant Marian Stant ("Marian"), and her husband, Defendant John Stant ("Stant") (collectively, the "Stants" or the "Defendants"). They and their twelve children lived close to Helen for many years and, in the last couple of years of her life, Helen lived with the Stant family in their home. Helen and her late husband had provided financial assistance to Marian and her family for many years. For example, Helen's husband had been partners with Stant in a restaurant business that frequently required cash infusions from her husband.

Helen began to fail: she suffered from a slow, progressive dementia, probably Alzheimer's disease. As that affliction took its toll, she became less and less able to handle her affairs. Even while she was in full command of her faculties, she had called upon Marian (and Stant as well) for help with financial matters. With the Stants effectively in control of Helen's financial resources, some of Helen's other children became concerned about the benefits that the Stants were receiving from Helen. With time, they became convinced that the Stants had taken advantage of their position of access to Helen's assets and had converted a substantial portion of those assets for their own benefit. That perception resulted in this litigation.

II. THE CLAIMS

The Plaintiffs contend that Helen became incompetent during the middle of 1998 and that the Stants preyed on her for the balance of her life, almost four and one-half years. They point to the building of an extensive addition to the Stants' house; the transfer of hundreds of thousands of dollars without good records while those funds were under the control of the Stants; irresponsible day trading by Stant, without a full accounting of the funds which he handled and with the possibility that funds he removed from Helen's accounts for his day trading activities were not properly returned; and a range of other financial benefits accruing primarily to the Stants. They also challenge gifts to other members of the family. They contest

Marian's decision, as executrix of their mother's estate and as successor-trustee of the trust that held most of her assets, not to pursue debts owed to their mother by other children. They challenge the executor's commission which Marian paid to herself. They have compiled a list of damages which they claim should require the imposition of a constructive trust against all of the Stants' assets for the benefit of their mother's estate in excess of $1.7 million.

The Defendants, in sharp contrast, maintain that Helen remained essentially the same until near the end of her life. According to them, she knew the extent of her holdings and the proper "objects of her bounty"—her family and her church. She had been forgetful; she may have been somewhat withdrawn toward the end, but she was aware of what was going on and she approved of what the Stants did and appreciated the fine care that they provided to her. Marian defends her decision to forego collection of debts owed by her siblings because of a letter her mother had written expressing her desire that all debts owed to her by her children be forgiven at the time of her death. In addition, the Defendants argue that their actions with respect to Helen's assets, estate, and trust were reasonable under the circumstances and that they did not take any unfair advantage of their close relationship with Helen.

III. BACKGROUND

A. *The Stone Family and its Finances*

Helen, and her husband, Raymond A. Stone ("Ray, Sr."), moved to Dover, Delaware in 1964. They had eight children: Plaintiff Mary Placzek ("Mary"), Plaintiff Raymond J. Stone ("Ray"), Robert Stone ("Bob"), Plaintiff Margie Stone ("Margie"), Plaintiff John Stone ("John"), Maureen Hannah ("Maureen"), Marita Marshall ("Marita"), and Marian.[1] On her death on November 30, 2002, Helen, then aged 87, had twenty-seven grandchildren, twelve of whom were Marian's children.

Ray, Sr. handled the finances of the family. Helen had little interest in money, except that she understood that she could help her family and help others (she was an exceedingly generous woman) with available funds. Helen did not drive. She apparently had one credit card, although she rarely, if ever, used it. Most likely, she never used an ATM machine. Helen held her family dear and was committed to her religion; she was extremely devout and on most days attended Mass.

Ray, Sr. died in 1993, and Helen lived alone, with occasional stays by her grandchildren, until 2000 when she moved to the Stants' house. The Stants lived a

[1] The father and son Raymond Stone are not "senior" and "junior" because they did not share the same middle name. This nomenclature has been chosen for clarity. First names are used sometimes, not disrespectfully, but because other usage would be cumbersome and confusing.

very short distance from Helen. Helen saw them on a regular basis. They looked after her and nurtured her. She loved all of her children, but she had a very special relationship with the Stants, a product of the support they provided for her, the large number of loving grandchildren, and simple proximity.

Ray, Sr. was a man of some wealth. He and Stant were partners in a restaurant business for which Ray, Sr. had apparently provided most of the capital. Moreover, as the restaurant business ebbed and flowed, Ray, Sr. would provide additional funds when necessary. The Stants, to some significant extent, were dependent upon the financial support provided by Marian's parents. After Ray, Sr.'s death, Helen gave Ray, Sr.'s interest in the restaurant business to Stant and two building lots to the Stants. In addition, she paid off the Stants' then-existing mortgage. For gift tax purposes, these transfers were valued at just under $500,000.[2] These transfers are important because they demonstrate the intimate financial relationship between Helen (and before then, Ray, Sr.) and the Stants. Helen supported the Stants and would continue to support the Stants, probably because she loved and cared for them, because they needed her support, and because she could.

[2] Although these gifts do not sit well retrospectively with the Plaintiffs, there is no basis to question Helen's capacity to make the gifts or to suspect that they were the product of any untoward conduct by the Stants.

Helen did not have to worry about sufficient funds to maintain her lifestyle after Ray, Sr.'s death. Helen was a relatively frugal woman when it came to meeting her own needs. Ray, Sr. had established a unitrust in 1973 with the trust's income to be paid to Helen during her lifetime. At Helen's death, the balance in the trust was to go to a charity. In 1990, Ray, Sr. and Helen executed the Irrevocable Stone Family Trust Agreement. This established a life insurance trust with Stant as the trustee. With the acquisition of two policies and the regular payment of premiums, this trust would eventually pay approximately $1.4 million to the eight children. In 1991, Ray, Sr. executed a Restatement of Trust Agreement, with Marian and Margie as trustees.[3] The family home was placed in trust for Helen's life with the remainder to Marita. Ray, Sr.'s personal assets were placed in a separate trust with Helen as the income beneficiary and the remainder to charity, but Helen had the right to access all funds and she later exercised her control over those funds for her personal benefit.

Helen was both the settlor and the trustee under a 1993 trust agreement which named Marian and Margie as the successor co-trustees.[4] There would be several revisions to this trust arrangement dealing with many different issues, such as the disposition of the restaurant business, the handling of certain loans made to

[3] PX 3.
[4] PX 4.

children, and the granting of lump sum payments to other children. All of these intervening trust revisions would be revoked in October 1997 when Helen executed a Restatement of Trust Agreement.[5] This trust, referred to as the "Revocable Trust," was the means by which Helen's remaining assets would be funneled in equal shares to her eight children because, in part, her will, which she executed in 1993, provided that the balance of her assets would be paid to the Revocable Trust.[6] Helen also had one other trust, the Helen M. Stone Irrevocable Family Trust, prepared in 1993, which provided that $10,000 from the trust would be paid to Helen's children each year. The balance was to have been transferred (and was transferred) to the children after Helen's death.

B. *Robert Crites*

It is unfortunately necessary to address the conduct of Robert V. Crites ("Crites").

Most of the "legal work" pertinent to this action was performed by Crites. A Pennsylvania lawyer, he is not admitted to practice in Delaware. Crites's letterhead, with a Wilmington, Delaware address, carries "Esq." after his name. He prepared numerous legal documents, such as trust agreement amendments and a power of attorney, for Helen. He provided advice of the nature routinely

[5] PX 14.
[6] PX 5.

provided by lawyers. Helen must have understood Crites to be a duly licensed attorney in Delaware.[7]

Moreover, although Crites met or talked with Helen occasionally and sometimes with other family members, particularly Margie, most of his communications regarding Helen's affairs were with Stant. Indeed, Stant was the only "family" recipient for much of Crites's correspondence. Furthermore, most of Crites's actions came after discussions with and input from Stant. In short, Crites's "representation" of Helen was not independent.[8] As will be seen, the legal work performed by Crites was not particularly well done. His unfortunate impact on these proceedings, however, casts a big shadow. In cases of this nature, the involvement of an independent Delaware attorney frequently serves to promote confidence in both the capacity and the informed voluntariness of the testatrix or trustor in arranging her affairs.[9] Because of Crites's status and conduct, the

[7] The Defendants argue that Helen realized that Crites was not a Delaware attorney. How she was supposed to have known that is something of a mystery. There is no evidence of any disclaimer of that status. Crites, between his letterhead and the services that he provided, must have appreciated the impression that he was creating. In addition, the Defendants, earlier in this litigation, asserted the attorney-client privilege in an effort to thwart access to Crites's records (*e.g.*, letter of Beth B. Miller, Esq., dated October 10, 2006, attached as Exhibit 7 to Fifth Mot. to Compel Prod. of Documents filed on behalf of Pls.).

[8] Crites contends that he reviewed the documents he prepared for Helen with a Delaware attorney, an attorney who had no contact with Helen. Crites's testimony on this point was equivocal. He may have consulted with a Delaware attorney on a few matters, but it certainly was not his standard practice to review the documents which he prepared for Helen with Delaware counsel. More importantly, it is worth remembering that it was Helen—and not Crites—who should have had the benefit of advice and guidance from Delaware counsel.

[9] *See, e.g.*, *Mitchell v. Reynolds*, 2009 WL 132881, at *12 (Del. Ch. Jan. 7, 2009).

Defendants cannot avail themselves of the benefit that the presence of independent counsel frequently provides.[10]

IV. THE DURABLE POWER OF ATTORNEY

The Plaintiffs challenge the validity of the durable power of attorney (the "Power") executed by Helen in September 1994.[11] They concede that it is valid on its face, but argue that (1) because Crites prepared it and had, at most, only minimal contact with Helen regarding it, he did not adequately explain to her the actions that the attorney-in-fact could take under it; and (2) as arranged by Stant on behalf of Helen, the Power conveniently aided Marian in the plan to take advantage of Helen as she aged.

That Crites prepared the Power, as with other documents in this case, is something of a cause for concern. It is not, however, enough to invalidate the Power. It was prudent for someone at Helen's stage of life to have a durable power of attorney. Marian was the logical attorney-in-fact: she was nearby and already helped her mother with her finances. The arrangements were made by Stant, but the Stants, after all, were already assisting Helen; it was reasonable for Stant to initiate the effort. Moreover, there is no reason to believe that Helen did not

[10] The concern about Crites's status is not simply that he is only licensed to practice law in Pennsylvania. The case before the Court does not involve a Pennsylvania lawyer who held himself out as such. Instead, Crites sent many signals that he was a Delaware lawyer. He did not even bother with a "not admitted in Delaware" note on his letterhead.

[11] PX 15; PX 15(a).

understand the general purpose of the Power. As for its gifting provision that specifically troubles Plaintiffs,[12] Helen was a very generous person. She gave away much of what the Plaintiffs may, understandably, have viewed as their rightful inheritance. That she would have wanted her attorney-in-fact to continue—even if she could not—to make gifts to her church and other charities and to her family members is not surprising.

The Plaintiffs struggle to analogize the circumstances surrounding the execution of the Power here to those of *Schock v. Nash*.[13] There, the power was granted to someone who had isolated the elderly person.[14] Moreover, the power in *Nash* did not authorize the attorney-in-fact to make gifts. In Helen's case, her Power specifically authorized gifting.

V. THE PROGRESSION OF DEMENTIA AND ITS CONSEQUENCES

A. *Some General Observations*

Helen began to suffer from progressive dementia perhaps as early as 1994, but much more likely in 1998. Her condition implicates two related, but analytically distinct, doctrines, each with its own set of rules designed to protect the impaired: susceptibility to undue influence and lack of capacity (mentally

[12] The gifting provision of the Power is quoted in the text accompanying note 54, *infra.*
[13] 732 A.2d 217 (Del. 1999).
[14] It may be worth noting that many of the transfers challenged in this action were not made under the authority of the Power.

incompetent). For some period of time, Helen's ability to manage her affairs was limited by her illness and, thus, she was "susceptible" to undue influence. Later she would become "incompetent" to deal with such matters. There is no certain moment when Helen crossed the line to a "susceptible" status; similarly, there is no bright line to establish when she became mentally incompetent.[15] The Court starts with that necessarily rough and imprecise effort of trying to set a timeline on which to measure the Defendants' actions in relation to Helen's capacity.

Labels are helpful in describing the deterioration of one's mental capacity, but they do not always capture well the inevitable, downward path. Helen suffered from organic brain syndrome. In lay terms, she suffered the effects of senility. More accurately, she suffered from a form of dementia. It most likely was Alzheimer's disease, evidenced by a deterioration of memory and other cognitive functions, accompanied by agitation and depression.

The first source of information to help the Court in its analysis can be found in the memories of individuals who interacted with Helen over the years. Those who saw her on a sporadic basis can be expected to have noticed the slippage more

[15] The phrase "mentally incompetent" is useful shorthand, but it must be remembered that the extent of cognitive ability necessary to be mentally competent will vary upon the context. For example, to be mentally competent to form a donative or testamentary intent, one need only, in very general terms, understand what one has and to whom one would want to give that. Handling one's affairs, whether balancing a checkbook or managing a portfolio, requires a more well-preserved set of skills. It may be too fine a line to draw, as a practical matter, but, especially with a slowly deteriorating capacity, as was Helen's fate, she likely was competent at some times for some tasks while not competent for other tasks.

starkly than those who lived with her and interacted with her on a daily or a very frequent basis. Because the downward progression as a result of Helen's infirmity was slow and marked by those "good days," those most close to her could be expected to be less attuned to the changes. Then again, those who saw her only occasionally have far fewer data points by which to assess how she functioned in her normal, undisturbed lifestyle. It is clear that Helen functioned better in the environment in which she was comfortable. And, she was most comfortable with the Stant family, with whom she was very close.

The second source of assistance for the Court comes from healthcare professionals. Michael Sweeney, M.D. was Helen's personal physician and treated her—although on a somewhat sporadic basis—over the years that are relevant to the pending dispute.[16] Nurses's notes evidencing some confusion regarding surgery provide a glimpse into Helen's status in 1999.[17] In 2000, she was seen by Harsha Tankala, M.D., a geriatric specialist, but her one visit is of limited value. Rounding out the healthcare professional input are the parties' experts, Carol Tavani, M.D.[18] and Neil Kaye, M.D.,[19] both highly regarded psychiatrists with extensive experience in treating the elderly suffering from dementia.

[16] PX 106.
[17] PX 104.
[18] PX 108
[19] DX 34.

It is the nature of the disease that the infirm person can "put on a good show." If in a comfortable setting, the infirm person may appear much more in control of her life than if put under the stresses of the unfamiliar.[20] There is no doubt that Helen's mental capacity deteriorated over the last several years of her life. There is also no doubt that, by the end of her life, she was not mentally competent. The Court's effort at trying to put stark markings on a timeline is necessary but fraught with uncertainty. There simply is no clear line in this case (or in many others) when the infirm person moves from one category to another. It is with the recognition that there is a certain abstract artificialness to the inquiry that the Court turns to the question of when were the material changes in Helen's mental acuity.

B. *Helen's Downward Drift*

Following a visit in 1994 by Helen, accompanied by Marian, Dr. Sweeney recorded in his notes a concern about symptoms of senility evidenced by Helen.[21] In the years that followed, some of Helen's children would have experiences with her that were consistent with early stages of dementia. For example, in 1995 or 1996, she visited her son John in Chicago and concluded that one of his neighbors

[20] Indeed, it is difficult to reconcile the testimony of the witnesses who recounted their experiences with Helen over the years.

[21] This entry was not a diagnosis of cognitive impairment. It is more fairly viewed as a clinical description of forgetfulness.

had been murdered.[22] There was no factual basis for this; the man was simply away on a visit. Nonetheless, this caused her a great deal of anxiety. During that same trip, she was unable to recognize her own luggage on the airport carousel after her flight landed in Chicago. In January 1999, while on a plane trip to Florida, she became convinced that the pilot was lost or was flying backwards.[23] She had trouble accepting her son's reassurance that the luggage picked up after the flight was indeed hers. On another occasion, she acted as if she had just been first introduced to a young man who was a grandson and who had spent the previous several summers with her.[24] There was at least one other instance when Helen had difficulty putting a name to a grandchild.[25] And yet another time, in September 1999, she was in the local hospital for knee surgery and could not recall which knee required surgical attention. The nurses referred to her as "pleasantly confused." There are also numerous examples of Helen's asking the same question (or making the same comment) several times during the course of a single conversation.[26]

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[22] Tr. 573, 577-80.

[23] Tr. 1230-31. Two of the Plaintiffs live in the Chicago area. Because of the distance and the difficulty that Helen had in traveling in her later years, they saw relatively little of her as the end neared. They are able to testify about specific moments in time. As noted above, however, their infrequent direct contact may have resulted in an exaggerated perception of the speed and depth of Helen's dementia.

[24] Tr. 323.

[25] Tr. 223.

[26] For example, Fred Goodwin, a friend of Ray, testified that, while at breakfast with Helen, Ray, Stant, and Marian in September 2000, Helen asked him the same question three times, and three

In July 1998, Marian and Margie were troubled enough by their mother's condition that they arranged for a conference with Dr. Sweeney. Based on their description of their mother's behavior, Dr. Sweeney reached a tentative diagnosis of Alzheimer's disease.[27] He prescribed Aricept, a medicine that has had some limited success in the treatment of Alzheimer's patients. Helen took one pill, had a bad reaction, and took no more.[28] Later, Dr. Sweeney would prescribe medications for anxiety and depression. In late 1999, Bob and Marian met with Dr. Sweeney. As the result of that gathering, Dr. Sweeney wrote a letter on December 14, 1999, apparently intended for circulation to all of Helen's children, to the effect that it was no longer appropriate (or safe) for her to live by herself.[29] In January 2000, she moved to the Stant residence. Up until that time, with extensive support from family, primarily the Stants, Helen had been able to reside in her home.

Both before and after changing her residence, Helen went to church regularly. She went out to restaurants with friends. The friends' testimony can

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times he gave her the same answer. Tr. 242-43. Ray testified to similar effect. Tr. 1209. In addition, Helen's friend, Kathleen von Urff, testified that Helen had once asked her the same question four times during a short car ride. This event occurred before Helen moved into the Stants' home in January 2000. Tr. 51-53.

[27] Marian seeks to distance herself from this conversation by stating that most of the information was provided by Margie. Nonetheless, if she had seriously disagreed with Margie's characterization of her mother's condition, one wonders why she would not have spoken up.

[28] Marian did not report to Dr. Sweeney that her mother had discontinued this medicine after only taking it once.

[29] PX 107. Dr. Sweeney wrote that "her living alone in her present house would be a dangerous situation." He also wrote: "As you know, your mom has probable Alzheimer's disease. Her memory has been slipping for some time."

generally be viewed as describing a woman who at the time was slowly failing but who still knew generally what was going on around her and interacted appropriately in familiar surroundings with those around her. After moving in with the Stants, she was visited regularly by family members and her friends. She continued to go out to Mass and to breakfast.[30]

Robert M. Matsko, an investment advisor then-employed by Merrill Lynch, met with Helen in March 2001 at the Stants' home to discuss her investment portfolio.[31] Matsko believed that she fully understood what was going on and had no reservations about Helen having the appropriate mental capacity for the discussions which he had with her.

In July 2001, Helen was examined by Dr. Tankala, who administered a mini mental status exam on which Helen scored a 20 out of a possible 30.[32] This score placed Helen at the lower end of a ranking of mild cognitive impairment (or early stage Alzheimer's).[33]

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[30] Several of Helen's friends, Alice McKone, Phyllis Mabrey, Patricia Gallagher, and Ellen Lazzeri (who perhaps knew her best but whose testimony must be viewed with care because she is Stant's mother) all told, more or less, the same story. McKone's testimony is especially helpful. She routinely went to Mass with Helen after Ray, Sr.'s death; that continued even after Helen moved in with the Stants. She understood that Helen was very happy living with the Stants and, as an indication of Helen's retention of mental faculties, McKone reported that Helen recognized her when she would visit Helen even after Helen's physical condition deteriorated to the point where she was bedridden.

[31] Tr. 491, 500.

[32] JX 177.

[33] Tr. 1559.

Dr. Sweeney, who only saw Helen a handful of times between 1997 and 2002, recorded in his notes following a June 2000 visit by Helen that "[h]er memory problems [had] not changed significantly."[34] This is consistent with much of the lay witness testimony to the effect that the progression of Helen's dementia was very slow.[35]

As her physical health deteriorated, she became less able to go beyond the Stants' home. The Reverend Michael Darcy, a priest from Holy Cross Catholic Church, with which Helen was deeply involved, visited with her on several occasions from late 2001 into early 2002.[36] He reported lucid discussions with her, about not only matters theological but also matters associated with daily living. The "great deal of love" that Helen shared with the Stant family was readily apparent to him. He recognized her as frail, but as someone who was in tune with her surroundings.[37] Father Darcy is entirely credible. As someone who, because of his calling, deals with the elderly on a regular basis, he stood in a unique position to assess Helen's capabilities.[38]

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[34] His notes between 1995 and 1997 do not reflect any concern for cognitive impairment.

[35] Dr. Sweeney would later sign Helen's death certificate, and he attributed the cause of death to Alzheimer's disease, which, he noted, had afflicted her for three years before her death. PX 23.

[36] Tr. 835-36.

[37] Father Darcy's testimony is the most difficult to reconcile with Plaintiffs' view of their mother's condition.

[38] Dr. Tavani, however, testified about how, for someone as devout as Helen, her ability to deal with religious matters would be among "the last to go." In her perceived safety in the Stant home and in the presence of a priest, the effects of her disease were for the moment less

Dr. Tavani concluded that Helen was no longer competent as of July 1998.[39] She based her opinion on the full body of evidence, including individual recollections and the medical records. She emphasized the anecdotal history and the concerns of Marian and Margie, who had met with Dr. Sweeney, resulting in his tentative assessment of Alzheimer's disease. She further focused upon medical records suggesting that the person taking Helen to the physician's office, and not Helen, provided the appropriate medical history, suggesting that this evidenced Helen's inability to communicate effectively and consistently.[40] She also relied upon the confusion in the hospital regarding the knee surgery.

Dr. Kaye, employed many of the same factors used by Dr. Tavani, with an emphasis on Helen's ability to remain at home and the degree of her social interaction, including her conversations with Father Darcy. He concluded that Helen was substantially impaired by March 2002, if not a few months earlier, by the end of 2001 or early 2002.[41] He acknowledged that, by September 2002, her cognitive functioning was minimal.

The Court is in general agreement with Dr. Kaye's analysis. Dr. Tavani seems to have put too much emphasis on isolated moments under stressful

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pernicious. That does not explain away Father Darcy's testimony about Helen's capacity for conversation.

[39] Tr. 1460.

[40] Tr. 1416.

[41] Tr. 1585, 1589.

circumstances caused by travel or hospitalization. She also appears to have given the meeting that Marian and Margie had with Dr. Sweeney, and the notes that Dr. Sweeney wrote as a result of that meeting, more weight than appropriate. The progression of Alzheimer's, although interspersed with both good days and bad days, is on something of a continuum. Picking isolated instances—out of the ordinary and away from Helen's "comfort zone"—does not allow for a full capture of the remaining cognitive skills that Helen had available to her. Whether it is Father Darcy's testimony, or Matsko's testimony, or the fact that she was able to continue living by herself for eighteen months after July 1998, these factors all refute the notion that she was mentally incompetent as early as July 1998.

Based on concerns brought forth by Marian and Margie in the summer of 1998, Dr. Sweeney made an early, tentative Alzheimer's diagnosis.[42] Helen had times of confusion and forgetfulness, and her condition deteriorated slowly, but she continued to live in her home. Her dependence on the Stant family increased, and her ability to remain in her home is no doubt attributable in large part to the family's love and care. It is a reasonable inference, based on the foregoing anecdotal evidence, the medical records, and the expert testimony, that Helen, by the end of 1999, was of weakened intellect or susceptible to undue influence. Determining when she lost mental capacity is more difficult. She carried on a low-

[42] Diagnosis of Alzheimer's disease, of course, does not equate with lack of mental capacity at the time. *See, e.g.*, *In re Will of Cauffiel*, 2009 WL 5247495, at *6 (Del. Ch. Dec. 31, 2009).

key, but still involved, social life with friends, family, and church. When she moved in into the Stant home in early 2000, it is clear that she was still functioning. Thus, it is a reasonable inference that Helen was not incompetent as of early 2000. The testimony of Father Darcy and Matsko, in particular, confirms that Helen retained her capacity for some time after she started living with the Stants. This conclusion is also consistent with her treating physician's notes from the summer of 2000 to the effect that there had been no material memory function deterioration. Perhaps, she lost capacity by as early as the middle of 2001 or as late as spring 2002. The beginning of 2002 is as reasonable a date as the record supports. It is consistent with both Dr. Kaye's conclusion and much of the testimony of those individuals who saw her regularly. Thus, for purposes of consideration of Plaintiffs' claims, Helen will be considered of weakened intellect as of January 1999 and no longer competent as of January 2002.

C. *Undue Influence*

Challenges to gifting (or testamentary disposition) based upon the doctrine of undue influence require the Court to assess five factors: (1) the susceptibility of the donor to undue influence, (2) the opportunity to exert undue influence, (3) the disposition to do so for an improper purpose, (4) actual exertion of undue influence, and (5) a result demonstrating its effect.[43] Undue influence is an

[43] *In the Matter of West*, 522 A.2d 1256, 1264 (Del. 1987).

"immoderate influence . . . that overcomes the transferor's free will."[44] Unfair persuasion is the touchstone; it may be accomplished by "solicitation, importunity, flattery, putting in fear, or in some other manner."[45]

As a general matter, courts presume that the person making the gift intended to make that gift unless the challenging party produces clear and convincing evidence to rebut that presumption.[46] That presumption against undue influence tainting an inter vivos transfer, however, shifts if the challenging party shows that the parties inducing the transfer were in a fiduciary or confidential relationship with the donor.[47] If that is the case, the party defending the transfer bears the burden to demonstrate by a preponderance of the evidence the absence of undue influence and the fairness of the transfer.[48] The Court, thus, moves to the question of whether or not the Stants, or possibly only Marian, acted as fiduciaries or in a confidential relationship with Helen during the period when she was susceptible to undue influence.

Helen was the sole trustee of the Revocable Trust which held most of her funds. Marian also held a power of attorney. When Marian acted under the Power is not altogether clear, but the better inference is that her use of it did not occur (or

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[44] *Mitchell*, 2009 WL 132881, at *8.
[45] *Id.* (quoting *In re Will of Langmeier*, 464 A.2d 386, 403 (Del. 1993)).
[46] *Hudak v. Procek*, 806 A.2d 140, 147 (Del. 2002).
[47] *Mitchell*, 2009 WL 132881, at *9.
[48] *Id.*

was extremely limited) until after Helen was no longer competent. Stant served as trustee of the Stone Family Trust, but that was a function separate from handling Helen's funds.

Nevertheless, a formal, documented fiduciary relationship is not the only means by which a "confidential relationship" for purposes of undue influence analysis can be established. For example, "as a rule of thumb . . . where one party has a relationship of superiority to another, and the other party's protections are based on investing trusting confidence in the person holding the superior position, those circumstances give rise to a fiduciary relationship."[49] Further indication of this type of special relationship may arise when it is clear that the parties do not deal on an equal basis but, instead, one has "an overmastering influence" or because of weakness or dependence, trust is properly and understandably placed in that person.[50]

Marian wrote and signed Helen's checks. Stant balanced the checkbook. Although the Plaintiffs suggest that this arrangement, dating back to Ray, Sr.'s death, demonstrates Helen's dependency on the Stants, it simply evidences, at least at the outset, that the Stants were helping Helen for her convenience. Helping out in a period when Helen's mental faculties were not impaired did not put the Stants in a confidential position with respect to Helen. Yet, as her condition deteriorated

[49] *Faraone v. Kenyon*, 2004 WL 550745, at *8 (Del. Ch. Nov. 15, 2004).
[50] *In re Will of Wiltbank*, 2005 WL 2810725, at *6 (Del. Ch. Oct. 15, 2005).

and her ability to act rationally with respect to her financial matters weakened, her dependence upon the Stants correspondingly increased. The increase in dependence upon and trust placed in the Stants occurred at roughly the same time as her mental faculties fell to the level where she was "susceptible" to undue influence. In short, as Helen's dependence increased and her faculties diminished, the Stants' role evolved into one of a confidential relationship.[51] They were in a position to control her finances; they were in a position to direct her decisions. Accordingly, for transfers occurring during the timeframe when Helen was "susceptible," the Stants bear the burden of demonstrating that they did not benefit from the exercise of undue influence.

Although the Stants were in a position to exert undue influence over Helen and may have had a disposition to exert undue influence because of their long-time dependence upon Helen's financial support, and although Helen was, for some period, potentially subject to the exercise of undue influence, the Stants have shown that there was no result demonstrating the effect of undue influence.[52] That

[51] This conclusion is not free from doubt. Helen was not estranged from the rest of her family. *Cf. Coleman v. Newborn*, 948 A.2d 422, 430 (Del. Ch. 2007). They visited her freely and often. She had significant interaction with her friends and went out regularly to church and for meals. But, the proximity of her home to the Stants' home, the continuing presence of numerous beloved Stant grandchildren, and the intertwined financial affairs tracing back to the days when her husband and Stant were business partners all contribute to the conclusion that the Stants had that special relationship with Helen that caused her to place her trust in them and to depend on them.

[52] Given the circumstances, this conclusion also supports the finding that there was no exercise of any such undue influence.

"immoderate influence" and that "unfair persuasion" so characteristic of undue influence cases are missing here.[53] Helen's financial support for the Stants and their family was extensive long before there was any question about her capacity. The support about which the Plaintiffs complain was simply a continuation of the practices that Helen had followed for several years. Even after she may have become "susceptible," the transfers which she made were not the result of undue influence; nothing changed about her donative intent; she was not persuaded to do something that she had not been doing all along. Helen was generous—and, it would be fair for some to conclude to a fault—when it came to the Stants and their family. That conduct, however, was not the product of anything that the Stants should have refrained from doing. Even if "susceptible," Helen had simply continued to do that which she wanted to do. Accordingly, any of Plaintiffs' claims based upon the doctrine of undue influence are dismissed.

D. *Gifts and other Acts by One Who is Mentally Incompetent*

Once Helen became incapacitated in January 2002, however, her expenditures or her gifts could no longer be fairly attributed to her judgment. From that point on, disbursement of Helen's funds was by (or under the control of) Marian. Either she lacked authority to make such payouts or she relied upon the

[53] *See Langmeier*, 466 A.2d at 403 ("The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to impel him to make a will that speaks the mind of another and not his own.").

Power prepared by Crites in 1994. Although it seems that Marian was not focused on the source of her authority to handle Helen's funds, the more plausible assessment is that she was acting under the Power.

The Power authorized Marian generally to do all things that Helen could have done personally. It went on to empower Marian "[f]or estate planning purposes and *to assist my family members*, to make annual and/or other gifts . . . ."[54] Thus, the Power authorized Marian to make gifts to "assist family members." Nothing expressly required her to spread such gifts around the family on something of an equal basis. On the other hand, nothing can be read into the Power to constitute a waiver of the duty of loyalty that accompanies the acceptance of the grant of such a power.[55]

Thus, disbursements of Helen's funds after January 1, 2002, that were not made in conformity with the terms of the Power were not effective to the extent that they benefited Marian as the attorney-in-fact who was charged with complying with Helen's instructions.

VI. LOANS v. GIFTS

The nature of the transfers from Helen to the Stant family also influences the analysis. Perhaps they were all intended as gifts but, especially with funds

[54] PX 15 at ¶ 15(a) (emphasis added).
[55] *See Carpenter v. Dinneen*, 2007 WL 1114082, at *7 (Del. Ch. Apr. 11, 2007). ("Absent an express and unambiguous waiver or modification of the fiduciary duties implied by law, an attorney in fact must act in good faith and in the interests of the principal.") (citation omitted).

immediately destined to help the restaurant business, that might not be the case. The transfers were frequently done on an informal basis. They were usually orchestrated by Stant. One cannot be confident of Helen's degree of participation in the decision to provide the funds. If they were not gifts, the status of Helen's cognitive ability matters less because, if loans to, or investments in, the restaurant business, they continue to be a source of value to the Revocable Trust.

The Stants contend that the best interests of Helen, who at times was a guarantor of loans to the restaurant business, were served by helping out financially. If the business failed or other circumstances arose that would have allowed the calling of the loans which she guaranteed, then she would have suffered adverse financial consequences. The proposition sponsored by the Defendants may be valid, but it does not answer the question of whether the transfers were a gift or whether they were some type of an investment. Stant, perhaps with Marian's assistance, was able to use his mother-in-law's funds to satisfy his business's cash needs. Evidence of donative intent is sparse.[56] Because they were arranged by Stant ostensibly to meet an ongoing business need, the conclusion must be that they were made for a business purpose. As a business matter, the funds would have fallen into one of two general categories: an equity investment or a loan. Helen did not want to own an equity stake in the restaurant

[56] The exception may be gift tax returns. To the extent that the gift tax returns filed before 2002 reflect specific payments to Stant as gifts, that is sufficient evidence of Helen's donative intent.

business; her decision in the early 1990s to give away her interest to the Stant family confirms this. Thus, it is more probable that the sums transferred to Stant (and perhaps some of the transfers to a grandson and a granddaughter that went directly into the business) should be treated as loans, with a duty to repay and a duty to pay some reasonable—although borrower friendly—rate of interest.[57]

VII. A COLLECTION OF DISCRETE CLAIMS

A recurring theme of the Stants' defense is that "Plaintiffs are unable to show" some aspect of their case. This is an argument that, however often reprised, can only carry them so far. For example, from at least 1999 on, on an average of once per week, the sum of $500 was withdrawn from Helen's Wilmington Trust account by use of an ATM card. Helen did not know how to use an ATM card. The direct evidence that the withdraws were made by a member of the Stant family is somewhat limited. That, however, begs the question of, if not a member of the Stant family, then just who was making the withdrawals? Even when Helen was in relatively good health and was aware of what the Stants were doing, they controlled her finances, the records of her finances, and which professionals would guide her. The debit card was (or should have been) in the possession of the Stants

[57] The Court asks for the assistance of counsel in marshaling the best evidence of the status of these debts (or whether the funding was a reported gift). Also, Stant apparently repaid approximately $225,000 in 2001 (Tr. 668-69), but tying that payment to then-existing indebtedness has proven to be an uncertain task. In addition, this review includes the status of those loans (and the interest to have been on those loans) which the parties seem to agree should be treated as debt obligations.

(certainly after Helen moved in with them). Presumably, Stant saw the ATM withdrawals when he balanced the checkbook. Presumably, if there had been a steady drain on Helen's funds through the use of an ATM card of which the Stants were not aware, one of them would have conducted an investigation. That did not happen. All of this compels the inference that the Stants (or their children) were making the withdrawals.

The Stants also seek to avoid liability by pushing responsibility for some matters off on their adult children. They argue that they are not responsible for the acts of their adult children. In a sense, they are correct, but this argument misses the point. A person in a confidential relationship cannot avoid responsibility simply by allowing funds to be diverted to an adult child. This is not a situation where the Stants are not charged with knowledge of the funds transferred to their children. This is not a situation where the children did anything which the Stants did not condone. The Court, in the absence of some explanation to the contrary, will presume that payments allowed, made, or facilitated by one of the Stants to a Stant child conferred a benefit upon the parents.

The Plaintiffs have categorized their claims against the Stants. The Court turns to consideration of some of those claims in light of the background developed above.

1. The Addition to the Stants' Home

In order for Helen to have her own room after moving in with the Stants, the Stants arranged for an addition to be built to their home. Both Margie and Ray approved this notion initially but, after the project approximately doubled in cost, with a more substantial enhancement to the Stants' home than what had been anticipated, they now seek to recover Helen's funds spent on that. Spending funds to improve a caretaker's home raises difficult issues. On the one hand, it makes sense to afford Helen the opportunity to be as comfortable as possible. On the other hand, it affords the owner of the property an opportunity to increase the value of her property at the expense of another. Here, the Stants spent approximately $70,000 of Helen's money on the project. The evidence is overwhelming that Helen was quite proud of her accommodations and was content with the benefits that it conferred on the Stant family. There is some evidence that the increase in the scope of the project was attributable to architectural or engineering problems. The best evidence is that a substantial portion of the project was reasonable; that Helen approved all of the project; and that there is no reason to second-guess the decision to expend the funds which clearly conferred a significant—although short-term—benefit on Helen.

2. Life Insurance Trust

Stant has retained approximately $14,000 from this account. All other funds have been distributed to the children who are the beneficiaries. He claims that he entitled to this amount as a fee for having administered the trust for more than a decade. Some compensation is appropriate. The burdens of serving as trustee of this account, however, were minimal. In light of the effort and risk associated with Stant's efforts as trustee, a fee of $10,000 is appropriate. Accordingly, funds in excess of this amount are to be disbursed to the beneficiaries of the trust.[58]

3. Rent from the Stant Children

The Plaintiffs seek $26,000 from the Stants because their children resided in Helen's house for approximately three years. This assumes a rental of $750 per month. Allowing certain of the Stant children, however, to reside there rent free provided a means of securing and protecting what would have otherwise been a vacant house. Renting the house may have been a possibility, but the record is unclear as to whether that was feasible. Helen was aware that some of her grandchildren were living in her home before she became incompetent and, as far as one can tell from the record, she condoned the practice.

[58] For a somewhat more detailed analysis of the setting of fiduciary fees, *see* Part X, *infra*. Part of the problem here is that the notion that Stant would charge for trustee services is of relatively recent origin. A similar quandary exists with respect to the Stants' argument that they should be compensated for their care of Helen from 2000 forward. This argument is even more difficult in light of the addition to their home which was paid for by Helen and in light of their use of Helen's funds to meet household expenses.

4. Gifts to Maureen and to Barry Marshall

Maureen received approximately $21,000 in 2000 to assist with the purchase of a car. They assert that Marian should be liable for this amount. They offer no compelling reason for that conclusion. Gifts to Helen's children were authorized by the Power and there is no suggestion that Marian, or any other member of the Stant family, derived any benefit from this gift. Similarly, more extensive gifts were made to Barry Marshall (Marita's husband), perhaps to assist with Marita's obligations. Again, the Plaintiffs are unable to offer any reason why these gifts were not reasonable. In particular, they have not shown that there was any self-interest on the part of Marian with respect to these gifts.

5. Professional Fees

There are generally two classes of professional fees. First, are the fees incurred as a result of this litigation. They are addressed in Part XI, *infra*. The second are the fees that Marian has incurred in administering her mother's estate, winding up the Revocable Trust, and paying the various tax liabilities. The accounting, legal, and financial advisor fees are substantial. The record is insufficient to determine if they are excessive. The bills were, as far as the record shows, regularly issued by the service providers in accordance with their normal practices and at rates to which Marian, again as far as the record shows, reasonably agreed. There is one item where legal fees associated with the administration of

the estate were overcharged by several thousand dollars. Marian should have pursued a rebate of those fees. Nevertheless, her failure to do so, does not necessarily make her liable for that amount.[59]

6. Crystal Rug Payments

Carpeting was installed at the Stant residence while Helen was residing there. Some of the funds came from Helen's Wilmington Trust account and some from the Revocable Trust account. As with the other improvements to the Stants' home designed to make life there more comfortable for Helen, this was not an improper expenditure.

7. Wilmington Trust Checking Account Disbursements

From 1999 through a period shortly after Helen's death, the Plaintiffs seek recovery of approximately $440,000 for amounts taken from Helen's checking account with Wilmington Trust.[60] The disbursements from 1999 through 2001 were made when Helen was not incompetent. As set forth above, the Plaintiffs have failed in their undue influence claim. Accordingly, these disbursements, as a general matter, are not subject to recovery by the Plaintiffs. Some of the specific items which the Plaintiffs challenge will be addressed to provide a better understanding of the nature of their claims.

[59] *See* note 73, *infra*.
[60] *See* App. 1 & 4 to Pls.' Post-Trial Opening Br. at 1 (Damages List).

As set forth above, transfers after Helen became incompetent had to be by way of the Power. The Power allowed for payment of expenses reasonably charged to Helen, including her fair contributions to maintaining the Stant household where care was being provided for her.[61] It also enabled Marian to make gifts to family members. Indeed, she could make gifts to members of her immediate family as long as she did not breach her duty of loyalty by materially discriminating in their favor.

Substantial gifting to family members occurred in 2002. The Plaintiffs received gifts. The Stant family received gifts. Non-party members of the Stone family received gifts. It is not possible—because of the way the recipients are described—to be certain as to which of them are members of the Stant branch. Some are identified, but probably not all. That more gifts may have been paid to the Stant family should not be surprising because of the number of children. A per capita gifting process, for example, would not necessarily be unfair. In any event, although it is likely that the gifting program favored the Stant family somewhat, the record does not sustain the conclusion that Marian somehow breached her duty of loyalty (or any requirement of the Power) with the gifts which she made during 2002.

[61] Ray, Jr. recognized that caring for Helen in the Stant home avoided nursing home care costs which he estimated at a minimum of $3,500 per month. Tr. 1283.

There are, however, several categories of disbursements which do not conveniently fall within the gifting/necessary expenses framework.[62] The most obvious are the ATM withdrawals. They, more likely than not, benefited members of the Stant family. The regular $500 per week withdrawals cannot be reconciled with the cash needs of someone in Helen's condition during the year 2002, as the end of her life neared. There is no indication that Marian was acting as Helen's attorney-in-fact to authorize ATM transactions as gifts here under the Power. The ATM withdrawals in excess of a reasonable amount to meet Helen's limited needs must be attributed to the Stants and must be returned by them. The best evidence—and it is little more than an estimate—of her cash needs during this period would be something on the order of $200 per week (for 48 weeks in 2002). Subtracting that from $25,500, the ATM withdrawals in 2002,[63] leaves a balance owed by the Stants of $15,900.[64]

Similar treatment must be given to the following expenditures from the Wilmington Trust Account in 2002:

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[62] The numbers used here are drawn from App. 4 to Pls.' Post-trial Opening Br., at 10-12.
[63] App. 1 to Pls.' Post-Trial Opening Br. (listing ATM withdrawals for 2002).
[64] To the extent the Stants have argued that ATM funds were used for any other purposes, such as conferring a benefit upon Heather Stant, the seriously ill granddaughter, the proof of any such disposition is too imprecise. Tr. 58, 680. To be clear, the Court is confident, from what it has learned about Helen during the course of this difficult matter, that Helen would have spent (and would have wanted anyone acting for her to spend) her last cent if it gave any seriously ill grandchild any hope for health and, also, that she would have been deeply troubled by anyone who might have objected to any such expenditure.

Payments to Stant of $13,000 cannot fairly be classified as "family" gifts within the scope of the Power and should be treated as business loans.[65] Similarly, the payments to two Stant grandchildren that were used for the restaurant business must also be treated as business loans.[66]

Insurance payments for insurance other than for Helen or for the Stant home were not proper. Similarly, a payment to Wells Fargo cannot be fairly attributed to Helen's benefit or within the scope of the grant of the Power.

Finally, two payments were made in 2003 for home heating oil and for household bills. No justification exists for these payments after Helen's death.

These expenditures were not considered (and, at least, for the most part, they do not seem to have been recorded) as gifts. They simply are the product of taking funds from Helen without evidence of the exercise of judgment by Helen's attorney-in-fact within the parameters contemplated by Helen in the granting of her Power.

Other disbursements, however, from the Wilmington Trust account as Helen's death approached, are not similarly subject to reimbursement. For example, on November 24 and 25, 2002, just days before Helen's death, gifts totaling $35,000 were made to Holy Cross Church. As the record amply

[65] Even if treated as gifts for tax purposes, *see* PX 173 at 003190, this was not made while Helen was able to form a donative intent.
[66] *See* Tr. 863.

demonstrates, Helen cared deeply about that parish and gifts to that church were within the scope of the attorney-in-fact's authority, and the Court perceives no reason why, in making such gifts, Marian was not carrying out the wishes Helen would have had if she had been able to have such thoughts. The Plaintiffs argue that the gifts from Helen resulted in reduced tuition at the parish school for Marian's children. Perhaps there was some tuition reduction, but no evidence has been presented as to the true benefit that fell to the Stant family. As such, the Court has no rational basis for imposing liability on Marian because of a gift that otherwise seemed appropriate.

Also not properly challenged are the following:

The payments to John Stone and Dawn Stone—if, indeed, made—were within the scope of Marian's gifting authority.

Expenses in 2002 for heating fuel (Carl King), household bills (Plaintiffs' characterization of these expenses), taxes, and contracting fall within the allowed scope of maintaining Helen's home or her contributions to the Stant household expenses while she lived with them.

The record does not support requiring the Stants to repay items in the medical expense category. Even if Helen had broad health insurance coverage, it is not unreasonable to accept that at least some medical expenses in the last year of her life were not covered.

VIII. THE FAMILY DEBT LETTER

In September 1998, Helen addressed the following letter to "[her] family":

> I met today with Robert V. Crites to review a number of gift planning and other estate planning ideas.
>
> As we discussed, I told Bob that I want all gifts or loans that I have made to my children during my lifetime to be disregarded in my plan to leave whatever assets I own when I pass away equally among my children.
>
> It is my wish that any outstanding loans I have made or will make to any of my children or grandchildren are to be totally forgiven at my death.
>
> The main plan that I wish to continue to pursue is to help any of my family as I may see fit to do but upon my death to then leave all my assets owned by me at that time equally to my children.[67]

This letter, drafted by Crites and notarized, has been relied upon by Marian to justify her decision, as Helen's successor-trustee, to forego any effort to collect loans otherwise due and owing from four of her siblings, Bob, Marita, Maureen, and Margie (who, perhaps surprisingly, is one of the Plaintiffs challenging Marian's failure to collect these debts). Significantly, the Family Debt Letter does not provide any benefit to Marian who was not indebted to her mother; it also does not help Stant because, of course, he is not one of Helen's children or

[67] JX 18 (the "Family Debt Letter").

grandchildren.[68] The Family Debt Letter reflects Helen's desire to help her family without any focus on equalizing the benefits conferred through inter vivos gifting. It also conveys Helen's desire that the debts of her children and grandchildren be forgiven. Although not cast as a trust amendment, Helen, as the trustee of her revocable trust, could, in the proper circumstances, release indebtedness owed to her trust by means of a relatively informal document.

While one may sympathize with Marian in her efforts to give meaning to her mother's words, her interpretation and application of the Family Debt Letter cannot stand. The language is precatory; it is discretionary. Helen chose words such as "[i]t is my wish"; "I want to give . . . ." At no point are any operative words constituting an affirmative giving, conferring, or releasing employed. It makes no reference to her trust; it was not exercised with sufficient formality to serve as a codicil to her will. In short, the Family Debt Letter reflects Helen's aspirations; it is not self-executing; it requires the consent and understanding of her family,[69] something which has not been forthcoming. The Family Debt Letter may not be read as an immediate or inter vivos forgiveness of debt. It specifically refers to "when I pass away" and "at my death."

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[68] The Plaintiffs speculate that Marian did not seek to recover on these loans because those other siblings who own money have not joined them in this action. This is nothing more than that—speculation.

[69] Indeed, even Crites, the drafter, acknowledges as much. Tr. 1116.

The letter was not addressed to Marian, as executor or trustee; instead, it was addressed more broadly to the "family."[70] Thus, it is difficult to read the letter as providing instructions to her fiduciary.

Our case law has struggled with the distinction between mandatory and precatory language. For example, the use of the word "desire" as an expression of a testator's intent may be "mandatory in meaning" and "as imperative as 'I direct.'"[71] On the other hand, use of the word "desire" may be viewed as "[n]othing more than a mere request or wish, binding on no one."[72]

Accordingly, the Family Debt Letter does not sanction Marian's failure to pursue the indebtedness owed to her mother by the several siblings.[73]

IX. THE "DAY TRADING"

In the mid-1990s, Stant moved substantial sums apparently from the Revocable Trust, to a brokerage account from which he engaged in extensive

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[70] *Cf. Wilmington Trust Co. v. Pryor*, 25 A.2d 685, 686 (Del. Ch. 1942).
[71] *Downs v. Casper*, 171 A. 753 (Del. Ch. 1934).
[72] *See Pryor*, 25 A.2d at 686 (drawing a further distinction between administration (more likely to be mandatory) and creation of a trust).
[73] Although the Court has concluded that the Family Debt Letter does not have the effect that Marian believed, that is not a conclusion free from doubt. In other words, Marian's interpretation of the letter was not unreasonable. The Plaintiffs chose not to include as defendants in this action those siblings who owed money to their mother at the time of her death. Thus, the Court is not in a position to order those who owe the funds to repay them. Indeed, there may be viable defenses. A fiduciary, such as Marian, who makes what appears to have been a good faith decision not to pursue her siblings for these debts does not automatically become personally liable for them or, in effect, become a guarantor of their repayment. Thus, Marian should evaluate whether at this late date, it is practicable and possible to pursue those debts.

short-term trading of securities.[74] The Plaintiffs invoke a pejorative connotation of "day trading" to describe Stant's conduct, but the holding periods varied, perhaps averaging three months.[75] Stant's strategy was largely unsuccessful; over a period of roughly seven years, Stant managed to lose perhaps as much as $287,000. Moreover, much of the trading was done on margin, thus significantly leveraging the risk to which he exposed Helen's assets.

Stant began this ill-conceived strategy while Helen was competent; it appears as if she may have approved of or condoned Stant's methodology, even though one suspects that she did not fully understand what he was doing and its potential consequences. Moreover, it is clear that she was dependent upon him to make the investments in her name.

Even though Stant may have initiated the short-term trading program as an agent, as Helen's condition deteriorated, his role took on more aspects of a fiduciary. For purposes of this analysis, the Court will assume that Stant engaged in the challenged trading as a fiduciary.[76]

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[74] He may also have done some of the trading with funds from another trust.

[75] A "day trader" has been defined as "as speculator who seeks profit from the intraday fluctuation in the price of a security or commodity by completing double trades of buying and selling or selling and covering during a single session of the market." Merriam-Webster Online Dictionary 2010, *available at* http://www.merriam-webster.com/dictionary/day%20trader. For a reflection on the tension between the duty of a fiduciary and "day trading," see *Trust under the Will of Somma*, 1999 WL 33248590 (Va. Cir. Ct. June 14, 1999).

[76] Evaluation of Stant's conduct in this context would depend, in part, upon whether he was acting as an agent or as a fiduciary. The better inference is that at different times he was acting

A fiduciary managing the funds of another is held to the prudent investor standard. Because Stant is not a professional, his duty was "to exercise the skill and care that a man of ordinary prudence would exercise in dealing with his own property in light of the situation existing at the time."[77] A primary focus of Stant should have been to "ensure the integrity of the corpus."[78] Care must be taken not to assess the fiduciary's actions with the benefit of "hindsight knowledge of subsequently developed facts and circumstances."[79]

Although experts representing both sides of this dispute testified about the propriety of Stant's trading strategy, neither claimed expertise in portfolio investment. As such, their views on this topic are of little assistance to the Court. Indeed, neither expert embraced Stant's strategy as appropriate for someone in Helen's stage of life, but their debate, limited as it was, straddled the line by which the investment actions of non-professional fiduciaries are assessed under Delaware law.

The Court is left with evidence of multiple short-term trades that, when measured by the losses incurred, can be criticized as ill-advised. Moreover, the

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in each of the capacities. Fortunately, determining when the relationship changed in unnecessary.

[77] *Law v. Law*, 753 A.2d 443, 447 (Del. 2000).

[78] *Id.* at 447-48.

[79] *Id.* at 448. Frequently, evaluation of a fiduciary's investment activities is aided by the terms of the written undertaking, such as a trust agreement. In this instance, Stant's fiduciary responsibilities evolved informally and no written guidance is available.

numerous short-term trades create the impression that Stant was not focused upon the risk to which he was exposing Helen's assets. Furthermore, the risk was exacerbated by trading on margin. In short, the Court finds that, if one judges Stant's conduct as that of a fiduciary, that Stant's strategy amounted to a breach of the prudent investor standard as applied to non-professional fiduciaries. The apparent effort to hit that stock that would have a run cannot be squared with the risk to which he exposed Helen's asset base.[80] Thus, the Court must turn to the question of damages, assuming that Stant's conduct is assessed throughout the entire short-term trading period as fiduciary.

It is here that Plaintiffs' case fails. The Plaintiffs have offered the Court no basis by which it may rationally engage in a damages calculation.[81] They contend that the proper measure of damages is the amount lost by Stant.[82] They offer no expert testimony—or indeed any other testimony—that would inform the Court of what the prudent investment of funds during the time in question would have

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[80] Assessment of an investment strategy generally requires an understanding of the full extent of the ward's assets. Investing a portion of Helen's assets as Stant did could be justified when evaluated in the broader context. Stant, however, did not attempt to justify or relate his investment strategy by reference to her other assets.

Not only was the short-term investment strategy unsuccessful and risky, but Stant also continued with it for an extended period of time as the losses continued to mount.

[81] *See Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005) ("Delaware law does not permit the fact finder to supply a damages figure based on 'speculation or conjecture' where the plaintiff has failed to meet its burden of proof on damages") (quoting *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958)).

[82] There is one limited proper measure of damages: the margin interest expense to facilitate this investment strategy. That is an objective, even if a less than comprehensive, measure.

generated. Investment carries risk. It is likely that a prudent investment strategy would have resulted in smaller losses, but even that inference is not clear from the record in this case. Although the Court is highly skeptical of Stant's investment actions, it simply has no basis to quantify any damages. Indeed, it is not even clear from the record that damages were suffered. A fiduciary who fails to meet his obligations, of course, cannot avoid liability simply because calculation of damages is difficult.[83] That, however, is not the precise issue here. Some reference, bolstered by expert testimony or market history or some other source, must provide a measuring stick for the Court.[84] Any award on these facts would be arbitrary. Most importantly, the only number sponsored by the Plaintiffs—the full amount of losses—is wholly unsupported.[85]

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[83] *See Thorpe v. CERBCO*, Inc., 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993) ("[O]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer.") (citation omitted).

[84] Indeed, the Court in *Thorpe* held that although "mathematical certainty" may not be necessary when determining damages, the Court must nonetheless have a "basis for a responsible estimate of damages." *Id.* No basis has provided in this case, and thus the Court cannot responsibly calculate damages from the Plaintiff's day trading claim.

[85] The Plaintiffs suggest that the funds that Stant transferred to various brokerage accounts for his "day trading" activities were not, even after accounting for the losses, returned to Helen's trust or estate. Although the records are not free from doubt, there is no credible evidence that Stant ever "pocketed" any of these funds. Indeed, it is important to note that there is no evidence that Stant ever personally profited from his short-term trading activities and the better inference is that he engaged in this conduct in a good faith, but ill-conceived effort to increase his mother-in-law's financial wherewithal. Moreover, various tax returns report losses in excess of $160,000. PX 91 at 41; PX 92 at 7; PX 93 at 5, 7; PX 94 at 9; PX 95 at 11. Significantly, all of this trading seems to have occurred before Helen became incompetent.

X. EXECUTOR'S COMMISSION

Marian collected a $50,000 "Executor's" commission as shown on the federal estate tax return for Helen's estate.[86] The Plaintiffs argue that this commission, or fee, for an estate consisting primarily of liquid assets and requiring little fiduciary effort, was excessive.[87] Marian attempts to justify the fee by noting the risk that one assumes as a fiduciary. Although supported by expert testimony,[88] her argument fails because she has been unable not only to identify any extensive work required to discharge her duties[89] but also to describe with any particularity the risk that she accepted in administering her mother's estate. Moreover, Marian paid tax and estate advisors almost $60,000 in the course of administering the estate. In sum, the effort involved was minimal and the risk was similarly minimal.

Although the Plaintiffs are correct that the commission taken by Marian was excessive, they are less than helpful when it comes to determining what an appropriate fee would have been.

Court of Chancery Rule 192 provides a useful analogous framework for determining what amounts to a reasonable fiduciary commission. Among the

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[86] PX 174 (Form 706) at Sched. J. The assets in the "estate" were minimal and handled in accordance with a small estate affidavit. PX 110.
[87] The total estate was approximately $1.7 million. *Id.* at 1, line 4.
[88] Dep. of Mark D. Olson, Esq. 29-31.
[89] Plaintiffs characterize the work required of Marian as writing "eight checks." Marian, herself, conceded that it was her understanding that she had little to do other than to write the eight checks. Tr. 80.

factors the Court may consider are the time spent, the risk and responsibility involved, the novelty and difficulty of the questions presented, comparable rates for similar services, the character and value of the estate's assets, and any guidance that the governing documents might provide. Helen's estate was—or, more accurately, should have been—easy to administer. With the substantial amount of professional fees incurred, Marian's risk should have been reduced and any unusual issues resolved. As she admits, she spent little time in the effort. There is no good way to calculate an appropriate fee in this instance. The Court, after balancing all of these considerations and applying its discretion, concludes that a fee of $10,000 would have been fair and reasonable under the circumstances.

Accordingly, Marian must return $40,000.

XI. ATTORNEYS' FEES

Marian was not a trustee of the Revocable Trust until Helen's death. She has invoked that lack of status in support of her argument that she did not owe fiduciary duties during Helen's life. Yet, she evidently has not been reluctant to use the trust's funds to pay the legal fees that she and her husband have incurred in defending this action.

Perhaps a small portion of those fees may fairly be attributed to challenges to her work as trustee and perhaps she is entitled to have those limited fees paid by the trust. Marian will be afforded an opportunity to justify and to quantify those

fees to which she may have been entitled. Otherwise, the fees expended by the trust for the Stants' defense in this action must be returned by Stant and/or Marian.

XII. CONCLUSION

The foregoing sets forth the Court's post-trial findings of fact and conclusions of law. Counsel are requested to confer and to prepare an implementing order. Unfortunately, a few open issues remain. Counsel are requested to confer and to determine if they can resolve them; otherwise, a brief hearing will be scheduled to resolve those open issues. Costs will be assessed against the Defendants.[90]

[90] Plaintiffs' request for imposition of a constructive trust is denied.