IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

IN THE MATTER OF:	)	
	)	
THE PURPORTED LAST WILL AND TESTAMENT OF ARLINGTON J. WILTBANK, SR.	)	Civil Action No. 2251-S

MEMORANDUM OPINION

Submitted: June 20, 2005
Decided: October 18, 2005

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Benjamin Wiltbank, II, Milton, Delaware, *Respondent Pro Se*

PARSONS, Vice Chancellor.

The three surviving children of the late Arlington J. Wiltbank, Sr. ("Wiltbank") dispute the validity of his Last Will and Testament dated September 26, 2002 (the "Will"). Petitioners are Wiltbank's daughters, Kathleen Brown ("Kathleen") and Claudia Wiltbank-Johnson ("Claudia"). They seek to set aside the Will on the grounds that Wiltbank did not have testamentary capacity at the time he signed it, that he was subject to the undue influence of Respondent, Wiltbank's son Benjamin Wiltbank, II ("Benjamin"),[1] and that none of the witnesses to the Will attested to Wiltbank's signature in his presence as required by 12 *Del. C.* § 202.

The Court finds that Benjamin unduly influenced his father in connection with the Will. Therefore, this Court orders that Wiltbank's estate be distributed in equal shares among his children, pursuant to 12 *Del. C.* § 503(1).

I. FACTS[2]

A. Background

Decedent Wiltbank is survived by three children: Benjamin, Kathleen, and Claudia. Wiltbank's residuary estate consisted primarily of his residence at 406 St. Paul Street, Lewes, Delaware (the "House").

Wiltbank suffered his first stroke in early 2001.[3] Shortly thereafter, Claudia moved into the House for approximately eight months to take care of her father, with the assistance of various caregivers.[4]

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1 I have referred to Wiltbank's children by their first names to avoid confusion.
2 The facts recited herein constitute the Court's post-trial findings of fact.
3 Tr. at 127-28.
4 Tr. at 98-99.

After his first stroke Wiltbank had some physical infirmities and his mental capacity began to decline. Spencer E. Kennedy, a close friend and neighbor of Wiltbank for over 30 years, observed that after his stroke Wiltbank could not comprehend matters as well as he had previously.[5] For example, Kennedy testified that "if he sent me to pay a bill for him, and he would get me at times, sometimes just to look at it to make sure that he was reading the right words, you know, what he was reading, that he was comprehending what was on that paper."[6] Before his first stroke, Kennedy noted that Wiltbank "would just give me the money to go pay [the bill]."[7] Additionally, Leona Robinson, a close cousin and neighbor of Wiltbank who attended the same church, testified that his memory of the words to hymns failed after his first stroke.[8] Robinson also testified that in the summer of 2001, Wiltbank made an irrational outburst in church, calling their pastor a "jezebel."[9] According to Robinson, Wiltbank later apologized and claimed that "he didn't mean it and he don't know why he said it."[10]

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5 Tr. at 128-29.

6 Tr. at 129.

7 *Id*.

8 Tr. at 162-63. Wiltbank's memory before his first stroke was considerably better; Petitioners and Respondent agree that their father previously had a remarkable memory. Tr. at 81-82.

9 Tr. at 164. Robinson did not believe that Wiltbank disliked their pastor or was opposed to their pastor being a woman. Tr. at 177-78. Robinson testified that the pastor Wiltbank called a jezebel "had already been the pastor three years before he said this, and she used to ride with him when we used to go out and sing. . . . So no, under normal circumstances he wouldn't have said that." *Id*.

10 Tr. at 164.

In 2001, as Wiltbank's health began to decline, his son Benjamin visited his father more often.[11] Between business trips, Benjamin stopped by the House to talk to his father and took him for rides in his van. Wiltbank continued to live by himself, taken care of by family, neighbors and nurses that would stop by the House.[12] The extent of Wiltbank's dependency on others during this period is illustrated by Kennedy's testimony that he visited Wiltbank on one occasion after he had been out with Benjamin and Wiltbank had soiled himself.[13] Kennedy called Benjamin and he came back to take care of his father.[14]

In early September 2002, Wiltbank called his grandson, Harold W. Johnson, Jr. ("Harold"), and asked him to return to Delaware to take care of him.[15] Harold and his grandfather enjoyed a very close relationship because Harold lived with his grandfather from age seven to sixteen.[16] When his grandfather called, Harold was living in North Carolina. Harold explained that he would have a difficult time returning to Delaware because it was hard to find work there.[17] Harold testified that Wiltbank told him that no one was taking care of him and that he would leave Harold the House if he came back to

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11 Tr. at 167.
12 Tr. at 167-68.
13 Tr. at 140.
14 *Id*.
15 Tr. at 214-15.
16 *Id*.
17 *Id*.

help him.[18] Harold moved into the House in September 2002 and took 100% responsibility of caring for his grandfather.[19]

The House was in a despicable state when Harold arrived in mid-September.[20] For example, his grandfather's bedroom had feces all over the floor.[21] Harold also testified that his grandfather was using a magnifying glass to read, and that he, Harold, opened and read all of Wiltbank's mail to him while living at the House.[22]

Shortly thereafter, on or about September 25, 2002, Benjamin drafted the Will for his father using a computer program that he had purchased.[23] Benjamin testified that he left the Will he drafted with Wiltbank to review overnight.[24] The next day, Benjamin drove Wiltbank to his bank, Wilmington Trust, to have the Will signed, notarized and witnessed.[25] At the bank, Wiltbank could not go into the building because it was not handicap accessible.[26] Therefore, the notary, Linda C. Marine, walked outside to Benjamin's van to speak with Wiltbank, ask for identification, and observe his signing of

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18 Tr. at 217.

19 Tr. at 215. This included bathing Wiltbank, helping him cook his meals and taking him to doctors. *Id*.

20 Tr. at 220-21. I find that Harold moved into the House in mid September, and not early October as Benjamin alleged. I find Harold's testimony well supported and credible. Harold testified that he interviewed for a job in Delaware on September 24, 2002, was hired the next day, and received his first paycheck in the beginning of October. Tr. at 226-27.

21 Tr. at 220-21.

22 Tr. at 219-20.

23 Tr. at 306-07. Wiltbank himself was not computer literate. Tr. at 112.

24 Tr. at 307.

25 Tr. at 184.

26 Tr. at 329-30.

the Will.[27] Marine and Benjamin then went inside the bank to affix a seal to the Will and have witnesses sign it.[28] While Marine could not recall exactly what transpired on that day, normal policy at the bank would have been to ask witnesses to come over to a window that looks out onto the parking lot where Benjamin's van was parked to execute and witness the Will.[29] Marine could not remember an instance where witnesses had left the building to witness a will.[30]

The Will confusingly states on the first page that the "names of my children are Benjamin Wiltbank," names Benjamin as executor, and gives Benjamin 100% of Wiltbank's residuary estate.[31] Specifically, the Will states:

> Residuary Estate. I direct that my residuary estate be distributed to the following beneficiaries in the percentages as shown: 100% to Benjamin Wiltbank, 203 Apollo Lane, Delaware. If this person does not survive me, this share shall be distributed to Juanita Y. Satchell Wiltbank, milton[sic], Delaware.[32]

Wiltbank also executed a document giving Benjamin power of attorney.[33] Neither Benjamin nor Wiltbank told Petitioners about these two documents.[34]

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27 Tr. at 197.

28 Tr. at 198.

29 Tr. at 204-05.

30 Tr. at 198-99.

31 See PX 2.

32 PX 2, Art. III.B. Juanita Wiltbank is Benjamin's wife.

33 Tr. at 201.

34 Tr. at 249. In fact, when asked if he knew whether his father had discussed the Will with anyone, Benjamin answered, "I don't think so because daddy said he wasn't going to tell anybody. That would be my job, and he kind of laughed about it." *Id*.

In early November 2002, after the Will had been signed, Wiltbank told Harold that he wanted to travel to Georgetown, Delaware to see an attorney about creating a will.[35] Wiltbank told Harold that he did not have a will.[36] When they arrived in Georgetown, however, they could not find the attorney Wiltbank was searching for at the location he remembered and they returned home.[37] The following day Wiltbank became ill.[38]

Wiltbank suffered his final stroke on November 18, 2002.[39] It was only at the hospital that Benjamin revealed to his sisters that their father had given him power of attorney. Wiltbank died on December 5, 2002.

The day before Wiltbank's death Benjamin filed the power of attorney with the Recorder of Deeds in Sussex County.[40] Then, on January 2, 2003, Benjamin transferred the House from himself as executor to himself individually.[41] Benjamin testified that he engaged in these transactions because he believed they were permissible under the power of attorney.[42]

After Wiltbank's death, Claudia Wiltbank-Johnson discovered an unsigned will (the "Unsigned Will") inside Wiltbank's bible in the House.[43] The Unsigned Will is

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35 Tr. at 218-19.
36 Tr. at 218.
37 Tr. at 218-19.
38 *Id*.
39 Tr. at 294.
40 Tr. at 332-33. Benjamin testified at trial that he transferred the deed for the House to himself individually on December 4, 2002. It appears from the record, however, that the document Benjamin was referring to was the power of attorney, and not a deed. *See* Tr. at 240.
41 Tr. at 341-42.
42 *Id*.
43 Tr. at 102-03.

remarkably similar to the Will in appearance.[44] The Unsigned Will correctly states that the "names of my children are Benjamin Wiltbank, Claudia Johnson Wiltbank, and Kathleen Wiltbank Brown" and directs that Wiltbank's residuary estate be distributed to his children in equal shares.[45] Additionally, the Unsigned Will listed Chief Ronald Gooch, a man that Wiltbank trusted and held in high regard,[46] as a witness. Benjamin testified that he did not prepare the Unsigned Will and had never even seen it before trial.[47]

A great deal of tension among the Wiltbank family members stems from Kathleen's having sold the house located at 419 Park Avenue and kept the proceeds. Around 1994 Wiltbank signed a deed conveying the 419 Park Avenue property to

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44 Tr. at 309.

45 PX 3.

46 Tr. at 222; Harold testified that, "That's the only person [Wiltbank] actually trusted in the town of Lewes I guess." *Id.*

47 Tr. at 308. Although he might have forgotten it, I find that it is more likely than not that Benjamin played at least some part in the preparation of the Unsigned Will and that at some point in time Wiltbank considered making it his last will and testament. I base this finding on the following circumstantial evidence. First, the Unsigned Will is extremely similar to the Will. This supports an inference that it was prepared from the same software program Benjamin used to create the Will. Since Wiltbank was not computer literate, it is reasonable to infer that Benjamin created the Unsigned Will. Second, the Unsigned Will lists Chief Gooch as a witness. Because Wiltbank held Chief Gooch in high regard, this fact supports an inference that at some point in time Wiltbank considered making the Unsigned Will his last will and testament. The evidence is unclear, however, as to when the Unsigned Will was created. The most reasonable inference I can draw is that it was created before the Will, but the evidence on this point is very limited. Thus, although it is not an operative will or legal document, the Unsigned Will weakly corroborates the inference that Wiltbank may have wanted his estate to go to his children equally.

Kathleen and her husband, Thomas Brown.[48] Thomas Brown testified that the town of Lewes had threatened to sell the property at a sheriff's sale if Wiltbank did not pay the back taxes owed on it.[49] According to Brown, Wiltbank gave the property to him and Kathleen as a gift with no obligations to anyone, except that they had to pay off the back taxes, clear the property and dispose of the rubbish, trees, out buildings, junk, etc.[50] Later, in July 2002 Kathleen and Thomas sold the property and kept the profits for themselves.[51] Benjamin contends that Wiltbank gave Kathleen the house at 419 Park Avenue with the understanding that once she sold it she would distribute the proceeds equally among her father, herself, and her siblings.[52] At trial Benjamin introduced videotaped footage depicting himself and Wiltbank discussing their frustrations over Kathleen's having sold 419 Park Avenue and kept the proceeds.[53] The dispute over the Park Avenue property is ongoing, but is not part of this action.[54]

Petitioners, Kathleen Brown and Claudia Wiltbank-Johnson, have petitioned to set aside the Will on three grounds: 1) that Wiltbank was confused, mistaken and not of sound mind when he signed the Will; 2) that he was subject to the undue influence of Benjamin; and 3) that none of the witnesses to the Will signed it in Wiltbank's presence as required by 12 *Del. C.* § 1202.

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48 Tr. at 24.
49 Tr. at 26.
50 Tr. at 24.
51 Tr. at 63.
52 Tr. at 72-73.
53 Tr. at 252-53; DX 14; and DX 14A.
54 Because the dispute regarding 419 Park Avenue is not before me, I express no opinion with respect to it.

Trial was held on March 29 and May 3, 2005. This letter opinion constitutes the Court's post-trial findings of fact and conclusions of law regarding the petition to set aside the Will.

B. Evidentiary Issues

1. Credibility of witnesses

Before turning to the legal analysis, I note that I did not find Benjamin, Kathleen, or Claudia to be very reliable witnesses. Each of them presented testimony, in turn, that their father said that he intended to leave the House to them or suggested that at least one of the other children was out of favor with Wiltbank for various reasons.[55] Moreover, all three of Wiltbank's children have something to gain or lose as a result of this action. Additionally, they exhibited considerable animosity toward one another at times, due in part to Kathleen's sale of 419 Park Avenue without sharing the resulting net proceeds with her siblings. Benjamin incited further family strife when he boarded up the House during Wiltbank's funeral service,[56] even though Claudia and Harold Johnson's family possessions were still in the House.

In contrast, I do find the testimony of Kennedy and Robinson credible. Both were close friends and neighbors of Wiltbank who conversed with him several times a week. Neither stands to gain from the outcome of these proceedings.

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55 Kathleen testified "the only thing I know is that he (Wiltbank) didn't want Benjamin to have anything." Tr. at 36. Claudia testified that Wiltbank told her that "Kathleen has a house and Benjamin has a home and this (referring to the House) will be your home, because he said that I would be fair keeping everything in the family and I wasn't greedy." Tr. at 99.

56 Tr. at 171.

2. Petitioner's videotapes

Benjamin proffered as evidence two videotapes. The first, marked DX 14, has three short segments depicting: a) Wiltbank riding in the back of Benjamin's vehicle and conversing with Benjamin; b) Wiltbank in a wheelchair in his home with Benjamin appearing to make a phone call to Kathleen and leave a message on her answering machine;[57] and c) Wiltbank in a hospital bed in an extremely weakened physical state, responding with his left hand and arm to certain exercise directions given to him by Benjamin. From his hand movements during the last segment, Wiltbank appeared able to understand Benjamin's instructions.

The second videotape was originally unmarked, but the Court has now marked it DX 14A. It begins with a seemingly irrelevant segment relating to a drum set and then switches to Wiltbank's home. The videotape appears to include the same footage as the telephone call shown in DX 14, as well as additional footage that appears to be from the same visit by Benjamin to Wiltbank's home. The additional footage shows Benjamin walking about the room and inciting Wiltbank about Kathleen's sale of the Park Avenue property, which Benjamin obviously believed was wrong. Immediately after making the call, Wiltbank expressed a desire to contact an attorney and seemed to be trying to look up a phone number. Benjamin discouraged Wiltbank from contacting an attorney,

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[57] Portions of the message are barely audible, but as best the Court could hear Wiltbank left the following message: "This is your father Carolyn [or Kathleen?], I am certainly surprised at you and look for [partially inaudible: "a van" or "a man"?] to come to you. I hope you have all the money, cause I ain't gonna give you a damn thing now." *See* DX 14.

however, suggesting instead that they confront Kathleen's husband, Thomas, about the sale of the property.

Petitioners objected to the videotaped exhibits on the grounds that they were not timely produced, are not dated and had not been properly authenticated. The Court gave Benjamin additional time to produce evidence corroborating the tapes authenticity. Benjamin did produce such information to Petitioners' satisfaction as to the excerpts showing Wiltbank in the van with Benjamin and in the hospital bed. As to the remainder of the videotaped exhibits, Petitioners maintained their objections.

The Court hereby admits the videotape of the van ride and of Wiltbank in the hospital bed. I also will admit the remaining portions of DX 14 and 14A. Although these exhibits should have been produced earlier in the litigation, I do not believe that Benjamin intentionally withheld them or that Petitioners were materially prejudiced by their belated production. I also find that the videotapes possess sufficient indicia of reliability to warrant overruling Petitioners' authenticity objection.

The relevance of the videotaped evidence is discussed in the Analysis section.

II. ANALYSIS

A. Applicable Standard

Delaware law presumes that a duly executed will is valid and that the testator had the requisite testamentary capacity to execute it.[58] The party who challenges the validity of a duly-executed will has the burden to show by a preponderance of the evidence that

[58] *In re Last Will of Szewzcyk*, 2001 WL 456448, at *3 (Del. Ch. Apr. 26, 2001); *See In re Last Will of Melson*, 711 A.2d 783, 786 (Del. 1998).

the testator either lacked the requisite testamentary capacity, or was unduly influenced, at the time of the will's execution.[59] The presumption of testamentary capacity, however,

> does not apply and the burden on claims of undue influence shifts to the proponent where the challenger of the will is able to establish, by clear and convincing evidence, the following elements: a) the will was executed by a testatrix or testator who was of weakened intellect; b) the will was drafted by a person in a confidential relationship with the testatrix; and c) the drafter received a substantial benefit under the will.[60]

If the party challenging the will can meet their burden as to these three elements, the ultimate burden of persuasion shifts to the proponent of the will to demonstrate that the testator "possessed the requisite testamentary capacity" and was not unduly influenced in the execution of the will.[61]

Petitioners contend, and Benjamin denies, that each of the three elements identified in *In re Melson* exists in this case. Accordingly, I address each of those elements below.

1. Did Wiltbank possess a "weakened intellect"?

To be deemed "of weakened intellect," a testator need not have manifested an advanced degree of debilitation.[62] The Court need only find that such "weakened intellect" existed, taking into account factors such as a sudden change in the testator's

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59 *See In re Melson*, 711 A.2d at 786; *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987); *In re Norton*, 672 A.2d 53, 55 (Del. 1996).

60 *In re Melson*, 711 A.2d at 788 (internal quotations omitted); *In re Szewzcyk*, 2001 WL 456448, at *3; *In re Estate of Hafer*, 2000 WL 1721129, at *1 (Del. Ch. Oct. 25, 2000).

61 *In re Melson*, 711 A.2d at 788.

62 *In re Szewzcyk*, 2001 WL 456448, at *4.

living habits and emotional disposition.[63] In this case, the evidence shows that Wiltbank had a reduced mental capacity from the time of his stroke in early 2001. For example, before his stroke Wiltbank simply would give his neighbor Kennedy the bills he needed sent out. Following his stroke, however, Wiltbank would ask Kennedy to explain the bills to him because he had trouble comprehending them.[64]

Wiltbank also had a sudden change in living habits. Before his stroke Wiltbank always dressed well, kept himself very neat and loved dressing.[65] Following his stroke in 2001, Wiltbank could not dress himself and had poor hygiene.[66] Furthermore, the condition of Wiltbank's House deteriorated badly. When his grandson, Harold Johnson, came to stay with him in September 2002, he found trash everywhere and feces all over Wiltbank's bedroom.[67] Wiltbank's daughter Kathleen testified that after his stroke the House was atrocious and he had pornography everywhere.[68] She testified that before his stroke her father never would have left pornography out like that or allowed the House to fall to such a level of disarray.[69]

Wiltbank also engaged in some irrational behavior following his stroke. Leonia Robinson testified that in the summer of 2001 Wiltbank called their pastor a "jezebel," even though she had been their pastor for three years and used to ride with Wiltbank

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63 *Id*.
64 Tr. at 129.
65 Tr. at 130.
66 Tr. at 18.
67 Tr. at 221.
68 Tr. at 39-40.
69 *Id*.

when the choir went out to sing.[70] On another occasion, after eating dinner with Kathleen, Wiltbank called her on her way home and accused her of stealing his letter opener.[71] He later found the letter opener on the floor and called her back to apologize.[72] In addition, during one visit with her father, Kathleen found him sitting in his chair naked.[73] She testified that normally he never would have acted like that.[74]

Based on the evidence presented, I find that Petitioners have shown by clear and convincing evidence that Wiltbank was of "weakened intellect" at the time he executed the Will.

2. Was Benjamin in a confidential relationship with Wiltbank?

The parties agree that Benjamin drafted his father's Will. As to the second factor, therefore, the only issue is whether Petitioners have demonstrated by clear and convincing evidence that Benjamin was in a confidential relationship with Wiltbank.

A confidential relationship requires more than a relationship of blood or marriage.[75] A confidential relationship exists 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."[76]

In *In re Szewzcyk*, the Court found a confidential relationship existed under circumstances very similar to this case. First, they noted that at the time the will was

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70 Tr. at 164-65.
71 Tr. at 42-43.
72 *Id*.
73 Tr. at 44-45.
74 *Id*.
75 *In re Szewzcyk*, 2001 WL 456448, at *5.
76 *Id*.

created the decedent's relationship with his other children was strained because he had delusions that his children were stealing from him.[77] Second, although it only lasted for a month, the individual who exerted undue influence over the testator in *Szewzcyk* had a power of attorney to act for him and also served as his attorney in fact.[78] Thus, the court concluded that that individual had a confidential relationship with the testator.[79]

The situation in this case is strikingly similar. Benjamin had a power of attorney to act for his father. Moreover, due in part to Wiltbank's delusions, Wiltbank had a strained relationship with his other children at certain times during the relevant time period.[80] Additionally, Benjamin drafted the Will, further proving that he had an overmastering influence on, and a confidential relationship with, his father. Therefore, I find that Wiltbank and Benjamin had a confidential relationship.

3. Was Benjamin substantially benefited under the Will?

The Will left 100% of Wiltbank's residuary estate to Benjamin.[81] Before Benjamin drafted the Will, he likely would have expected to share the property equally with his sisters under the Delaware intestacy statute.[82] Thus, Benjamin stands to receive a substantial benefit under the Will.

I therefore conclude that Petitioners have met their initial burden to show by clear and convincing evidence that: 1) the testator, Wiltbank, possessed a weakened intellect,

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77 *Id*.
78 *Id*.
79 *Id*.
80 Tr. at 17-18.
81 *See* PX 2.
82 12 *Del. C.* § 503(1).

2) Benjamin, who drafted the Will, had a confidential relationship with the testator, and 3) Benjamin received a substantial benefit under the Will. Accordingly, "the burden shifts to the proponent of the will [here, Benjamin] to prove by a preponderance of the evidence that the testator or testatrix [1)] possessed the requisite testamentary capacity" and 2) was not unduly influenced in the execution of the Will.[83]

B. Testamentary Capacity

In order to be capable of executing a valid will an individual must, *at the time of execution*, be capable of exercising thought, reflection, and judgment, know what she is doing and how she is disposing of her property, and[84] possess sufficient memory and understanding to comprehend the nature and character of the act.[85] Thus, the law requires the testator to have known that she was disposing of her estate by will, and to whom.[86] Only a modest level of competence is required, however, for an individual to possess the testamentary capacity to execute a will.[87] Courts have long held there is a low standard for testamentary capacity.[88] Furthermore, even though a testator has periods where she may not have capacity to make a will, she nonetheless may still have testamentary capacity at other times.[89]

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83 *In re Melson*, 711 A.2d at 788.

84 *In re West*, 522 A.2d at 1263; *see also* 12 *Del. C.* § 201.

85 *In re West*, 522 A.2d at 1263.

86 *Id*.

87 *Id*.

88 *In re Boyd*, 2003 WL 21003272, at *4 n.36 (Del. Ch. Apr. 24, 2003).

89 *Id*. (although the testator had been diagnosed with dementia of the Alzheimer's type, resulting in impaired mental capacity, the evidence showed that when he executed his will he understood that he was disposing of his estate to the beneficiaries named); *In re Will of Macklin*, 1991 WL 9981, at *2 (Del. Ch.

In this case Wiltbank had the minimal capacity needed to execute a will. A segment of the videotape Benjamin presented showed Wiltbank riding in a van carrying on a normal conversation with Benjamin.[90] When Wiltbank signed the Will the notary spoke with him briefly and he was able to identify himself.[91] Furthermore, evidence showed that even in his final days, when Wiltbank was physically very weak, he still could follow simple commands in the hospital.[92] The evidence also showed that Wiltbank understood what he owned and on more than one occasion used his House, albeit inconsistently, as leverage to get what he wanted or thought he needed.[93]

I do not find Wiltbank's occasionally erratic behavior, such as calling the pastor a "jezebel" or his failure to maintain his prior level of cleanliness in terms of his person and his home, indicative of a lack of testamentary capacity. Evidence of this nature does not relate to Wiltbank's knowledge of his property, but rather his ability to care for himself. Thus, I find that Benjamin has met his burden of proving that Wiltbank had the requisite testamentary capacity when he executed the Will.

Jan. 23, 1991) (holding that witness testimony that testatrix had good periods and less clear periods and that she found the testatrix's house a "shambles" and her personal cleanliness to be wanting does not go very far to establish incompetence for purposes of testamentary capacity).

90 DX 14.

91 Tr. at 197-98.

92 DX 14.

93 For example, around September 15, 2002 (shortly before Wiltbank executed the Will) he offered his grandson Harold the House if he would take care of him. Tr. at 216-17.

C. Undue Influence

To avoid a finding of undue influence Benjamin has the burden to prove by a preponderance of the evidence that he exerted no influence adverse to the interests of Wiltbank and that the property disposition in dispute was consistent with Wiltbank's intentions.[94] Undue influence is an excessive or inordinate influence considering the circumstances of the particular case.[95] The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate her mind to the will of another, to overcome her free agency and independent volition, and to compel her to make a will that speaks the mind of another and not her own.[96]

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.[97] The fact that the proponent of a will had an opportunity, at the date of its execution, to exercise undue influence, raises no presumption that he did so. Nor does any of the following factors: 1) the existence of confidential relations between the testator and beneficiary; 2) the alteration of an existing will arbitrarily and without reason; or 3) the mere fact that a testator disposes of his property unequally, or in a manner which may seem unreasonable.[98] The reason is that a testator having capacity, and acting freely, may

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94 *See In re West*, 522 A.2d at 1264; *In re Melson*, 711 A.2d at 788.
95 *In re Will of Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983).
96 *Id*.
97 *Norton v. Norton*, 672 A.2d 53, 55 (Del. 1996).
98 *In re West*, 522 A.2d at 1264-65.

dispose of his property as he sees fit.[99] Nevertheless, because the burden in this case has shifted for the reasons previously discussed, Benjamin must prove by a preponderance of the evidence the absence of undue influence.[100]

Turning to the elements of undue influence, the first element, weakened intellect, is present here. Wiltbank was a susceptible testator. As discussed *supra*, Wiltbank possessed a "weakened intellect" at the time he executed the Will. His final stroke rendered him more dependent on others and less capable of clear thought. Several other factors previously discussed, such as Wiltbank's delusions about his children stealing from him, also reflect a weakened intellect. Moreover, the evidence adduced by Benjamin was not sufficient, in my opinion, to prove that Wiltbank was not susceptible to his influence.

The second element also exists in that Benjamin did have the opportunity to exert influence over his father. Following Wiltbank's stroke Benjamin began spending a great deal more time around his father. The evidence shows that Benjamin assumed a more prominent role in caring for his father during the last few months of his life. The incident recounted by Kennedy in which Benjamin had to come back to Wiltbank's house to get him out of his soiled clothes reflects the degree of Wiltbank's dependency upon Benjamin and others.

The evidence further suggests that Benjamin had a disposition to exert influence over his father in a manner consistent with Benjamin's view of how Wiltbank's estate

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99 *Id*.

100 *Id.* at 1264.

should be distributed. For example, Benjamin strenuously objected to Kathleen's sale of 419 Park Avenue and did not hesitate to mention his displeasure to his father. He also testified about an incident in 1979 when he paid a $3,000 bill Wiltbank had for back taxes to save his mother and father's house at 406 St. Paul Street. At that time, according to Benjamin, his father said, "son I'm going to put this property in your name. As a matter of fact I'm going to put everything in your name."[101] In addition, Benjamin knew how to create a will. This evidence supports the conclusion that Benjamin was disposed to exert influence over Wiltbank to create a will consistent with Benjamin's views.

The final two elements of undue influence, whether Benjamin actually exerted such influence and a result demonstrating its effect, can be addressed together. The evidence is sufficient to support a finding that Benjamin took advantage of his father's weakened intellect. As depicted in the videotapes, Benjamin actively reminded his father of his frustrations related to Kathleen's disposition of the 419 Park Avenue property and urged Wiltbank to take action about it.[102] Consistent with Benjamin's urging, Wiltbank stated on that occasion that he was not going to give Kathleen anything.[103]

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101 Tr. at 321.

102 DX 14A. Contrary to the message conveyed in DX 14A, Kathleen testified that on an earlier date, and in her presence, Wiltbank called Benjamin to tell him the house at 419 Park Avenue was completely Kathleen's. Tr. at 35-36. This supports an inference that due to Wiltbank's weakened state he was susceptible to suggestion by whichever family member happened to be with him at a particular time.

103 Notably, Wiltbank said nothing about Claudia. Benjamin failed to adduce any evidence that would explain why Wiltbank would have disinherited Claudia in the Will, with the possible exception of the incident in 1979 where Benjamin paid a tax bill his father owed. Benjamin's testimony about the 1979 incident, however,

In addition, Benjamin drafted his father's final Will.[104] Therefore, he had the ability to make changes to the Will with little or no input from Wiltbank. In terms of form, the Will and the Unsigned Will introduced into evidence by Petitioners are very similar.[105] The primary difference between the two documents is that in the Unsigned Will each of the children is to receive an equal share of Wiltbank's estate and in the other Benjamin is to receive the entire estate.[106] The fact that the Will only lists Benjamin as Wiltbank's "children"[107] even though he had three surviving children raises doubts about whether Wiltbank read and understood the Will. Additionally, Benjamin drove Wiltbank to the bank to sign the Will,[108] further demonstrating the extent of his influence on its creation. Yet another relevant fact is that Wiltbank never told his other children that he had disinherited them.[109]

There also is evidence that Wiltbank may not have wanted his property distributed in the manner specified in the Will Benjamin prepared. Sometime after Wiltbank executed the Will, he asked his grandson Harold Johnson to take him to an attorney to draft a will.[110] When asked if he knew how Wiltbank planned to leave his property in this will, Harold stated "no, we never really discussed the actual leaving of the property.

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reflects more on his own state of mind and raises more questions about potential undue influence by Benjamin than it answers.

104 Tr. at 305-07.

105 Tr. at 309.

106 *Compare* PX 2 (the Will) *with* PX 3 (the Unsigned Will).

107 PX 2.

108 Tr. at 184.

109 Tr. at 249.

110 Tr. at 218-19.

He just said that he would actually give me the house."[111] Other evidence indicates that Wiltbank may have intended to leave his property equally to his three children. In any event, the record would support a finding that, absent Benjamin's influence, Wiltbank would not have left his entire estate to Benjamin.

Benjamin's videotape evidence does not support a contrary conclusion. One videotape purported to show a telephone call from Wiltbank to his daughter Kathleen advising her that he was upset with her.[112] While these videotapes may demonstrate that Wiltbank was displeased with one of his daughters it does not explain why both daughters received nothing under the Will. The videotapes also show that Benjamin actively and extensively coached his father on the issue with Kathleen.

Taken as a whole the evidence supports a reasonable inference that Benjamin may have exerted undue influence over his father. Benjamin has not produced adequate evidence to rebut that inference. Therefore, Benjamin has not met his burden of proof to demonstrate that he did not exert undue influence over his father. In fact, I find that it is more likely than not that Benjamin's influence over Wiltbank caused him to write a will that left everything to Benjamin and effectively disinherited his daughters. Because this may not have represented Wiltbank's true intent, I find the Will to be the product of undue influence and therefore void.

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111 Tr. at 219.

112 DX 14.

D. Compliance With 12 *Del. C.* § 202(a)(2)

Petitioners also argue that the Will does not comply with 12 *Del. C.* § 202(a)(2) because the witnesses did not sign in the testator's presence. To support this claim Petitioners presented evidence that after the notary saw Wiltbank sign the Will, Benjamin followed the notary into the bank where two other witnesses signed the Will.[113] Further evidence demonstrated that during this time Wiltbank remained in Benjamin's van only 15 to 20 feet from the bank's front door.[114] Apart from any inferences that might be drawn from the affidavit executed by the witnesses when the Will was signed, however, neither side presented any evidence as to whether Wiltbank could see the witnesses from where he was sitting in the van.

The requirements for witnessing a will are set forth in 12 *Del. C.* § 202(a)(2). The statute requires that the will be "attested and subscribed in testator's presence, by two or more credible witnesses." To be within the testator's presence the testator must be able to see the witnesses sign the will from their actual position at the time, or have the power to readily make alterations to the will without assistance, causing themselves pain, or incurring a personal risk.[115]

The Alabama case of *Green v. Davis* presents facts very similar to this case.[116] In *Green*, the testator, who was disabled, sat in the back seat of his automobile, which was parked at the curb adjacent to a bank building, and near but not exactly opposite a

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113 Tr. at 185-86.
114 Tr. at 204.
115 *In re Wilson*, 2003 WL 22227850, at *4 n.12 (Del. Ch. Sept. 25, 2003).
116 153 So. 240 (Ala. 1934).

window of the bank which measured 15 by 18 feet.[117] The applicable statute in *Green* resembled 12 *Del. C.* § 202(a)(2) in all material respects.[118] One of the witnesses had taken the will into the bank where the witness and another bank officer signed it.[119] The court held that since there was no evidence showing or tending to show that a person seated where testator was even could have seen the witnesses, much less their acts in subscribing their names, the proponent failed to sustain his burden of proof.[120]

Similarly here it is unclear whether or not Wiltbank could see into the bank from the van. When the witnesses signed the Will, however, they also signed an affidavit stating that they properly witnessed it.[121] The affidavit states, among other things, that "at the Testator's request and in the Testator's sight and presence, and in the sight and presence of each other," they each subscribed their names as witnesses on the date shown. Indeed, the affidavit and other documentation relating to the signing of the Will arguably would make it a self-proved will under 12 *Del. C.* §§ 1305 and 1310.[122]

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117 *Green*, 153 So. at 240-41.

118 *Id*. at 241 (the Alabama statute states that "no will is effectual to pass real or personal property…unless the same is in writing signed by the testator…and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator").

119 *Id*. at 240-41.

120 *Id*. at 242.

121 Tr. at 206-07.

122 Section 1310 of Title 12 of the Delaware Code provides: "If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, and, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit, the will shall be admitted to probate subject to all other provisions of this title." *See In re Wilson*, 2003 WL 22227850, at *4 (The purpose of § 1310 is "to make it unnecessary for the

Unfortunately, the parties submissions shed little or no light on the applicability of either § 1305 or § 1310 to the facts of this case.[123] For that reason and because I already have concluded that the Will is void as the product of undue influence, I consider it unnecessary to reach the issue of whether the Will complied with the formalities of 12 *Del C.* § 202(a)(2).

III. CONCLUSION

For the reasons stated, I conclude that Benjamin unduly influenced his father, Arlington Wiltbank, in connection with the creation of Wiltbank's Will. Therefore, this Court holds that the Will is void.[124] Based on that holding, I conclude that because there appears to be no dispute that in the absence of the Will Wiltbank died intestate, his estate (including the House) will pass to Wiltbank's issue, per stirpes.[125]

Petitioners' counsel shall prepare a proposed form of judgment consistent with this Memorandum Opinion and promptly submit it, upon notice to Respondent, for the Court's consideration.

IT IS SO ORDERED.

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attesting witnesses to appear in person before the Register of Wills in order to verify their role in the creation of the testamentary instrument.").

[123] Section 1305 sets forth the requirements for making a self-proved will. In addition, the *Green v. Davis* case from Alabama was decided well before the first statutes authorizing the use of self-proving affidavits were enacted. *See* Betsy Dupree-Kyle, *Michigan Self-Proved Wills: What are They and How do They Work?*, 2000 L. Rev. Mich. St. U. Det. C.L. 829, 836 (2000) (noting that, "In 1955, Texas was one of the first states to enact a provision authorizing the use of self-proving affidavits.")

[124] As a result, Benjamin's transfer of 406 St. Paul Street to himself, individually, on January 2, 2003 is also void.

[125] 12 *Del. C.* § 503(1).