COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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RE: ***IMO the Purported Last Will and Testament of James W. Henry***,
C.A. No. 2019-0042-SEM

Dear Parties:

This is my final post-trial report regarding the purported last will and testament of James W. Henry. Mr. Henry's sons argue Mr. Henry lacked testamentary capacity or was unduly influenced by his granddaughter to change his will. The matter proceeded to a full trial on the merits. After careful review of the trial record, I find Mr. Henry's sons have failed to demonstrate that Mr. Henry lacked the minimal capacity necessary to create a will or that he was unduly influenced by his granddaughter to do so. For the reasons explained herein, the request to declare

the purported last will and testament void and to prohibit the estate from distribution on the terms provided therein should be denied.

I. Background[1]

James W. Henry passed on July 10, 2018, having enjoyed 101 years of a rich, full life.[2] Mr. Henry was a deacon and enjoyed monthly meetings with fellow deacons at his favorite restaurant—Hometown Buffet.[3] He loved singing, his church, and his large family.[4] Mr. Henry left behind two sons, two daughters, and many grandchildren and great-grandchildren. He also left two documents purporting to be his last will and testament; one executed on September 30, 2009 (the "2009 Will") and the other on May 22, 2018 (the "2018 Will").[5]

[1] Unless otherwise noted, the facts in this report reflect my findings based on the record developed at trial on July 7, 2021. *See* Docket Item ("D.I.") 37. I grant the evidence the weight and credibility I find it deserves. Citations to the hearing transcript at D.I. 39 are in the form "Tr. #." Trial exhibits are cited as "JX __."

[2] *See In the Matter of James W. Henry*, ROW 170054 ("ROW"). "Because the Register of Wills is a Clerk of the Court of Chancery, filings with the Register of Wills are subject to judicial notice." *Arot v. Lardani*, 2018 WL 5430297, at *1 n.6 (Del. Ch. Oct. 29, 2018) (citing 12 *Del. C.* § 2501; Del. R. Evid. 202(d)(1)(C)).

[3] Tr. 43:1-6.

[4] *See* Tr. 37:22-:38-3, 43:6, ROW D.I. 3.

[5] *See* JX A (2009 Will), JX B (2018 Will).

The execution of the 2009 Will was witnessed by Kathryn Laffey, Esquire.[6] Ms. Laffey testified that Mr. Henry was "quite alert", although "a little frail[,]" but she believes he "[a]bsolutely" had the mental capacity to execute the 2009 Will.[7] Through the 2009 Will, Mr. Henry bequeathed his estate, including real property in Delaware and Alabama to his children, or *per stirpes* to their issue if they predeceased him, in equal shares.[8] The 2009 Will also sought to appoint the Petitioners as executors.

Trial testimony confirmed Mr. Henry's sons, James E. Henry, Sr. and John E. Henry (the "Petitioners") and some of their family members were aware of the 2009 Will and the wishes express therein.[9] But many of Mr. Henry's family members were unaware of, and were surprised by, the 2018 Will.[10] The 2018 Will was executed less than two months before Mr. Henry's death. Through it, Mr. Henry bequeaths his Delaware home and a specified bank account, in full, to Anita Hawkes, his granddaughter (the "Respondent").[11] The 2018 Will leaves the residue of his

[6] Tr. 5:7-11.

[7] Tr. 5:12-6:9.

[8] JX A.

[9] *See, e.g.*, Tr. 18:10-13 (T. Tucker).

[10] *See, e.g.*, Tr. 10:10-13 (O. Washington), 18:14-17 (T. Tucker), 23:1-3 (H. Perine).

[11] JX B.

estate and proceeds from a sale of his Alabama property to Mr. Henry's children and six other family members, in equal shares, *per stirpes*.[12] Unlike the 2009 Will, which designated the Petitioners, the 2018 Will named the Respondent as executor.[13]

The 2018 Will was drafted and notarized by a Delaware attorney and witnessed by two individuals; none of whom testified at trial. Unfortunately, the trial record is devoid of testimony from any party with knowledge regarding the drafting or execution of the 2018 Will. Most of the trial witnesses knew nothing about the 2018 Will before Mr. Henry died, and the Respondent testified that she, likewise, was not involved.[14] Per the Respondent, her daughter transported Mr. Henry to his attorney's office to prepare and execute the 2018 Will, at his request.[15]

At the time he executed the 2018 Will, Mr. Henry lived with the Respondent and other family members. His daughter, Hazel Perine, moved in two months before he passed because she knew "he was seriously ill" and she wanted to assist him.[16]

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[12] *Id.*

[13] *Id.*

[14] *See* Tr. 44:7-17.

[15] *Id.*

[16] Tr. 21:14-22:4. Ms. Perine testified that she had difficulty getting through to her father or getting information about him before she moved in. *Id.* Mr. James E. Henry, Sr. likewise testified that communication was strained but improved once Ms. Perine moved in. Tr. 60:24-61:6.

Ms. Perine stated numerous times at trial that her father was very sick; she did not, however, elaborate on the nature and extent of his illness(es) nor how such may have affected his mental capacity.[17]

The Respondent, who testified that she lived in Mr. Henry's house since she was 11 years old, provided a bit more detail.[18] She explained that she would help Mr. Henry get up in the morning and fix his breakfast. He then had aides who would attend to him from 8:00 a.m. to 10:00 a.m.[19] The Respondent explained that Mr. Henry continued to go to church every Sunday and she and her daughters acted as his caregivers.[20] The Respondent confirmed that Mr. Henry was diagnosed with a brain tumor and he was visually impaired.[21] Nonetheless, the Respondent testified that Mr. Henry was "still sharp", "very vibrant" and "very, very direct about trying to get his last wishes resolved."[22]

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[17] *Cf.* Tr. 30:15-19 (H. Perine) (explaining that, before she moved into his home, she would speak with Mr. Henry on the phone and he "sounded totally out of it").

[18] *See* Tr. 46:23-24.

[19] Tr. 48:6-9.

[20] Tr. 72:7-16 ("My daughters and I, we shaved him, we cleaned him, we would prepare his meals. You do what a caregiver does.")

[21] *See* Tr. 52:17-53:4. *See also* JX C (reflecting diagnoses of advanced glaucoma), JX B (noting "visually impaired" on each page).

[22] *See* Tr. 42:17-19.

The Petitioners disagree. Mr. James E. Henry, Sr. testified that he noticed in March 2018 that Mr. Henry was "very confused" and had trouble recognizing his voice.[23] At one point in time, the Respondent placed Mr. Henry in respite care in Hockessin and, per Mr. James E. Henry, Sr., Mr. Henry was confused and combative, "[h]e didn't understand why he was there, didn't understand why they took him there."[24] Mr. James E. Henry, Sr. believes after the 2009 Will was executed, Mr. Henry "got sicker and sicker, he slipped away mentally."[25] And at the time Mr. Henry signed the 2018 Will, Mr. James E. Henry, Sr. believes "anybody could convince [Mr. Henry] of anything that they wanted to convince him of because he didn't have the firepower, he didn't have the frame of mind to do those things because of his medical condition."[26]

The Petitioners point me to medical records from Delaware Hospice and Christiana Care for support.[27] The records reflect that Mr. Henry was admitted to

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[23] Tr. 58:19-22, 80:7-10. The Petitioners testified that a notebook regarding Mr. Henry's progress and care was intentionally removed after the Petitioners made notations about Mr. Henry's confusion. *See* Tr. 79:5-24. The Respondent disagrees. *See* Tr. 53:20-54:1 ("I don't recall them being removed from the table. . . . But the paper was in the bin where you-all would come and get the bills from monthly.").

[24] Tr. 59:5-23.

[25] Tr. 62:14-22.

[26] Tr. 62:24-63:3.

[27] JX C. Unfortunately, the parties did not arrange for any of Mr. Henry's medical providers to testify at trial and it is unclear if the records within JX C are full and complete.

hospice with Delaware Hospice, on his own accord, on June 26, 2017. Thereafter, Delaware Hospice visited him frequently, making contemporaneous records of their visits. During some of those visits, Mr. Henry was described as being confused or in pain. The clinical assessment from April 16, 2018 notes "weakness, confusion" and states "Yes" in response to "Does the patient have Dementia or is Unresponsive".[28]

Further, the Delaware Hospice plan of care notes reflect that through May 4, 2018, Mr. Henry "continue[d] to show steady physical and mental decline."[29] Notably on April 20, 2018, the Delaware Hospice records reflect that Mr. Henry "continues to decline evidenced by increased confusion, slowed thought processing, impaired memory, hallucinations (talks to dead relatives and friends), slurred speech, and weakness[.]"[30] The medical records provided do not, however, include a medical diagnosis of dementia nor any indication as to the severity of such condition, to the extent it existed.

Nonetheless, I have endeavored to review the provided medical records and give them the weight and credibility I find they deserve under the circumstances.

[28] JX C.

[29] *Id.*

[30] *Id.*

On or around May 11, 2018, one of Mr. Henry's caregivers reported to Delaware Hospice that Mr. Henry "was not him self [*sic*]".[31] On May 12, 2018, Delaware Hospice visited Mr. Henry and noted that the most important issue voiced by Mr. Henry was "[t]o talk about his house deed[.]"[32] Mr. Henry also reported no discomfort and was described as "[p]eaceful".[33] Ten days later, he executed the 2018 Will. Two days later Delaware Hospice met with Mr. Henry again and found he was "[o]riented to person" and place and able to discuss his developmental and work history and Ms. Perine's recent move to assist with his care.[34]

The trial record reflects that Mr. Henry often spoke with his family about his estate planning. Mr. Henry's eldest daughter, Olivia Washington, testified that she had a good relationship with her father, and he confided in her that he was being pressured by the Respondent and her children about his will.[35] Per Ms. Washington, Mr. Henry wanted to make sure that the children of his deceased son, Nathaniel, received their share of his estate; a promise he wanted to fulfill.[36] When it came to

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Tr. 8:13-9:13. The Respondent denied that Mr. Henry was pressured and testified the 2018 Will was a product of Mr. Henry's wishes and not her desires. Tr. 55:10-13.

[36] Tr. 8:22-9:1.

his home in Delaware, Mr. Henry was consistently inconsistent with who should inherit it—for example, he offered it to both Ms. Washington[37] and Ms. Tucker.[38] Ultimately, in the 2018 Will, he bequeathed it to the Respondent.

The 2018 Will was admitted to probate on August 31, 2018.[39] On January 22, 2019, the Petitioners filed their challenge.[40] Trial was originally scheduled for October 28, 2020, but, in light of the ongoing pandemic, trial was cancelled and the matter was referred to mandatory mediation in the interim.[41] Mediation was unsuccessful and trial was rescheduled for July 7, 2021.[42] Eight witnesses, including the parties, testified and the Petitioners submitted three exhibits (the 2009 Will, the 2018 Will, and the medical records). This is my final post-trial report.[43]

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[37] Tr. 10:8.

[38] Tr. 10:3-4, 16:19-21. Ms. Tucker explained that she refused this offer because it was not what her father, Nathaniel, wanted. She explained, her father purchased the home for Mr. Henry and his wife but that he ultimately wanted the property to pass to Ms. Tucker and her brother. Tr. 17:5-18:9.

[39] *See* ROW D.I. 7.

[40] D.I. 1. The Respondent filed a response on or about May 13, 2019. D.I. 9.

[41] *See* D.I. 17.

[42] *See* D.I. 23.

[43] This report makes the same substantive findings and recommendations as my October 29, 2021 draft report, to which no exceptions were filed. D.I. 40.

II. Analysis

The Petitioners seek to invalidate the 2018 Will for lack of testamentary capacity or undue influence.[44] I will address each in turn.

A. *The Petitioners Have Failed To Overcome The Presumption Of Testamentary Capacity.*

I first address whether Mr. Henry had testamentary capacity when he executed the 2018 Will. His capacity is presumed, and the Petitioners have "the burden of overturning that presumption by a preponderance of the evidence."[45] Proof by a preponderance of the evidence "means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[46]

When considering whether the Petitioners met their burden, I remain cognizant that testamentary capacity is a low bar:

> To possess testamentary capacity, a testator must be capable of exercising thought, reflection and judgment, and must know what he or

[44] Although the Petitioners pled a third count claiming the 2018 Will was ineffective due to the renunciation of Victor Moody, they did not present any argument or evidence in support of that claim at trial. I find it has been withdrawn or waived by their failure to prosecute.

[45] *In re Boyd*, 2003 WL 21003272, at *4 (Del. Ch. Apr. 24, 2003). This burden may be shifted under certain circumstances, which are not present here. *See In re Last Will & Testament of Melson*, 711 A.2d 783, 788 (Del. 1998).

[46] *Mitchell Lane Publ'rs Inc. v. Rasemas*, 2014 WL 4925150, at *3 (Del. Ch. Sept. 30, 2014) (citations and quotation marks omitted).

> 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. It is important to note that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will.[47]

Further, "the evidence as to a testator's capacity must relate to the time at which the will was executed."[48] Thus, this case "must turn on the facts and circumstances leading up to and surrounding the execution of" the 2018 Will.[49]

I find the Petitioners have failed to overcome the presumption of capacity. It is undisputed that Mr. Henry was in poor health when the 2018 Will was executed. But the Petitioners were required, and failed, to demonstrate that Mr. Henry, more likely than not, did not understand "his assets, the objects of his bounty, and the purpose of" the 2018 Will at the time it was executed.[50] Such cannot be shown merely through testimony that Mr. Henry was diagnosed with a brain tumor or

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[47] *Sloan v. Segal*, 2010 WL 2169496, at *7 (Del. May 10, 2010) (citations and quotation marks omitted). Even those subject to the protection of a guardianship, one of the most severe deprivations of the right to self-determination, may possess the minimal capacity necessary to make a will. *See In re Last Will & Testament of Kohn*, 1993 WL 193544, at *6 n.2 (Del. Ch. May 19, 1993) ("In all events, one who very plainly does qualify for the protective services of a guardian may still retain sufficient capacity to designate the disposition of their property at death.").

[48] *In re Langmeier*, 466 A.2d 386, 389 (Del. Ch. 1983).

[49] *Id.* This factual record can include "circumstantial evidence bearing on the state of mind of a testator at the critical time[.]" *Id.* at 401.

[50] *In re Boyd*, 2003 WL 21003272, at *5 n.42.

dementia; both conditions have varying levels of severity and may effect mental faculties to varying degrees.[51]

Nor does evidence regarding Mr. Henry's visual impairment or confusion overcome the presumed capacity. I struggle to appreciate how Mr. Henry's visual impairments would render him without the mental capacity to create a will; rather, the 2018 Will reflects that Mr. Henry's attorney considered his visual impairments during execution.[52] And, that Mr. Henry suffered from confusion does not prevent him "from creating a valid will if on the day the will [was] executed he [was] not confused and possesse[d] an understanding of [his] property and the natural objects of [his] bounty."[53] The law presumes as such and the Petitioners have failed to overcome that presumption.

The evidence reflects that Mr. Henry was concerned about his estate and questioning how best to dispose of his assets. Ten days before he executed the 2018 Will, the most important issue voiced by Mr. Henry to the hospice workers was "[t]o

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[51] *See In re Kittila*, 2015 WL 688868, at *12 (Del. Ch. Feb. 18, 2015) (explaining "a diagnosis of dementia, including Alzheimer's dementia, is not conclusive of a person's testamentary capacity"); *In re Boyd*, 2003 WL 21003272, at *4 (finding testamentary capacity even with a diagnoses of dementia when "the evidence shows that [when the will was executed, the testator] understood that he was disposing of his estate to the beneficiaries named in the [will]").

[52] *See* JX B (noting "visually impaired" on each page).

[53] *Davis v. Estate of Perry*, 2013 WL 53991, at *2 (Del. Ch. Jan. 2, 2013).

talk about his house deed[.]"[54] Such is consistent with someone who is planning to execute a new will. Two days after Mr. Henry executed the 2018 Will he was found to be oriented to person and place.[55] On this record, I find the Petitioners have failed to prove, by a preponderance of the evidence, that Mr. Henry did not possess the minimal capacity required to execute a will.[56]

B. *The Petitioners Have Failed To Prove Undue Influence.*

The Petitioners argue in the alternative that Mr. Henry was unduly influenced by the Respondent. The Petitioners bear the burden of proving, by a preponderance of the evidence "(1) a susceptible testator; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual assertion of such influence; and, (5) a result demonstrating its effect."[57] I find four out of these five

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[54] JX C.

[55] *Id.*

[56] *See, e.g.*, *In re Will of Cauffiel*, 2009 WL 5247495, at *6 (Del. Ch. Dec. 31, 2009) (finding "facts indicat[ing] that the [testator] was struggling with her memory and becoming increasingly confused, . . . do not overcome the presumption that she possessed testamentary capacity"); *In re Boyd*, 2003 WL 21003272, at *6 (same regarding a testator who was diagnosed with dementia, had impaired mental capacity, and needed assistance remembering the names of those close to him); *In re Holmes*, 1994 WL 384599, at *6 (Del. Ch. Jul. 19, 1994) (same regarding a testator who had a stroke that left her with good days and bad days, sometimes recognizing people and sometimes not); *In re Purported Last Will & Testament of Macklin*, 1991 WL 9981, at *3 (Del. Ch. Jan. 23, 1991) (same regarding a the testator who "was failing and had increasing periods of confusion").

[57] *In re Boyd*, 2003 WL 21003272, at *6.

elements have been established. The failure of proof on one, however, dooms the Petitioners' case.

It is more likely than not that Mr. Henry was a susceptible testator, subject to undue influence. The record reflects he had diminished capacity to independently perform his activities of daily living and relied heavily on the Respondent, Ms. Perine, and other family members for assistance. The Respondent also had the opportunity to assert undue influence on Mr. Henry because the two lived together and were intimately involved in each other's daily lives. I further find that the Respondent had a disposition to exert undue influence on Mr. Henry—she had been living in Mr. Henry's home since she was 11 years old and could have been forced to move if the home were to pass as contemplated under the 2009 Will. Stated another way, the Respondent stood to benefit from obtaining a new will, leaving the home to her or otherwise allowing her to remain therein. And, assuming undue influence was actually asserted, the 2018 Will, which leaves the home and a bank account solely to the Respondent, would be a result supporting a finding of undue influence.

But the Petitioners have failed to demonstrate by a preponderance of the evidence "actual assertion" of undue influence. Undue influence is more than a suggestion, it "is an excessive or inordinate influence" sufficient "to subjugate [the

testator's] 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."[58] When analyzing "actual assertion," I appreciate:

> [p]ersons who unduly influence a testator to change his or her will normally do that surreptitiously. Only rarely do such persons supply leave confessions or permit eyewitnesses to observe their acts. By its nature such activity is covert and subtle. Therefore, in most cases proof of undue influence must necessarily be circumstantial, that is, based upon inferences from other objective facts.[59]

But, "if the evidence supports two equally plausible explanations for a late change of beneficiary, one of which involves undue influence and the other does not[,]" the moving party has not met their burden of proof.[60] Rather, the moving party—here the Petitioners—"must show that undue influence is the more probable and plausible explanation for the testator's acts, and conversely, that any alternative explanations are improbable and implausible."[61]

Mr. Henry discussed his testamentary plans with many of his family members who shared their concerns and opinions with him. For example, when Mr. Henry confided in his daughter, Ms. Washington, that he wanted to give his Delaware home

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[58] *In re Langmeier*, 466 A.2d 386, 403.

[59] *In re Konopka*, 1988 WL 62915, at *3 (Del. Ch. Jun. 17, 1988).

[60] *Id.* at *5.

[61] *In re Boyd*, 2003 WL 21003272, at *7.

to Ms. Tucker, Ms. Washington told him "no" and that his proposal would not be fair. When he offered to give it to Ms. Washington instead, she again rebuffed him. Ms. Washington also encouraged Mr. Henry to talk to the Petitioners about his plans. The question before me is whether the Respondent not only expressed her opinion to Mr. Henry (like other family members did) but whether she did so with undue influence sufficient to overcome Mr. Henry's will. The Petitioners have failed to present evidence that makes the answer to this question, more likely than not, "yes."

The Respondent testified at trial that her daughter took Mr. Henry to his attorney's office to prepare and execute the 2018 Will; she testified that she played no part in those events and no evidence to the contrary was introduced. Further, the attorney who drafted and notarized the 2018 Will was subject to "high ethical standards . . . to ensure that [Mr. Henry's] actions were the product of [his] own free will."[62] The Petitioners have failed to present any evidence that the attorney failed in this regard.

There is also another plausible explanation for Mr. Henry's change of heart in the 2018 Will. As Mr. Henry struggled with what to do with his Delaware home—offering it to various family members—a reasonable solution could have come to

[62] *In re W.*, 522 A.2d 1256, 1264 (Del. 1987).

mind: leave it to the Respondent. The Respondent lived in the home since she was 11 years old, provided daily care to Mr. Henry when he needed it the most, and is a natural recipient of a greater portion of his estate.[63] Because this is an equally probable explanation for the changes in the 2018 Will, the Petitioners have failed to prove that the Respondent actually asserted undue influence.

III. Conclusion

"The ability to discharge one's property by will is a cherished right."[64] Thus, "[t]he law disfavors invalidating a will absent strong evidence mandating such drastic action. This is especially so where, as here, two equally plausible reasons exist for the late change in beneficiaries."[65] Based on the record developed at trial, it is equally plausible that Mr. Henry had a change of heart and wished to bequeath his home and additional assets to the Respondent in recognition of the care and comfort she provided to him during his time of need. Or, perhaps, he simply wanted to allow her to remain in her longtime home after his death.

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[63] *See, e.g.*, *In re Last Will & Testament of McElhinney*, 2007 WL 2896013, at *5 (Del. Ch. Oct. 1, 2007) (finding a testator's decision to leave "half of her estate to the two individuals who spent time with her, made her life better, and helped her when help was needed during the last several years of her life" plausible).

[64] *In re Hammond*, 2012 WL 3877799, at *5 (Del. Ch. Aug. 30, 2012).

[65] *In re W.*, 522 A.2d at 1265.

Mr. Henry's motivations are unclear, but the Petitioners bore—and failed to meet—the burden to overcome Mr. Henry's presumed capacity or to prove undue influence by the Respondent. On the record developed at trial, I find it is not more likely than not that Mr. Henry lacked the minimal capacity necessary to create a will or that the Respondent unduly influenced him to do so. The challenges brought by the Petitioners should be dismissed. This is my final report and exceptions may be filed under Court of Chancery Rule 144.

Respectfully,

/s/ Selena E. Molina

Master in Chancery