

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

SELENA E. MOLINA
MASTER IN CHANCERY

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

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Tiffany M. Shrenk, Esquire
MacElree Harvey, LTD
5721 Kennett Pike
Centreville, DE 19807

Thomas A. Uebler
McCollom D'Emilio Smith Uebler LLC
2751 Centerville Road, Suite 401
Wilmington, DE 19808

RE: *Lisa M. Sweeney v. Mark C. Sweeney*
C.A. No. 2020-0802-SEM

Dear Counsel:

Pending before me is a motion to dismiss a petition challenging Theresa A. Smith's purported testamentary plan. The petitioner alleges that Ms. Smith was unduly influenced by her nephew during her final years and her final will and trust were a product of that influence or not signed with the requisite testamentary capacity, given Ms. Smith's infirmities. The alleged influencer has moved to dismiss for failure to state a claim. I find the motion should be granted and the amended petition should be dismissed. This is my final report.¹

¹ This report makes the same substantive findings and recommendations regarding testamentary capacity, unjust enrichment, and the requested remedies, as reflected in my July 27, 2021 draft report, to which exceptions were filed. *See* Docket Item ("D.I.") 25-26. The exceptions were fully briefed as of September 30, 2021, and are sustained, in part,

I. Background²

This matter is a family dispute between two siblings, Lisa M. Sweeney (“Petitioner”) and Mark C. Sweeney (“Respondent”) over the administration of their late aunt’s estate. Theresa A. Smith (“Decedent”), the parties’ aunt, was close with the parties for many years. She moved in with Petitioner and her family around 2005 and lived with them for seven (7) years. While she was there, Decedent undertook some estate planning. On October 12, 2010, Decedent executed the Theresa A. Smith Living Trust (the “2010 Trust”), transferred personal and real property to the 2010 Trust, and executed a purported last will and testament (the “2010 Will”). Petitioner was named as executrix under the 2010 Will and successor trustee of the 2010 Trust. Petitioner’s two minor children were named as beneficiaries of the 2010 Trust.

Decedent moved out of Petitioner’s home in or around March 2012. At that time, Decedent returned to Delaware to assist her sister with administering their late brother’s estate. While back in Delaware, Decedent, on October 4, 2017, executed a new will (the “2017 Will”), another living trust (the “2017 Trust”), and powers of

regarding the susceptibility prong of undue influence. I, nonetheless, find the undue influence claim should be dismissed for the reasons provided herein.

² Unless otherwise noted, the facts recited herein are taken from the amended petition and its exhibits. D.I. 15.

attorney (the “2017 POAs”). In the 2017 Will, Decedent’s sister was named as executrix, with Petitioner and Respondent named as joint successor executors. Petitioner and Respondent were also named as joint successor trustees of the 2017 Trust. The 2017 POAs appointed Decedent’s sister as her agent, with Petitioner and Respondent as joint successor agents. The 2017 Will and 2017 Trust, together, contemplated Petitioner and Respondent receiving equal shares of Decedent’s estate.

In 2018, Decedent’s sister passed and Decedent “began having significant health problems[.]”³ Petitioner alleges, “[a]s a result of her advanced age, blindness, and infirmities, Decedent needed assistance with her daily living and was dependent upon others to accomplish activities of daily living.”⁴ Thus, after Decedent’s sister passed, Respondent handled Decedent’s finances, drove her to doctors’ appointments, took her grocery shopping, and ran other errands for her. Respondent also accompanied Decedent to her medical and legal appointments. While Respondent was assisting Decedent, he changed the locks on Decedent’s home, changed her cellphone, “isolated [her] from significant contact with Petitioner,” and did not keep Petitioner informed of Decedent’s medical treatment and condition.⁵

³ D.I. 15 ¶21.

⁴ D.I. 15 ¶23.

⁵ D.I. 15 ¶26.

“In the final year of her life, Decedent suffered from cancer, vertigo, and cognitive decline[.]”⁶ She was also legally blind and “either tried to use a large magnifying glass to read documents or relied upon others to read documents to her.”⁷ Despite these infirmities, Decedent changed her testamentary plans on December 27, 2019. Decedent executed a new will (the “2019 Will”), restated her trust (the “2019 Trust”), and executed new powers of attorney naming Respondent as her sole agent. Together, the 2019 Will and the 2019 Trust disinherited Petitioner and put Respondent in charge as sole executor and successor trustee.⁸ Decedent died about three (3) months later, on March 28, 2020, at the age of 84.

Respondent submitted the 2019 Will for probate and was granted letters testamentary and appointed as executor of Decedent’s estate on August 5, 2020. In response, Petitioner filed this action on September 21, 2020.⁹ After Respondent moved to dismiss the original petition, Petitioner filed an amended petition, in which she pleads five counts: (I) for review of proof of the 2019 Will; (II) to invalidate the

⁶ D.I. 15 ¶22.

⁷ D.I. 15 ¶21.

⁸ The 2019 Trust provides: “I intentionally have not provided for [the parties’ sister] and [Petitioner] as beneficiaries in this trust, therefore, for all purposes of this trust, they will be treated as having predeceased me.” D.I. 15, Ex. E, art. 2.

⁹ D.I. 1.

2019 Trust; (III) for unjust enrichment; (IV) for imposition of a resulting trust; and (V) for a constructive trust (the “Amended Petition”).¹⁰

Respondent filed a motion to dismiss the Amended Petition on January 18, 2021, seeking dismissal of Counts I, II, and III for failure to state a claim for undue influence or lack of testamentary capacity (the “Motion”).¹¹ Respondent argues Counts IV and V, for equitable remedies, must also be dismissed. The Motion was fully briefed, and oral argument held on April 12, 2021.¹² My draft report was issued on July 27, 2021, and exceptions were taken thereto and fully briefed as of September 30, 2021.¹³ This is my final report.

II. Analysis

Respondent moves to dismiss under Court of Chancery Rule 12(b)(6). The standard for dismissal under Rule 12(b)(6) is settled:

(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are “well-pleaded” if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and ([iv]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any

¹⁰ D.I. 15

¹¹ D.I. 17.

¹² *See* D.I. 23-24.

¹³ *See* D.I. 25, 26, 33.

reasonably conceivable set of circumstances susceptible of proof.¹⁴

But this Court does not “simply accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences” in favor of the pleader.¹⁵

A. Petitioner Has Failed to Plead Non-Conclusory Facts in Support of the Alleged Lack of Testamentary Capacity.

Petitioner seeks to invalidate the 2019 Will and the 2019 Trust for lack of testamentary capacity.

To possess testamentary capacity, a testator must be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act. 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.¹⁶

Petitioner, as the party challenging capacity, needed to plead facts that would support a reasonably conceivable claim for lack of capacity to execute the 2019 Will and the 2019 Trust.¹⁷ She failed to do so.

¹⁴ *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (quotation marks and citations omitted).

¹⁵ *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

¹⁶ *Sloan v. Segal*, 2010 WL 2169496, at *7 (Del. May 10, 2010) (quotation marks and citations omitted).

¹⁷ *See In re Will of Hurley*, 2014 WL 1088913, at *4 (Del. Ch. Mar. 20, 2014). Petitioner argues in her exceptions that *Hurley* is distinguishable because Petitioner provided more detail in the Amended Petition than the petitioners in *Hurley*. I disagree. In *Hurley* the

The Amended Petition contains all the words one might expect in a lack of testamentary capacity claim—“weakened intellect,” “dependent,” “cognitive decline,” “infirmities,” and the like. But these are conclusions, not facts. Petitioner needed—and failed—to plead facts from which these conclusions could be drawn. Because she failed to do so, I cannot accept these conclusory allegations.

The only non-conclusory, specific factual allegations in the Amended Petition that may support lack of testamentary capacity are: (1) Decedent was 84 years old, (2) Decedent had cancer and vertigo, (3) Decedent relied on Respondent to help with her finances and run errands, (4) Decedent had surgery in January 2020 and did not tell Petitioner about it beforehand, and (5) Decedent did not tell Petitioner about the reoccurrence of her cancer when Petitioner visited her in January 2020.¹⁸ Taking these altogether, in a light most favorable to Petitioner, I find Petitioner has failed to

petitioners likewise pointed to the decedent’s age, non-cognitive medical diagnoses, and failure to inform; the lack of specific non-conclusory allegations is comparable.

¹⁸ In my draft report I included the averment that Decedent was blind in my list of non-conclusory allegations. But blindness is not a condition indicative of cognitive capacity. Even accepting as true that Decedent was blind, such condition does not tip the scale one way or the other in determining whether it is reasonably conceivable that Decedent was incapable of exercising thought, reflection, and judgment or unaware of what she was doing when she executed the challenged documents. I decline to infer cognitive impairment from visual impairment. I continue to include Decedent’s age and diagnoses of cancer and vertigo because, when taking those averments in a light most favorable to Petitioner, I will accept these conditions may have a cognitive component, under certain circumstances. That said, I find it would not be appropriate to infer lack of testamentary capacity solely, or collectively, from old age or diagnoses of cancer and vertigo.

plead a reasonably conceivable claim that Decedent lacked the requisite testamentary capacity to execute the 2019 Will and the 2019 Trust.¹⁹

B. Petitioner Has Failed To Plead A Reasonably Conceivable Claim of Undue Influence.

Petitioner pleads in the alternative that the 2019 Will and the 2019 Trust were the product of Respondent's undue influence. An undue influence claim must be supported by well-pleaded facts as to the following elements: "(1) a susceptible testator; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and, (5) a result

¹⁹ In her exceptions, Petitioner argued I erred as a matter of law and failed to view the Amended Petition in a light most favorable to Petitioner. Petitioner argues:

The facts alleged in the Amended Complaint, specifically that the Decedent was blind, advanced in age, had cognitive impairment, was diagnosed with and undergoing cancer treatment, was forgetful in not alerting Petitioner of her recent cancer diagnosis and cancer treatment, had cognitive impairment, was advanced in age, needed assistance with her activities of daily living, and was dependent upon Respondent, are sufficient non-conclusory facts to state a claim of lack of capacity.

D.I. 30. I continue to disagree. Testamentary capacity is presumed and is a modest level of capacity. Someone of advanced age, with cognitive decline and visual impairments may possibly lack such capacity. But to state a claim of lack of testamentary capacity must require more. Otherwise, it would be impossible to achieve a pleading-stage dismissal of challenges to estate planning documents executed by someone elderly, declining, or visually impaired, essentially flipping the presumption of capacity. This could invite unwarranted challenges to the testamentary plans of visually impaired, elderly testators. I decline to send such invitation, particularly considering the presumption of capacity and this State's long history of respect for, and deference to, a decedent's wishes.

demonstrating its effect.”²⁰ In my draft report, I held that Petitioner failed to plead facts from which a reasonable inference of susceptibility could be made. After review of the exceptions, I find I relied too heavily on the capacity aspect of susceptibility, which requires less of a showing than testamentary capacity, and did not fully consider the non-conclusory factual allegations supporting Decedent’s dependance on Respondent. Herein, I find Petitioner has pled susceptibility and move on to the remaining elements, which I did not address in my draft report.

Although “[t]here is no precise definition or defining feature of susceptibility, . . . the analysis is informed by the subject’s capacity[.]”²¹ Ultimately, “[e]vidence of a subject’s dependence on another, or a particular predisposition to accede to the demands of another person, may be sufficient to show susceptibility.”²² Although I continue to have concerns about whether Petitioner has alleged facts supporting the conclusions of weakened intellect or diminished capacity, Decedent’s visual impairments, medical condition, and reliance on Respondent taken together in a light most favorable to Petitioner make it reasonably conceivable that Decedent was

²⁰ *In re W.*, 522 A.2d 1256, 1264 (Del. 1987) (citations omitted).

²¹ *In re Dougherty*, 2016 WL 4130812, at *10 (Del. Ch. Jul. 22, 2016) (citations omitted).

²² *Id.* (citations omitted).

susceptible to undue influence.²³

I turn now to opportunity, disposition, actual exertion, and a result demonstrating the effect of such. As someone Decedent was dependent on, Respondent had the opportunity to exert undue influence. Accepting as true that Respondent made efforts to isolate Decedent also makes it reasonably conceivable that he was disposed to exert such influence. And the designation of Respondent as sole trustee and executor and the new distribution of Decedent's real property and personal property solely to Respondent may demonstrate the effect of such exertion.

I struggle, however, with actual exertion.²⁴ Petitioner is correct that actual exertion is often covert and subtle and ultimate proof may be by circumstantial evidence.²⁵ But Petitioner still needed to plead facts from which actual exertion

²³ Although I found *Hurley* persuasive regarding Petitioner's claim of testamentary capacity, I agree with Petitioner that it is distinguishable regarding the susceptibility prong of undue influence. Unlike in *Hurley*, Petitioner alleged that Decedent was dependent on Respondent, who handled Decedent's finances, drove her to doctors' appointments, and assisted with errands. *See Hurley*, 2014 WL 1088913, at *6. Petitioner also pled that Respondent changed the locks on Decedent's home and her cellphone; both are indicative of dependance and control. I find Petitioner met the minimal pleading standard for susceptibility and the post-trial decisions cited by Respondent are inapposite. *See* D.I. 31.

²⁴ My draft report cited and relied on the four-factor undue influence test articulated in *McAllister v. Schettler*, 521 A.2d 617, 623 n.4 (Del. Ch. Dec. 2, 1986). But the parties agree—as do I—that the five (5) factors articulated by the Delaware Supreme Court in *In re West*, 522 A.2d 1256, 1264 (Del. 1987) constitute the prevailing standard.

²⁵ *See In re Konopka*, 1988 WL 62915, at *3 (Del. Ch. Jun. 17, 1988).

could be inferred.²⁶ I find she failed to do so because the only allegations that may support actual exertion are conclusory and “upon information and belief” which this Court does not need to accept as true.²⁷

* * *

Because Petitioner has failed to plead a reasonably conceivable claim of lack of testamentary capacity or undue influence, Counts I and II should be dismissed.

C. Petitioner Has Failed to Plead A Reasonably Conceivable Claim of Unjust Enrichment.

Petitioner alleges that “Respondent will be unjustly enriched by virtue of the changes to Decedent’s testamentary plan” in 2019.²⁸ But Petitioner has failed to “adequately plead the enrichment of [Respondent] at the expense of [Petitioner] that

²⁶ See *Hurley*, 2014 WL 1088913, at *5 (Del. Ch. Mar. 20, 2014) (rejecting an argument that the petitioners should be excused from pleading facts in support of all elements of undue influence, due to the covert nature of actual exertion, and explaining “[t]hat the claims are fact-intensive does not excuse the Petitioners from satisfying Delaware’s pleading standards; conclusory allegations are not sufficient to allow a would-be plaintiff to explore through discovery whether any facts exist that might support those allegations”).

²⁷ See D.I. 15 ¶¶34-35.; *O’Gara v. Coleman*, 2020 WL 752070, at *6 (Del. Ch. Feb. 14, 2020) (holding that allegations “upon information and belief” need not be accepted as true when unsupported by or inferred from well-pleaded facts) (citations omitted). On this element, Petitioner provided less support than the petitioners in *Hurley*, who alleged that the influencer “sought out and took the Decedent to meet with” the attorney who drafted the challenged documents; a non-conclusory fact supporting actual exertion. See *Hurley*, 2014 WL 1088913, at *6.

²⁸ D.I. 15 ¶52.

was not justified.”²⁹ Because Petitioner failed to plead non-conclusory facts in support of a lack of testamentary capacity or undue influence, it would be unreasonable to infer that Decedent’s testamentary plan as reflected in the 2019 Will and the 2019 Trust was not justified. Petitioner, thus, failed to plead a reasonably conceivable claim for unjust enrichment and Count III should be dismissed.

D. Petitioner’s Requested Remedies Should Be Dismissed.

Because Petitioner fails to state a claim for relief in Counts I-III, Counts IV and V, for related equitable remedies, should also be dismissed.

III. Conclusion

Although this Court prefers to hear cases on their merits, a petitioner must plead facts, rather than mere conclusory allegations, in support of her claims. Even with the second chance provided to her under Court of Chancery Rule 15(aaa), Petitioner failed to support her vague conclusions of “weakened intellect,” “cognitive decline,” and other “infirmities” with well-pled facts. These phrases are not magic and, when unsupported by factual allegations, are insufficient to state a reasonably conceivable claim of lack of testamentary capacity.

Although I have sustained the exceptions, in part, finding Petitioner has pled

²⁹ *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *9 n.33 (Del. Ch. July 24, 2009) (emphasis added).

sufficient facts from which it is reasonable to infer that Decedent was susceptible to undue influence, Petitioner failed to plead facts supporting actual exertion by Respondent. The failure to support any element warrants dismissal and I find it would not be appropriate to allow Petitioner's claims to move forward into discovery. That includes the claim of unjust enrichment and the requested remedies, which are not independently viable. This is my final report and exceptions may be filed under Court of Chancery Rule 144.

Respectfully,

/s/ Selena E. Molina

Master in Chancery