IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KATRINA McGEE Plaintiff, v. THE ESTATE OF FREDERICK L. HOPKINS, WANDA HOPKINS, Individually and in her capacity as Executrix, Defendants.	)))))))))))	C.A. No. 2019-0250-PWG

MASTER'S REPORT

Date Submitted: September 30, 2022
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Dean A. Campbell, Esquire, LAW OFFICE OF DEAN A. CAMPBELL, P.A., Milton, Delaware, *Attorney for Plaintiff Katrina McGee*

Bruce A. Rogers, Esquire, BRUCE A. ROGERS, P.A., Georgetown, Delaware, *Attorney for Defendants The Estate of Frederick L. Hopkins and Wanda Hopkins*

GRIFFIN, M.

A daughter of decedent seeks to invalidate his will, which left his estate to his spouse. She claims he lacked testamentary capacity and was unduly influenced by his spouse when he executed the will six days before his death. The daughter also argues that the spouse breached her fiduciary duty as his agent by self-dealing related to the execution of the will. I find that the evidence shows the will is valid because decedent did not suffer from weakened intellect, had testamentary capacity, and was not unduly influenced by his spouse, when he executed the will. In addition, his spouse did not breach her fiduciary duty as his agent. I recommend that the Court deny the daughter's claims. This is a final report.

I. **BACKGROUND**[1]

A. Factual Background

Frederick L. Hopkins ("Decedent") and Defendant Wanda Hopkins ("Wanda") were married for close to 30 years.[2] Decedent had five children – four by prior marriages, Plaintiff Katrina McGee ("Katrina"), Fred Vann, Troy Hopkins ("Troy") and Brenda Vann (who died in 1988), and Sean Hopkins ("Sean"), who is Decedent's and Wanda's child.[3] At issue is property located at 24307 Hollyville

[1] I refer to the Trial Transcript as "Trial Tr.," the joint exhibits as "JX," and Dr. Marie Gray's Deposition Transcript as "Gray Dep. Tr." I use first names in pursuit of clarity and intend no familiarity or disrespect.

[2] Trial Tr. 75:19-76:4.

[3] *Id.* 41:17-42:5.

Road, Millsboro, Delaware ("Property"), which was Decedent's only solely owned property at his death.[4] Decedent was described as a "man of faith," who was active in his church and in his community,[5] and was "always positive."[6] Sean described the relationship between Decedent and Wanda as "[e]verything that she said goes, but he would have the final say."[7] Katrina testified that Decedent loved and trusted Wanda, and also that Wanda was controlling – "[n]ot only just to my father; she was controlling with us."[8] She further testified that Decedent's children "were his world."[9] Wanda testified that Decedent was not easily influenced and they "would discuss things but if [he] didn't really want to do it, he didn't do it."[10]

1. Decedent's Medical History and Activities Leading Up to the Will Signing

Decedent was diagnosed with cancer in December 2013, had surgery in 2014 and was under treatment for the cancer continually until December 2018.[11] In or

[4] JX 5. The Property was the childhood home of Katrina and Troy, and Fred Vann's home while he was in high school. Trial Tr. 42:11-43:1.

[5] Trial Tr. 53:5-9; *id.* 54:5-9 (Decedent was a reverend at his church).

[6] *Id.* 115:1-10

[7] *Id.* 181:17-18; *id.* 182:17-18 (Sean's testimony that "the bigger decisions, everything really went through [Wanda]").

[8] *Id.* 116:10-11; *id.* 371:19-21.

[9] *Id.* 116:12-15.

[10] *Id.* 362:17-363:2. Wanda also testified that, up until he died, she and Decedent "worked together," and that she "paid the bills," but "[h]e knew how to deal with the money and save money … to get what he want[ed]." *Id.* 232:17-233:18.

[11] *Id.* 137:2-138:18.

around October 2018, he called Sean to say that he "didn't feel like doing this [any more]," and arrangements were made for all of his children to come home so he could talk with them.[12] It appears that Decedent went out to lunch with Troy, Fred and Sean (with Katrina arriving later) and had discussions related to property but did not talk specifically with his children about his estate plans.[13]

On or about December 12, 2018, Decedent entered into the hospice program at home.[14] Wanda remained his primary caregiver.[15] His initial evaluation in the hospice program indicates that his status was terminal and he was experiencing "weakness" and "decreasing functional status" with his disease, but was calm, "[a]lert, orientated," and his recent and remote memory was intact.[16] His medication, at that time, included oxycodone and MS Contin, an opiate, (60 mg

[12] *Id.* 171:24-172:4; *id.* 365:14-366:9 (Wanda's testimony that Decedent wanted the children to come home so she paid for Fred to fly home from California); *id.* 395:9 (Troy's testimony that Decedent "called for a family meeting" around October 2018).

[13] *Id.* 172:9-173:23 (Sean's testimony that Decedent asked Troy whether he needed a place to live, but Troy declined the offer to move into the trailer on the Property, and that Fred Vann requested one of Decedent's cars). Troy testified that they "never had the meeting," and that Decedent told his sons at lunch that he didn't have a will and Wanda will "do the right thing." *Id.* 396:8-18.; *but see id.* 380:24-381:2 (Katrina's testimony that she was not involved in the meeting with her brothers).

[14] *Id.* 138:22-139:7; JX 2, Hospice Records ["HR"]000074.

[15] Trial Tr. 109:10-13.

[16] JX 2, HR000078.

every 12 hours).[17] On or about December 17, 2018, the hospice social worker, who discussed having estate planning documents with Decedent, Wanda and Katrina, described Decedent's cognitive status, at that time, as "[o]riented to person, [o]riented to place, [o]riented to time."[18] On December 19, 2018, his medication was increased (MS Contin was prescribed for three times a day) although the hospice records show he was taking it only two times a day.[19] On December 19, 2018, hospice records describe him as peaceful, alert, orientated, with his recent and remote memory intact.[20]

On December 24, 2018, Decedent wanted to see his newborn grandchild and Wanda drove him to the hospital in Salisbury to see the grandchild.[21] They stayed at the hospital for around six hours that day.[22] Decedent and Wanda had breakfast at his sister's house on Christmas morning, came home to open gifts with family members, and then returned to the hospital to see the baby again for a couple of

[17] *Id.*, HR000077; *see* Gray Dep. Tr. 17:13-16. MS Contin was changed from BID to TID regimen due to Decedent's reports that the oxycodone wears off too soon), and dexamethasone (4 mg daily) was added. *Id.*, HR000081.

[18] *Id.*, HR000082; *see also* Trial Tr. 98:3-15.

[19] JX 2, HR000087 (Decedent and the family thought MS Contin three times a day was too much).

[20] *Id.*, HR000089. A hospice volunteer notary was called in on December 19, 2018 but their services were declined because the family was not ready. *Id.*, HR000091.

[21] Trial Tr. 354:9-16 (Decedent was in a wheelchair); *id.* 167:18-168:12. Sean described Decedent as "the best I've seen him in months on that day.) *Id.* 168:20-23.

[22] *Id.* 354:17-355:1; *id.* 168:17-19.

hours.[23] In the evening of either December 26 or 27, 2018, Decedent and Wanda traveled to Salisbury to see a friend's son play basketball.[24]

On December 27, 2018, Wanda called hospice to report Decedent's higher pain, and the hospice nurse who visited later that day described Decedent as calm, alert, and orientated, before changing his MS Contin medication (to 75 mg BID twice a day).[25] On December 28, 2018, Rosalie Betts Walls ("Notary") went to the home late morning to notarize Decedent's power of attorney and health care directive.[26] Around noon that day, the hospice nurse meeting with Decedent described him as calm, peaceful, alert, orientated, with this recent and remote memory intact.[27]

2. Decedent's Intentions for Estate Planning

There was testimony that, at a bible study in September 2018, Decedent stated that he wanted Wanda to have whatever he had because he loved his wife and wanted her taken care of.[28] Wanda testified that she and Decedent originally thought that

[23] *Id.* 355:18-358:3; *id.* 169:2-3;

[24] *Id.* 358:7-359:2; *id.* 280:8-22.

[25] JX 2, HR 000095; *id.*, HR000097.

[26] *Id.*, HR000096; Trial Tr. 160:4-16; *id.* 198:16-199:22 (the Notary brought two witnesses with her). The Notary testified that she provided notary services for Decedent as a volunteer for hospice and did not "know the family." *Id.* 144:21-22; *id.* 146:20-22.

[27] JX 2, HR000097; *id.*, HR000098.

[28] *Id.* 295:24-296:4; *id.* 317:21-318:3; *id.* 320:5-321:6 (Yvonne Sample also testified that he told them, at the September bible study, that he would be meeting with his children about his estate plans and discussed, at a later bible study, that the meeting had occurred);

everything they owned would go to the other spouse when they died, and had discussions about a will and what to put in it.[29] Sean testified that, after the October 2018 lunch with his children, Decedent expressed to him that he was "leaving everything to [Wanda]."[30] In contrast, Katrina testified that Decedent had told her in the past that the Property "was supposed to be for Troy and [her]," that "Wanda knew what to do," and the Property should never be sold.[31] She further testified that, in December 2018, Decedent stated that "Wanda knows what I told her," and would "do right by [his] kids."[32] Troy testified that, during the October 2018 lunch, and prior to that, Decedent repeatedly said Wanda is "going to do the right thing."[33] Decedent's mother testified that Decedent told her "in the past that he wanted [Troy and Katrina] to have the land."[34]

3. Decedent's Will and the Will Signing

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id. 352:14-18. Katrina stated that she found it "hard to believe" that Decedent discussed his estate plans at a bible study since he was "a very private person." *Id.* 376:1-14; *id.* 381:15-18. She was not present at any of the bible studies, however.

[29] *Id.* 214:18-23; *id.* 231:3-5.

[30] *Id.* 183:14-184:17; *id.* 189:19-190:7.

[31] *Id.* 45:19-46:1.

[32] *Id.* 47:13-49:2.

[33] *Id.* 396:17-18; *id.* 398:19-399:9. Troy also testified that, around 2015, Decedent had told him that the Property would go to him and Katrina, and that the Property should not be sold. *Id.* 393:9-394:13.

[34] *Id.* 26:21-22; *id.* 29:2-4. At trial, Wanda's attorney objected to Decedent's mother's testimony about Decedent's testamentary intent as hearsay. *Id.* 26:16-17. Decedent's statement as to his then-existing state of mind are admissible under D.R.E. 803(3).

Wanda testified that she and Decedent discussed about a will after Yvonne Sample ("Yvonne") suggested that they have a will prepared, but Wanda looked on the internet about a will and thought it looked like a lot of work.[35] Wanda stated that, on December 28, 2018, she had a meeting with her accountant, who mentioned that she could write a "sweetheart will" for Decedent to sign.[36] She had talked with Decedent previously about the will and again after her meeting with the accountant, and he agreed that she could write the will and he would sign it.[37] She wrote the "Last Will and Testament" ("Will"), which provides that "I Frederick L. Hopkins leave my entire estate to my wife Wanda [illegible] Hopkins and I appoint her as the executor of my estate."[38] She also wrote four questions ("Questions") intending to show that he understood what he was doing.[39] She contacted the Notary, Yvonne, and Doris Sample ("Doris"), Yvonne's mother, to witness the Will.[40]

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[35] *Id.* 205:4-206:12; *id.* 214:18-23. Yvonne indicated that she has known Wanda and Decedent for a long time, attended the same church with them. *Id.* 300:6-301:1. She testified that she tells all her friends and family, and told both Decedent and Wanda years ago, and Wanda again before Decedent passed, that "it's good to have wills." *Id.* 311:8-21.

[36] *Id.* 200:9-202:5; *id.* 206:13-22.

[37] *Id.* 214:18-23; *id.* 228:23-229:10.

[38] *Id.* 202:11-13; JX 1. Decedent signed his name "Frederick L. Hopkins." *Id.*

[39] The questions were: "Youngest son name," "What year is this," Who is the president," What is your birthday." JX 1. Wanda testified that her accountant had told her to "make sure that they ask some questions because they going to say that he's not in his right mind." Trial Tr. 200:23-201:2.

[40] *Id.* 212:8-11; *id.* 229:11; *id.* 302:19-303:6. Doris categorized herself as a social friend of Wanda, and stated that she attends church with them and knew Decedent "a lot longer" than she knew Wanda – from when they were young. *Id.* 288:4-16.

The testimony shows that Wanda, Yvonne, Doris and the Notary were in the bedroom and watched Decedent sign the Will on December 28, 2018 around 6 p.m.[41] The Notary testified that Decedent appeared to know the nature of what he was doing when he signed the Will.[42] She further testified that she would not have notarized the Will if she had questions about his capacity to sign and understand the Will, and recalled asking him if he knew what he was signing and that he "nodded his head yes."[43] She asked Decedent the Questions, which he answered correctly.[44]

Doris testified that, prior to the Will signing, she spoke with Decedent – "small talk," noting that he was in pain.[45] She was "positive" Decedent knew what he was doing when he signed the Will, did not appear to be influenced by anyone, and that he wanted to sign "of his own free will."[46] She further testified that she stayed in the room with Decedent after the Will signing and he confirmed to her that

[41] *Id.* 304:15-18; *see also* JX 2, HR000100. Tina Mallory, Yvonne's sister was at the Hopkins' home while the Will was signed but stayed in the living room and interacted with Decedent only when he asked her to get his shoes so he could go to the Hospice Center. Trial Tr. 346:12-348:22. Tina testified that, based on her observations, he appeared to know what was happening. *Id.* 348:23-349:2.

[42] Trial Tr. 153:5-9. She notarized the Will as a volunteer notary for Delaware Hospice. *Id.* 146:20-21.

[43] *Id.* 153:10-20; *id.* 155:21-24.

[44] *Id.* 292:20-293:7; *id.* 306:15-307:7.

[45] *Id.* 289:20-290:16.

[46] *Id.* 294:20-22.

the Will was really what he wanted to do.[47] Yvonne testified that, at the Will signing, she asked Decedent how he was feeling, and he responded that he was in a lot of pain, and she did not talk with him about the Will but saw him sign it.[48] She confirmed that he "seemed to know what he was doing and where he was."[49] She didn't stay in the room with him after the Will signing but, afterwards, she heard him tell Wanda that he wanted to go to the Hospice Center, and make calls to let certain people know that he was going to the Hospice Center.[50] Katrina testified that she did not know that Decedent executed his Will on December 28, 2018.[51]

4. After the Will Signing

Around 8 p.m., Wanda called hospice to report that Decedent's pain was not managed, and Decedent was admitted to the Hospice Center later that night for pain management.[52] The admitting nurses described him as distressed with occasional moaning, but also as "[a]wake and alert, [c]onverses easily."[53] Wanda stated that it was Decedent's decision to go to the Hospice Center, and that he believed that he

[47] *Id.* 291:6-13.

[48] *Id.* 304:9-14; *id.* 304:19-305:14. Yvonne visited Wanda and Decedent's home five or six times in December 2018. *Id.* 301:18-24.

[49] *Id.* 308:16-17. She testified that she saw him again on December 31, 2018, and that he recognized her and engaged in conversation with her then. *Id.* 310:4-21.

[50] *Id.* 308:4-11; *id.* 309:7-21.

[51] *Id.* 62:24-63:3; *id.* 70:24-71:5.

[52] JX 2, HR000101.

[53] *Id.*, HR000102; *id.*, HR000104.

would return home from the Hospice Center once his pain was managed.[54] Decedent remained at the Hospice Center, with his condition worsening, until he died at 70 years old, on January 3, 2019.[55]

5. Decedent's Condition Around the Time of the Will Signing

Sean, who lived with Decedent and Wanda and saw him "[e]very day," described Decedent as being in pain during the last three months of his life but testified that Decedent was in his right mind until the "day before he died, [when] he was out of it."[56] Decedent's niece testified that she saw him most days in December and after Christmas (but didn't see him on December 28, 2018, although he called her that night to tell her he was going to the Hospice Center to get his pain under control), and he was always of sound mind and recognized her.[57] Robbie Hagans ("Hagans"), a long-time friend of Decedent (for 40 years) who worked with him and called him every day, described Decedent as still "able to do a lot of stuff" (getting up and walking, shaving) in December 2018.[58] Hagans testified that he visited with Decedent on December 28, 2018 for about four hours, and Decedent

[54] Trial Tr. 221:16-19; *id.* 222:7-17.

[55] D.I. 7, ¶ 4; *see also* Trial Tr. 166:21-167:4.

[56] Trial Tr. 166:8-167:4; *id.* 171:9-15.

[57] *Id.* 326:6-330:13.

[58] *Id.* 266:8-18; *id.* 267:22-268:3.

held a "general conversation" and did not seem confused.[59] Hagans' wife received a call from Decedent the night of December 28, 2018 during which Decedent asked her to tell Hagans he was going to the Hospice Center for pain management and Hagans should not tell work about it.[60]

Decedent also called his pastor that night to tell her he was going to the Hospice Center, and she testified that, when she visited him the next day, he did not seem confused and was aware of his surroundings.[61] Troy saw Decedent on December 25, 2018 and testified that Decedent could not "get off the couch," but knew Troy, was laughing and talking, and "fooling around with everybody."[62] Katrina testified that she saw Decedent on December 25, 2018 and, although he was in pain, he was aware and knew everyone.[63] She did not see him again until December 29, 2018 and her belief that he lacked the capacity to sign the Will was based on the medications he was taking.[64]

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[59] *Id.* 267:21-270:12. Hagans testified that he visited Decedent at the Hospice Center later (he did not remember what day) and Decedent recognized him and did not appear confused. *Id.* 271:15-272:21.

[60] *Id.* 282:13-284:12.

[61] *Id.* 257:19-261:9.

[62] *Id.* 402:21-404:1.

[63] *Id.* 106:10-107:13.

[64] *Id.* 91:9-93:5; *id.* 106:1-5.

B. Procedural History

On April 2, 2019, Katrina filed a complaint against the estate of Frederick L. Hopkins ("Estate") and Wanda, individually and in her capacity as executrix of Decedent's estate (together with the Estate, "Defendants"),[65] seeking to invalidate the Will because Decedent lacked testamentary capacity, the Will was a product of undue influence, and Decedent's signature was a forgery.[66] She also claims that Wanda breached her fiduciary duty by self-dealing, and asks for attorneys' fees.[67] Defendants filed an answer on August 21, 2019, denying Katrina's claims, and seeking attorneys' fees.[68] Discovery ensued.[69] Katrina filed a pre-trial brief on May 20, 2022, and Defendants filed their pre-trial submission on May 23, 2022.[70] Defendants filed a motion in limine objecting to the qualifications of Katrina's expert witness, Dr. Marie Gray ("Dr. Gray"), under Delaware Rule of Evidence 702,

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[65] Wanda was granted testamentary letters of Decedent's estate by the Sussex County Register of Wills on February 7, 2019. Sussex County Register of Wills ("ROW"), Folio No. 17715, D.I. 3. Because the ROW is a clerk of the Court of Chancery, filings with the ROW are subject to judicial notice. *See* 12 *Del. C.* § 2501; Del. R. Evid. 202(d)(1)(C); *Arot v. Lardani*, 2018 WL 5430297, at *1, n. 6 (Del. Ch. Oct. 29, 2018).

[66] D.I. 1, at 3.

[67] *Id.*, at 4.

[68] D.I. 7.

[69] D.I. 8-17. The Court issued a letter under Court of Chancery Rule 41(e), on October 15, 2021, when it appeared from the court docket that there had been no case activity for a year. D.I. 18. On October 28, 2021, Counsel provided a joint response that discovery was mostly completed and requested a trial date. D.I. 19. Additional discovery followed after that. D.I. 20-23; D.I. 26-29.

[70] D.I. 30; D.I.32.

on May 24, 2022.[71] On May 26, 2022, Katrina filed a motion to permit the use of Dr. Gray's deposition testimony at trial in lieu of live testimony,[72] which I granted, without objection, on May 31, 2022.[73] Trial was held on June 1-2, 2022.[74] Defendants filed a motion in limine on June 22, 2022, and opening brief on June 23, 2022.[75] Katrina filed the answering brief on July 14, 2022.[76] On September 9, 2022, I issued an Order denying the motion in limine.[77] On September 30, 2022, both parties filed their post-trial closing memoranda.[78]

II. ANALYSIS

A. Katrina Bears the Burden of Proving Decedent Lacked Testamentary Capacity and was Unduly Influenced.

Katrina challenges the validity of the Will, arguing that Decedent was of weakened intellect, and that the Will was drafted by Wanda, who was in a

[71] D.I. 33. Katrina had objected to Dr. Gray's qualifications at the pre-trial conference earlier that day, and I postponed consideration of that challenge until after trial. D.I. 35.

[72] D.I. 36.

[73] D.I. 37. Exceptions to that Order were stayed.

[74] D.I. 38.

[75] D.I. 41; D.I. 42.

[76] D.I. 44. Defendants responded, on July 21, 2022, that no reply brief was necessary. D.I. 46.

[77] D.I. 48. I concluded that Dr. Gray's opinion testimony was admissible and I would consider it for the limited purposes for which it is offered. *Id.*, at 8. I made "no decision as to the weight that [her testimony would] be given at this juncture," allowing the parties to argue their positions as to the weight that her testimony should be given in their post-trial closing memoranda. *Id.* Exceptions to that Order were stayed. *Id.*

[78] D.I. 51; D.I. 52.

confidential relationship with Decedent and received a substantial benefit under the Will.[79] She contends that, as a result, the burden shifts to Defendants to prove Decedent's testamentary capacity and the absence of undue influence, and they have failed to meet their burden.[80] Defendants respond that the evidence does not prove Decedent was of weakened intellect; instead, it shows that Decedent had testamentary capacity and was not subject to undue influence when he executed the Will.[81]

"Delaware law presumes that the [testator] had sufficient testamentary capacity when executing [his] will, and the party attacking testamentary capacity bears the burden of proof."[82] In addition, a "duly-executed will is presumptively valid and free of undue influence,"[83] and the challenger "carries the burden of proving undue influence."[84] However, in *In re Melson*, the Supreme Court held that

> the presumption of testamentary capacity does not apply and the burden on claims of undue influence shifts to the proponent where the challenger of a will can demonstrate by clear and convincing evidence that: (a) the will was executed by a testator who was of weakened intellect; (b) the will was drafted by a person in a confidential

[79] D.I. 52, at 12-15.

[80] *Id.*, at 16-17.

[81] D.I. 51.

[82] *In re Est. of W.*, 522 A.2d 1256, 1263 (Del. 1987) (citing *In re Langmeier*, 466 A.2d 386, 389 (Del. Ch. 1983)).

[83] *In re Hammond*, 2012 WL 3877799, at *3 (Del. Ch. Aug. 30, 2012).

[84] *In re Cauffiel*, 2009 WL 5247495, at *7 (Del. Ch. Dec. 31, 2009) (citing *In re Melson*, 711 A.2d 783, 786 (Del. 1998)).

> relationship with the testator; and (c) the drafter received a substantial benefit under the will.[85]

Thus, if Katrina establishes the three *Melson* factors by clear and convincing evidence, then the burden shifts to Defendants to prove by a preponderance of the evidence that Decedent "possessed the requisite testamentary capacity and to show the absence of undue influence."[86] If Katrina does not prove those factors, then she has the burden of proving that Decedent lacked testamentary capacity and the Will was a product of undue influence.

I first address the second *Melson* factor – whether Wanda was in a confidential relationship with Decedent. "A confidential relationship is more than a relationship of blood or marriage, and it must be established by clear and convincing evidence."[87] "A confidential relationship has been found to exist where 'circumstances make it certain the parties do not deal on equal terms but on *one side there is an overmastering influence* or on the other weakness, dependence or trust, justifiably reposed.'"[88] Here, Wanda admitted that she drafted the Will.[89] She was married to Decedent for close to 30 years and was his primary caregiver around the time that

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[85] *In re Seppi*, 2010 WL 1534189, at *16 (Del. Ch. Mar. 30, 2010)(citing *In re Melson*, 711 A.2d at 788); *see also Ray v. Williams*, 2020 WL 1542028, at *29 (Del. Ch. Mar. 31, 2020).

[86] *In re Melson*, 711 A.2d at 788.

[87] *In re Szewzcyk*, 2001 WL 456448, at *5 (Del. Ch. Apr. 26, 2001).

[88] *Id.* (citation omitted).

[89] *See supra* note 38.

the Will was executed.[90] Earlier on the day that Decedent executed the Will, he had given Wanda a medical power of attorney and a durable personal power of attorney.[91] Katrina has satisfied the second *Melson* factor by clear and convincing evidence.

Next, I look at the third *Melson* factor – whether she, as the drafter of the Will, received a substantial benefit under the Will. Since the Will devises Decedent's entire estate to Wanda, I find that she receives a substantial benefit (the Property) under the Will.

Turning to the first *Melson* factor, I consider whether the Will was executed when Decedent suffered from weakened intellect.

> Although a precise standard for 'weakened intellect' has not been articulated in our law, it has been recognized that the party challenging a [document] need not demonstrate an advanced degree of debilitation. Instead, [t]he Court need only find that such 'weakened intellect' existed, taking into account factors such as a sudden change in the testator's living habits and emotional disposition. Importantly, the court need not find that someone lacked testamentary capacity to find that [he] was suffering from a weakened intellect.[92]

In determining whether a testator suffered from weakened intellect, "the Court considers all circumstances, including whether the individual was suffering from a

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[90] *See supra* notes 2, 15 and accompanying text.

[91] *See supra* note 26 and accompanying text; *see also* JX 6; JX 7.

[92] *Ray v. Williams*, 2020 WL 1542028, at *30 (Del. Ch. Mar. 31, 2020) (internal quotation marks and citations omitted).

debilitating mental condition and whether objective evidence indicates that the individual could comprehend, understand, and make decisions himself."[93]

Katrina focuses on Decedent's great pain at the time he signed the Will, his five-year fight with cancer, the effects of the medications he was taking at the time, which were reviewed by Dr. Gray in her report, and the credibility of the witnesses to the Will signing and Wanda.[94] Defendants contend that Dr. Gray's opinion as to Decedent' weakened intellect or capacity is not reliable, because of her limited review of records and no other evidence, and that the "plethora of witnesses" at trial showed Decedent's capacity and the lack of undue influence.[95]

All of the witnesses who saw Decedent close to the day and time that he signed the Will testified that he did not seem confused or disoriented and recognized them.[96] The evidence shows Decedent as relatively active during that time – he traveled to the hospital to meet his new grandchild on December 24, spending six hours there (in a wheelchair), and again on December 25, 2018, participated in a family breakfast and exchange of gifts on Christmas Day, and went to a basketball game to watch a friend's son play after Christmas.[97] Sean described Decedent as in his right mind up

[93] *Id.*

[94] D.I. 52, at 13-14.

[95] D.I. 51, at 1-2.

[96] *See supra* notes 27, 41-44, 46, 47, 49, 50, 59-61 and accompanying text.

[97] *See supra* notes 21-24.

until January 2, 2019 (the day before he died).[98] Troy testified that, while Decedent couldn't get off the couch on December 25, 2018, he was laughing, talking, and "fooling around with everybody."[99] Even Katrina testified that Decedent knew what he was doing on Christmas Day.[100] The hospice nurse who saw him around noon on December 28, 2018 described him as calm, peaceful, alert, oriented and with his memory intact.[101] Hagans visited with Decedent for four hours on December 28, 2018, had a general conversation with him, and did not find him confused.[102] Decedent's pastor did not see him on December 28, 2018, but he had called her when he was going to the Hospice Center, and she did not find him confused when she saw him on December 28, 2018.[103] The Notary, who was independent and had no prior relationship with Decedent or Wanda,[104] testified that Decedent appeared to know what he was doing when he signed the Will and that he answered the Questions correctly.[105] The witnesses to the Will signing, who were long-time friends, testified

[98] *See supra* note 56.

[99] *See supra* note 62.

[100] *See supra* note 63.

[101] *See supra* note 27 and accompanying text.

[102] *See supra* note 59.

[103] *See supra* note 61.

[104] *See supra* note 26.

[105] *See supra* notes 42-44.

that Decedent knew what he was doing when he signed the Will.[106] One of the witnesses testified that she stayed with him after the Will signing and he confirmed that the Will was what he wanted to do.[107] Shortly after he signed the Will, Decedent made the decision to go to the Hospice Center for pain management, and he called a few friends and family members to advise them of what he was doing.[108] Indeed, he asked that one friend, who worked at the same place that he did, not tell work that he was going to the Hospice Center.[109] Between midnight and 1 a.m. (after he was admitted to the Hospice Center), a nurse described him as awake and alert, and "[c]onverses easily."[110] This evidence depicts Decedent as able to make his own decisions and to comprehend or understand what he was doing when he signed the Will.

It is undisputed that, at the time Decedent signed the Will, he was experiencing significant pain, which led to his decision to go to the Hospice Center for pain management. And that he was taking MS Contin, oxycodone, and other

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[106] *See supra* notes 46, 49. Katrina argues that the witnesses' credibility is lacking because they "made it appear that [the Will signing] was just another friendly visit with Decedent." D.I. 52, at 14. I find that argument unsupported by the evidence. The witnesses attested that they made small talk, or talked with Decedent briefly, prior to the Will signing, but referenced that he was in pain. *See supra* notes 45, 48 and accompanying text.

[107] *See supra* note 47 and accompanying text.

[108] *See supra* notes 41, 50, 54, 60, and 61.

[109] *See supra* note 60.

[110] JX 2, HR000104; *see supra* note 53.

medications, to help alleviate that pain at that time, and that his MS Contin medication dosage had been changed on December 27, 2018.

In her report, Dr. Gray, Katrina's expert witness, offered her opinion that Decedent "was substantially impaired and not capable of making informed decisions at the time he signed his last [W]ill," because of "his declining health due to the advancement of cancer and the side effects of the various medications he was prescribed."[111] She opined that he "clearly lacked the mental capacity to understand the nature of his act when he signed this document," referring to his "horrendous pain," and the combination of medications that he was ingesting, and the hospice progress reports' notes ("Notes") of his "confusion, irritability, pain and distress."[112]

After reviewing Dr. Gray's report, deposition testimony and the entire trial record, I determine it is appropriate to give little to no weight to her opinion about whether Decedent suffered from a weakened intellect or lacked the capacity to make a will. I consider that her opinion was based on very limited information – she reviewed only the Notes in making her opinion and had no personal interactions with him or with those who had interacted with him.[113] The Notes offer only a limited

[111] JX 4, at 7.

[112] *Id.*, at 7-8.

[113] Her report indicates that she reviewed the Delaware Hospice records from December 12, 2018 – December 28, 2018, and used website information regarding side effects of medications, in developing her opinion. *Id.*, at 2.

picture of Decedent's mental state. Further, Dr. Gray testified at her deposition that persons in the room during a will signing would be in a better position to assess a testator's competency than a person reviewing documents later.[114] And the evidence shows that the persons present at the Will signing uniformly believed that Decedent understood what he was doing in signing the Will. Further, Dr. Gray appeared to discredit evidence provided by medical personnel in the Notes on Decedent's mental status (that he was alert and oriented) because "oftentimes people just check the box," referring, instead, to the Notes' discussion of Decedent's "confusion, irritability, pain and distress."[115]

My review of the Notes indicates that the information about Decedent's mental state changed between visits, which supports that attention was being paid to what information was recorded in the Notes, and I do not find that the Notes reflected confusion on Decedent's part.[116] It is undisputed that Decedent suffered pain around the time he executed the Will. But, pain, without evidence showing that the pain affected Decedent's ability to understand what he was doing or to make decisions,

[114] Gray Dep. Tr. 78:19-79:2.

[115] *Id.* 69:16-70:4; *see also id.* 63:21-64:7.

[116] *See* JX 2. Dr. Gray appears to find that references in the Notes to Decedent's weakness, fatigue, and decline mean that Decedent was confused. *See* Gray Dep. Tr. 61:1-62:20. I do not find that conclusion to be reasonable, given that the same notes also referred to Decedent as alert and oriented. *See supra* notes 16, 18, 20, 27 and 53 and accompanying text.

is not sufficient to prove weakened intellect or incapacity. Further, Dr. Gray relied on information from medical websites about the effects of Decedent's medications to conclude that he did not have the capacity to understand that he was signing the Will.[117] However, she admitted in her deposition that different people react differently to drugs.[118]

In determining the weight to give Dr. Gray's opinion, I consider that her opinion was based upon very limited information, and her testimony that persons may experience different side effects to drugs and that the legal standard for testamentary capacity in Delaware is "beyond the scope of [her] understanding."[119] Outside of Dr. Gray's opinion, which I give little or no weight, the evidence, based upon witnesses' first-hand interactions with Decedent at and around the time he signed the Will, shows that the Decedent, despite taking the medications, understood what he was doing and was able to make decisions. So, I conclude that Katrina has failed to demonstrate by clear and convincing evidence that Decedent suffered from

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[117] *See* JX 4, at 2. Dr. Gray is not authorized to write prescriptions for medications. Gray Dep. Tr. 12:5-11. She referred to an increase in Decedent's medications in her report. JX 4, at 2. There was some confusion in her deposition testimony concerning whether the change in Decedent's medication on December 27, 2018 represented an increase or decrease in the overall dosage (since the MS Contin dosage changed from 60 mg three times a day to 75 mg two times a day and to extended release). *See* Gray Dep. Tr. 88:24-90:2; *id.* 91:2-8.

[118] Gray Dep. Tr. 49:10-12. She admitted that she did not know Decedent's weight or height, which could affect drug interaction, but stated that those factors were not relevant to the scope of the review that she was asked to undertake. *Id.* 49:13-50:5.

[119] *Id.* 68:25-69:4.

weakened intellect on December 28, 2018 when he executed the Will. Since all three *Melson* factors have not been met, the burden remains on Katrina to prove by a preponderance of the evidence that Decedent lacked testamentary capacity and was unduly influenced when he signed the Will.[120]

B. Katrina has Failed to Prove that Decedent Lacked Testamentary Capacity.

I consider whether Katrina has overcome the presumption that Decedent had testamentary capacity when he executed the Will. The standard for testamentary capacity "is that one who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property."[121] Decedent must "have known that [he] was disposing of h[is] estate by will, and to whom."[122] "The burden of overcoming the presumption of testamentary capacity has been described as 'significant,' as a testator needs only a 'modest' amount of competence to execute a valid will."[123]

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[120] Even assuming *arguendo* that Katrina met the first *Melson* factor, I would still find that the evidence shows that Decedent had testamentary capacity and was not unduly influenced when he executed the Will. *See* §§ II B, C *infra*.

[121] *In re West*, 522 A.2d 1256, 1263 (Del. 1987) at 1263; *In re Langmeier*, 466 A.2d 386, 402 (Del. Ch. 1983).

[122] *In re West*, 522 A.2d at 1263.

[123] *In re Cauffiel*, 2009 WL 5247495, at *4 (Del. Ch. Dec. 31, 2009) (citations omitted); *see also In re West*, 522 A.2d at 1263; *In re DeGroat*, 2020 WL 2078992, at *16 (Del. Ch. Apr. 30, 2020).

Although Decedent was suffering from declining health, all of the witnesses who interacted with him around the time he signed the Will attested to his understanding of what was going on and that he was making his own decisions.[124] There is no evidence that he had memory problems.[125] The medical evidence indicates that he was alert, oriented and able to converse with others around that time and, specifically, shortly before and after he signed the Will.[126] I conclude that the evidence shows Decedent understood what he was doing in disposing of his property through the Will, and that he possessed testamentary capacity, or "a modest level of competence," when he executed the Will, and Katrina has not overcome the presumption of testamentary capacity. Therefore, I recommend that the Court deny Katrina's claim that the Will was invalid because Decedent lacked testamentary capacity.

C. Katrina has Failed to Carry her Burden to Prove Undue Influence.

Next, I address whether the Will was a product of undue influence. "To be considered undue, the amount of influence exerted over the testator's mind '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

[124] *See supra* note 96.

[125] *See supra* notes 16, 20, 27 and accompanying text.

[126] *See supra* notes 27, 53 and accompanying text.

and not his own.'"[127] The "essential elements of undue influence are: (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 demonstrating its effect."[128] The elements must be proven by a preponderance of evidence.[129] If any one of the elements is not proven, then the challenger to the will has not met her burden of proving undue influence.[130]

For purposes of this analysis, I assume, without deciding, that Decedent was a susceptible testator and that Wanda had the opportunity to exert undue influence over Decedent, so the first two elements have been met.[131] And, Wanda stood to benefit under the Will so the fifth element of undue influence – a result demonstrating the effect of undue influence – has been established.

For the third element of undue influence, the alleged influencer's motive for exerting influence must have been for an "improper purpose," which "may be

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[127] *In re Cauffiel*, 2009 WL 5247495, at *7 (quoting *In re Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983).

[128] *In re West*, 522 A.2d at 1264. *See In re Cauffiel*, 2009 WL 5247495, at *7; *In re Gardner*, 2012 WL 5287948, at *11 (Del. Ch. Oct. 24, 2012); *In re Hammond*, 2012 WL 3877799, at *4 (Del. Ch. Aug. 30, 2012).

[129] *In re West*, 522 A.2d at 1264.

[130] *Id.*

[131] I make no findings on these points and merely assume that they were proven for purposes of my decision. (I note that, "[w]hile a finding of weakened intellect informs the inquiry, it is not necessary to render an individual susceptible." *Ray v. Williams*, 2020 WL 1542028, at *32 (Del. Ch. Mar. 31, 2020).) Because I hold that the Will was not the product of undue influence on different grounds, I do not need to engage in these analyses.

satisfied where the alleged influencer stood to benefit financially from such action under circumstances in which the alleged influencer's continued ability to support himself was dependent on the challenged transaction."[132] Wanda stood to benefit financially because, under the Will, she would be the sole beneficiary of his estate. But the evidence does not show that she was dependent on her inheritance under the Will to support herself, since all of his other property, including two other houses, four cars, and bank accounts, was owned jointly with her, so interest in that property vested in her at his death.[133] And, there is no evidence that Wanda was improperly motivated by hostility towards Katrina or Decedent's other children.[134] Therefore, I conclude that the third element has not been established.

In addition, the fourth element – actual exertion of improper influence – must be shown. "Delaware law requires the party alleging undue influence to prove its actual exertion by a preponderance of evidence. [O]pportunity and motive, standing alone, do not establish a charge of undue influence."[135] "Actual exertion cannot be satisfied where the action is consistent with the individual's intent."[136] Further,

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[132] *Ray*, 2020 WL 1542028, at *32 (internal quotation marks and citations omitted).

[133] *See* JX 5.

[134] Trial Tr. 116:19-118:4; *id.* 121:1-10; *id.* 122:11-123:1.

[135] *In re West*, 522 A.2d 1256, 1264 (Del. 1987). *See also Sloan v. Segal*, 996 A.2d 794, 2010 WL 2169496, at *7 (Del. 2010) (TABLE).

[136] *Ray*, 2020 WL 1542028, at *34 (citation omitted).

"[t]he law disfavors invalidating a will absent strong evidence mandating such drastic action. This is especially so where … two equally plausible reasons exist for the late change in beneficiaries."[137] "[T]he evidence must clearly show that undue influence is the more probable, plausible explanation for the testator's acts, and that, conversely, any alternative explanations are improbable and implausible."[138] Where the facts merely show an "attempt[] to influence," the Court will not invalidate a will unless there is some showing of "domination."[139]

The evidence adduced at trial supports two plausible but conflicting conclusions concerning the Will. On the one hand, Decedent had told Katrina, Troy and his mother in years past that he would devise the Property to Katrina and Troy,[140] and Wanda prepared the Will and actively managed and participated in the process of executing the Will,[141] did not advise the children about the Will,[142] and was a

[137] *In re West*, 522 A.2d at 1265.

[138] *In re Konopka*, 1988 WL 62915, at *5 (Del. Ch. June 17, 1988).

[139] *In re Kohn*, 1993 WL 193544, at *9 (Del. Ch. May 19, 1993).

[140] *See supra* notes 31, 33, 34 and accompanying text.

[141] *See supra* notes 36-41 and accompanying text.

[142] *See supra* note 51 and accompanying text.

strong personality.[143] These facts could lead to a reasonable conclusion that Wanda exerted undue influence in the creation and execution of the Will.[144]

But, the facts also support another more plausible conclusion that Wanda did not exert undue influence upon Decedent. Members of Decedent's bible study and Sean, in addition to Wanda, testified that Decedent stated that he wanted Wanda taken care of after his death so he intended to devise all of his property to her.[145] Decedent's statements indicating that he would leave the Property to Troy and Katrina were from year(s) earlier and his comments to Katrina and Troy closer to when he died signaled that he was leaving the distribution of his assets up to Wanda and that he trusted Wanda, his spouse of almost 30 years, to do the right thing regarding his children.[146] Actual exertion of undue influence cannot be satisfied if the Will reflects Decedent's intent. The evidence shows that it is plausible Decedent established the estate plan reflected in the Will without the operation of undue

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[143] Katrina described Wanda as controlling with Decedent and with everyone. *See supra* note 8 and accompanying text. Sean also attested to Wanda's strong personality, but noted that Decedent would have the final say. *See supra* note 7. Wanda attested to the fact that Decedent was not easily influenced and would not do something that he did not want to. *See supra* note 10. Based on this evidence, I cannot conclude that, because Wanda has a strong personality, her intention in this instance was to "impel [Decedent] to make a will that speaks the mind of another and not his own." *In re Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983).

[144] *See In re Dougherty*, 2016 WL 4130812, at *1 (Del. Ch. July 22, 2016); *Sloan v. Segal*, 2009 WL 1204494, at *16-17 (Del. Ch. Apr. 24, 2009).

[145] *See supra* notes 28-30 and accompanying text.

[146] *See supra* notes 30-34 and accompanying text.

influence. I conclude that Katrina has not shown that undue influence is the more probable, plausible explanation for Decedent's execution of the Will and, because "two equally plausible reasons exist for the late change in beneficiaries,"[147] Katrina has not met her burden of proving that Wanda actually exerted undue influence upon Decedent. Thus, I recommend that the Court deny Katrina's claim that the Will was invalid because it was a product of undue influence.

D. Wanda has Not Breached her Fiduciary Duty.

Katrina claims that Wanda stood in a confidential relationship with Decedent and breached her fiduciary duty by engaging in self-dealing.[148] She alleges that Wanda's self-dealing transfer of Decedent's property to her, when she was his agent under the power of attorney, was in violation of her duty of loyalty and voids the Will.[149] I disagree.

> As a fiduciary, the attorney-in-fact is subject to a duty of loyalty that obligates the attorney-in-fact to act at all times in the best interest of the principal, unless the principal validly consents to some different conduct. A self-dealing transfer of the principal's property to the attorney-in-fact is voidable in equity unless the attorney-in-fact can show that the principal voluntarily consented to the interested transaction after full disclosure.[150]

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[147] *In re West*, 522 A.2d 1256, 1265 (Del. 1987); *see also In re Konopka*, 1988 WL 62915, at *5 (Del. Ch. June 17, 1988).

[148] D.I. 1, at 4.

[149] D.I. 52, at 17-19. Defendants deny this claim in their answer but do not otherwise address this issue. D.I. 7, ¶ 21; *see* D.I. 51.

[150] *Faraone v. Kenyon*, 2004 WL 550745, at *11 (Del. Ch. Mar. 15, 2004); *Schock v. Nash*, 732 A.2d 217, 225-26 (Del. 1999).

Here, Wanda was Decedent's agent under the power of attorney that was signed earlier on December 28, 2018 and owed him a duty of loyalty.[151] However, she did not, as Katrina argues, transfer his property to her. Decedent executed the Will establishing his estate plan. The Will is not a self-dealing transfer by Wanda that is voidable – Decedent acted in executing the Will, not Wanda. It can be challenged if Decedent lacks lack of testamentary capacity and was unduly influenced, and not because of Wanda's actions.[152] I recommend that the Court deny Katrina's claim that the Will is void because Wanda breached her fiduciary duty to Decedent.

E. The Parties Must Bear Their Own Attorneys' Fees.

Each party seeks attorneys' fees.[153] "Delaware follows the 'American Rule,' which provides that each party is generally expected to pay its own attorneys' fees regardless of the outcome of the litigation."[154] "Where fees and costs are sought in

[151] *See supra* note 26 and accompanying text.

[152] Katrina also claims that Decedent's signature is a forgery. D.I. 1, at 3. She provided no evidence to support that allegation at trial, only testifying that Decedent "doesn't write his name Frederick," and he signed "Frederick L. Hopkins" on the Will. Trial Tr. 70:14; *see supra* note 38. The witnesses to the Will signing testified that they saw Decedent sign the Will. *Id.* 292:1-3; *id.* 305:13-14. Accordingly, I recommend the Court deny this claim, finding the evidence does not show that Decedent's signature on the Will was a forgery.

[153] *See* D.I. 1; D.I. 7. They did not address attorneys' fees in their post-trial closing memoranda. D.I. 51; D.I. 52. Although the parties have not briefed the issue of attorneys' fees, I find the record is sufficiently clear to determine that fee shifting is not appropriate in this matter.

[154] *Shawe v. Elting*, 157 A.3d 142, 149 (Del. 2017) (citation omitted); *see also ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014).

will contests, however, a 'compelling special equity' may require the shifting of the costs of an individual seeking review of a will onto the estate."[155]

> [An exception to the American Rule] permits a court in a 'proper case' to impose on the estate the attorneys' fees incurred by a party who unsuccessfully contests a will. To invoke that exception, an unsuccessful contestant must show he had probable cause to contest the will and that exceptional circumstances justify ordering the estate to pay the contestant's fees and costs.[156]

In addition, the challenger to the will must demonstrate that exceptional circumstances exist that justify shifting her attorneys' fees onto the estate. Examples of "exceptional circumstances" include "an action benefiting an estate," "one in which a contestant was successful after trial but ultimately lost on appeal," or "occasions when a [testator] disinherits a blood relative in favor of a stranger, materially alters a prior testamentary scheme, or relies on legal advice from an interested party."[157] "The presence of one or more of these factors does not, however, create a presumption of exceptional circumstances," because "the Court

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[155] *Scholl v. Murphy*, 2002 WL 31112203, at *3 (Del. Ch. Sept. 4, 2002).

[156] *In re Kittila*, 2015 WL 3899572, at *2 (Del. Ch. June 24, 2015) ("To establish that [she] had probable cause to challenge the wills, [Katrina] must show that the evidence [she] produced was 'sufficient to establish a prima facie case, and overcome the presumption of law that always exists in favor of the will's validity … and justify the court in believing that the paper writing in issue is not the will of the deceased, if no other evidence should be produced.'")(citing *Ableman v. Katz*, 481 A.2d 1114, 1118 (Del. 1984), *overruled on other grounds by In re Melson*, 711 A.2d 783 (Del. 1998)).

[157] *Id.*, at *3.

evaluates each case based on its unique facts."[158] If "challenges are made on good grounds, they potentially benefit the estate as a whole by ensuring that it will be administered in the manner intended by the [testator]."[159]

Here, I find that Katrina presented a prima facie case since she had justifiable cause to bring this case, given the circumstances surrounding the drafting and execution of the Will, and presented a fair amount of evidence that supported her position. I conclude that she has not, however, demonstrated that exceptional circumstances exist to justify shifting her attorneys' fees to the Estate. I consider that her action does not benefit the Estate by clarifying an ambiguous testamentary scheme (there is nothing ambiguous about the terms of the Will); resolve a conflict that benefits the Estate as a whole; she was not successful after trial; Decedent did not disinherit blood relatives in favor of a stranger (the Will benefits Decedent's long-time spouse), materially altered a testamentary scheme (although Katrina's witnesses assert that he previously indicated he would leave the Property to Katrina and Troy, Decedent had no previous will or specific testamentary plan to support that claim), or receive legal advice from an interested party. I find there are no unusual circumstances that justify making the Estate, or Wanda,[160] bear Katrina's

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[158] *Id.*

[159] *In re Pusey*, 1997 WL 311503, at *4 (Del. Ch. May 23, 1997).

[160] Courts have "found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims." *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005) (quoting *Johnston v. Arbitrium (Cayman Islands)*

attorneys' fees in challenging the Will, and recommend that the Court decline to shift Katrina's fees to Defendants. In addition, I find no basis to award attorneys' fees to Defendants since there is no evidence of bad faith by Katrina.[161]

III. CONCLUSION

For the reasons stated above, I recommend that the Court deny Plaintiff Katrina McGee's claims seeking to invalidate the Last Will and Testament of Frederick L. Hopkins, executed on December 28, 2018, and admit that Will to probate. I also recommend that the Court decline to award attorneys' fees to either party. This is a final report and exceptions may be taken under Court of Chancery Rule 144. Stays on exceptions to the May 31, 2022 Order to Admit Dr. Gray's Deposition Testimony in Lieu of Live Testimony,[162] and the September 9, 2022 Order Denying Defendants' Motion in Limine,[163] are lifted, and exceptions to those Orders may also be taken under Rule 144.

Handels AG, 720 A.2d 542, 546 (Del. 1998)) (internal quotation marks omitted). To find bad faith, a party must have acted in subjective bad faith, which "involves a higher or more stringent standard of proof, *i.e.*, 'clear evidence.'" *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997), *aff'd,* 720 A.2d 542 (Del. 1998) (citations omitted). There is no basis in the record to assess attorneys' fees against Wanda under the bad faith exception.

[161] Since I find that Katrina was justified in challenging the Will, the evidence is not sufficient to meet the higher standard of proof for bad faith.

[162] D.I. 37.

[163] D.I. 48.