IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

IMO: LUCILLE F. PETERMAN, a disabled person.	)))	C. M. No.2337-K

LUCILLE F. PETERMAN,	)
	)
Petitioner,	)
	)
v.	)
	)
DONALD A. PETERMAN and TIMOTHY ALLEN PETERMAN,	))
	)
Respondents.	)

MASTER'S REPORT
(On the Merits)

Date Submitted: October 6, 2006
Draft Report: February 27, 2007
Final Report: July 17, 2007

John W. Paradee, Esquire, of Prickett, Jones & Elliott, P.A., Dover, Delaware; Attorney for Petitioner.

William S. Hudson, Esquire and Sean M. Lynn, Esquire, of Hudson, Jones, Jaywork & Fisher, Dover, Delaware; Attorneys for Respondents.

GLASSCOCK, Master

Lucille Peterman is a disabled person who is 98 years of age and the subject of a guardianship in this Court. Her son, Harold Peterman ("Jack")[1] held a power-of-attorney at the time this guardianship was created in January, 2006. At the same time Jack petitioned for guardianship, he also sought to set aside a 2005 real estate transaction in which his mother transferred parcels of real property in Milford (the "home place") to another son, Donald Peterman ("Donald"). Obviously, the entry of the guardianship in this Court terminated the power-of-attorney. 12 Del.C. §4903 (a). Nevertheless, I permitted Jack to proceed with the prosecution of his request to set aside the deed, on his mother's behalf. Jack argues that the deed is void *ab initio* due to lack of capacity, undue influence and fraud. Donald maintains that his mother had capacity to execute the deed transferring the property from her name solely, to her and Donald as joint tenants with right of survivorship. In the alternative, he seeks that a trust be imposed upon the home place in his favor, either to enforce a contract to make a will, or because, he claims, otherwise his mother would be unduly enriched at his expense.

This family matter has been bitterly litigated. A two-day trial was held, followed by post-trial briefing. This is my report following that trial.

[1] I will refer to members of the Peterman family by their first names or nicknames in this report, not out of disrespect, but to avoid confusion.

I FACTS

A) The Certificates of Deposit

Mrs. Peterman's husband George died in 1986. This left her a widow in her seventies with a very large number of children and grandchildren. After her husband's death, Mrs. Peterman continued his practice of purchasing certificates of deposit in joint names with one or another of their children. While the parties have argued about whether these certificates of deposit were convenience accounts or outright gifts of a present interest in the certificates, the evidence demonstrates clearly that Mrs. Peterman intended neither. As she explained to her personal banker, Priscilla Rogers, Mrs. Peterman purchased the CDs in joint names with her children as a kind of testamentary device. Her intent was that, should she die with such a certificate of deposit outstanding, pursuant to her contract with the bank that money would belong to the child with whom she held the CD jointly. The money in these CDs came from Mrs. Peterman, and not from the children. She did not intend the children to have access to these funds during her lifetime. As the CDs matured, she would typically use the funds to purchase new certificates of deposit, frequently changing the designation of the child or grandchild with whom she was to hold the new CD. While Donald Peterman was extremely elusive in the discovery phase of this matter as to the source of the funds used to purchase certain CDs which he held jointly with his mother, he conceded at trial that the funds in these CDs were a "gift" "just like" the CDs Mrs. Peterman had placed in the names of other children and grandchildren.

According to Donald, in 1986 Mrs. Peterman owned four of these certificates of deposit totaling $60,000 titled jointly with Donald.[2] On December 15, 1986 , Donald and Mrs. Peterman appeared before Priscilla Rogers and Donald signed away any interest he held in these certificates of deposit, so that the accounts were then in Mrs. Peterman's name solely. A statement signed by the bank officer, Ms. Rogers, at that time states that "as of this date, [Donald] has turned over two certificates to [Mrs. Peterman].[3] A few days later, Mrs. Peterman had her lawyer, Eugene Bayard, draft a will which left the home place to Donald. The will directed that the rest of her property was to be sold and the money distributed evenly among her children and her favorite grandson, Timothy Peterman ("Tim"). Donald, however, was excluded from this pool of residuary beneficiaries.

B) The Many Wills

Mrs. Peterman was extraordinarily fond of creating wills and codicils. Over the next decade and a half she executed at least five wills, each differing in some detail but maintaining Donald as the beneficiary entitled to the home place.[4] In the early 1990s, she

[2] There is some dispute as to the number and amount of these joint CDs, but it is a dispute that does not affect my decision here.

[3] As will be described later, this document was subsequently altered, and notes were added in Mrs. Peterman's handwriting.

[4] In addition to the December 18, 1986 will leaving the home place to Donald, Mrs. Peterman executed similar wills drafted by Eugene Bayard on August 2, 1988, April 10, 2000, October 17, 2002 (never executed), October 30, 2002 and March 4, 2003.

purchased a house for Tim's use ("Tim's place") and most subsequent wills provided an estate for Tim in that property. Because all these wills bequeathed the home place to Donald, I will refer to them (and other such wills) as "Donald Wills." On March 4, 2003, Mrs. Peterman executed a will drafted for her by Mr. Bayard which, for the first time since 1986, directed that the home place be sold (together with her other properties) and divided among her ten children and grandson Tim. Unlike the 1986 will, although Donald was no longer the sole beneficiary of the home place, he was named a residuary beneficiary entitled to receive an equal share with the other children. Because this will divides the value of the home place among Mrs. Peterman's children, I will refer to it and similar wills as "Children's Wills."

A few months later Jack took Mrs. Peterman to see Roy Shiels, Esquire, for the purpose of drafting a new will. Mr. Shiels was a friend of Jack's and according to Jack, he did not know that Mr. Bayard was his mother's long-time attorney. The resulting June 10, 2003 Shiels' will devises Tim's place to Tim, and the residue of her estate to all ten of her children including Donald—another Children's Will.

On October 23, 2003 Mr. Bayard prepared yet another will at Mrs. Peterman's direction. This will would have devised Tim's place to Tim, would have given Robert Peterman ("Bob"), who was living with Mrs. Peterman at the time, the right to an estate for eighteen months in the home place, thereafter devised the home place to Donald, and directed that the residue of the estate be distributed in eleven equal shares to all her children (including Donald), and Tim. This would have been a Donald Will, but Mrs.

Peterman never executed the October 23, 2003 draft will. A week later, Mr. Bayard prepared yet another will for Mrs. Peterman. This will devised Tim's place to Tim, gave Bob the right to live on the home place for eighteen months, ultimately devised the home place to Donald, and directed that the residue of the estate be distributed in nine equal shares to her children, excluding Donald and Tim. That Donald Will was executed on November 5, 2003.

On November 13, 2003 Mr. Bayard prepared another draft will at Mrs. Peterman's direction. Without executing that will, however, Mrs. Peterman left a message with Mr. Bayard's office on November 18, 2003 confirming an appointment to discuss her testamentary scheme, and requesting him not to let her family be present during her consultation with Mr. Bayard. The next day, Mrs. Peterman executed a newly-drafted (by Mr. Bayard) will which left Tim's place to Tim for life and then to Donald's grandchildren, Joel and Kyle, gave Bob the right to live on the home place for eighteen months and thereafter devised the home place to Donald, and left the residue in equal shares to nine of her children (excluding Donald): a Donald Will. On January 7, 2004, Mrs. Peterman executed a will drafted for her by her pastor, Kenneth Huffman, which is not in evidence, but which according to testimony was a Children's Will. On April 2, 2004 Mr. Bayard drafted another will for Mrs. Peterman. This will changed executors but otherwise was identical to the November 19, 2003 will, a Donald Will. Thus, it superceded the January 7, 2004 will and made Donald beneficiary of the home place.

In June, 2004 Mrs. Peterman left a message for Mr. Bayard that indicated that she had tired of her children "pestering" her about her will, and wanted a will just like that of her late husband–a Children's Will. Mr. Bayard prepared such a will: under its terms the estate was to be liquidated and divided into thirteen equal shares with one share to go to each of her ten living children (including Donald) and the remaining three shares to Tim. That will was executed by Mrs. Peterman on June 22, 2004. Bob, who at the time was living with Mrs. Peterman, was named executor of this will. On September 1, Mrs. Peterman executed a codicil to this will, changing the executor from Bob (who was in ill health) to Jack. She also made Jack her attorney-in-fact at this time. However, the June 22, 2004 Children's Will was the last will executed by Mrs. Peterman. On February 1, 2005, Mr. Bayard prepared a draft will for Mrs. Peterman, another Children's Will that left Tim's place to Tim and directed the residue of the estate to be distributed in nine equal shares to her nine living children (Bob having died). Mrs. Peterman did not execute this will.

C) The Appearance of Dementia

On January 13, 2005 Mrs. Peterman arrived at Mr. Bayard's law office accompanied by Donald. Mr. Bayard spoke with Mrs. Peterman outside of Donald's presence. Mrs. Peterman had with her a copy of the April 16, 2004 will, leaving the home place to Donald, the will that she (erroneously) believed to be her then-current will. Mrs. Peterman explained to Mr. Bayard that she wanted a will which would leave her estate to her children in equal shares, and wanted a special bequest for Tim. When Mr. Bayard explained that he had drafted a will for her, the June 22, 2004 will, accomplishing those very goals, which she had executed six months before, Mrs. Peterman became noticeably confused. She did not remember having executed the June 22 Children's Will.

At this point, Mr. Bayard brought Donald into the conversation and explained to him the terms of the June 22, 2004 Children's Will. Donald told Mr. Bayard that, contrary to the provisions of that will, he had received a promise from Mrs. Peterman to leave him the home place[5] in her will, in consideration for which he had paid her $60,000. Mr. Bayard asked Mrs. Peterman whether this had taken place: she failed to respond. According to Mr. Bayard, Mrs. Peterman was confused, unable to answer basic questions and he was "troubled" as to her competency. In any event, Mr. Bayard advised Donald

[5] The discussion between Mr. Bayard and Donald involved Donald's claimed right to receive 706 NE 10th Street in Milford, only one of the two properties making up the home place. He did not claim a right to 700 NE 10th Street, the other home-place parcel. Because of my decision herein, any distinction between these two parcels is irrelevant, and I have drawn no distinction between them in my discussion.

and Mrs. Peterman to return at another time if Mrs. Peterman wished to change her will to pass the home place to Donald.[6] Later that same day Steven Peterman ("Steven"), Donald's son, faxed a letter to Mr. Bayard directing that he prepare a will for Mrs. Peterman leaving the home place to Donald and disinheriting Jack. On January 17, Mr. Bayard responded by letter to Donald Peterman. Mr. Bayard explained that, because of Mrs. Peterman's apparent deteriorating mental condition, he could no longer make changes to her testamentary scheme unless a physician could attest to her mental capacity.

In the meantime, members of Mrs. Peterman's family were becoming increasingly convinced that she was no longer competent. On January 26, 2005 Mrs. Peterman's daughter Jean took her to see her family physician, Dr. Foote, for an evaluation of her mental capacity. Dr. Foote administered a Folstein mini-mental examination to Mrs. Peterman. Mrs. Peterman scored 23 out of 30 points, demonstrating "mild impairment." Dr. Foote then referred Mrs. Peterman to a local neurologist, Dr. Kofahi. On January 31, 2005 Jean took Mrs. Peterman to Mr. Bayard's office. Mr. Bayard asked Mrs. Peterman about the supposed contract for a will which Donald claimed to have purchased, for $60,000 paid to Mrs. Peterman. Mrs. Peterman emphatically denied such a transaction. Mrs. Peterman told Mr. Bayard that she wanted the home place to be sold and the proceeds divided among her heirs, that Tim's place was to go to Tim, and that she wanted

[6] According to Mrs. Peterman's daughter Jean, Donald also approached Ronald Prisco, Esquire, Donald's attorney, for help in preparing a will favorable to him. Mr. Prisco, per Jean, declined to draft a will without a physician certifying to Mrs. Peterman's competence.

her son Joseph Peterman ("Joe") to serve as her executor and power-of attorney. Based on his discussion with Mrs. Peterman at that time, Mr. Bayard was convinced that she was competent to make a will. He drafted another Children's Will for Mrs. Peterman preserving the terms of the then-current will dividing the home place among all the children, but providing that Tim should receive Tim's place. This will, however, was never executed by Mrs. Peterman.

On March 7, 2005 Mrs. Peterman again met alone with Mr. Bayard. She again stated that Donald had not given her $60,000. She asked Mr. Bayard to contact Donald and direct him to provide any documentation of the contract to make a will, and Bayard did so. In response, a week later, on March 14, Steven, on Donald's behalf, faxed to Mr. Bayard a letter by Mrs. Peterman dated November 13, 1992. That letter, written in Mrs. Peterman's hand, stated:

> This is what I want when I die. Be sure that this is the way it is done. First of all, Donald [Jack] is to be the one to make all the arrangements. I realize Bob is the oldest. But, Bob is not well. He doesn't need the responsibility. Donald [Jack] can do it.
>
> Donald, is getting the home place. No one ever had shown an interest in it. Donald did. He made over to me 4 CDs two were $20,000 each which made $40,000. Two were $10,000 each which made $20,000 more dollars. That made $60,000. That was more than this place was appraised for. I mean the entire property. I invested the money and saved my paychecks. That'll be divided between all the children. You will all have about the same amount. I want every one of you to take any thing that you have given to me. I appreciated it, but I won't need it when you are reading this writing. I love and appreciate every one of you. It would really make me happy if you all would love each other, and be friends to each other. My greatest desire is for each of you to give your life to Jesus. Then we will never be separated. I'm sure Dad is looking for every one of

you. I'll be right beside him. So will Douglas and Paul. Don't let the circle be unbroken. Love Mom.

According to the date thereon, November 1992, this letter was written nearly six years after the CD transaction, and was not notarized until September 9, 2004. Although directed to her children, the letter was given only to Donald.[7]

Strangely, Donald did not provide Mr. Bayard with the more-nearly-contemporaneous documentation of the CD transaction which was ultimately placed in the record in this case.[8] At some point in the late winter or spring of 2005, however, Donald produced a rather odd video tape of Mrs. Peterman, under his direction, reading portions of these documents into a video camera. Although Donald contends the video was made in 2004, it is clear to me from the testimony at trial, including that of his son Steven who edited the tape, that it was made in 2005, after Eugene Bayard demanded documentation for the supposed contract to make a will. In the video tape, Mrs. Peterman is clearly confused. She cannot remember the names of her children and has trouble

[7]The documents handwritten by Mrs. Peterman, although all directed to her children generally, were in Donald's possession alone. Donald maintains stoutly that this was because his mother wished to hide the "will contract" from her other children. Jack, unsurprisingly, suggests a darker motive.

[8] These documents are attached to the deposition of Donald Peterman, which was received as a trial exhibit. The internal deposition exhibit numbers are 8, 9, 11 and 12. *See* Note 20, *infra*.

reading the documents she is given. Nevertheless, she dutifully reads them into the camera.[9]

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[9] In support of the "will contract", Donald points to several documents in his mother's handwriting. First are handwritten notations on the statement signed by Mrs. Peterman's banker, Ms. Rogers, dated December 15, 1986. The typed portion of that document stated "as of this date, Donald A. Peterman has turned over two certificates to Lucille F. Peterman." The word "two" is obscured, and a notation in Mrs. Peterman's hand explains that this was her doing. Another note in her hand on the document states "these certificates were turned over to me from Donald for payment on [of] the home property where I live. 700 and 706 NE 10th Street, Milford, Del."

Next is a note written nine months later and notarized by Priscilla Rogers on October 4, 1987. It is in Mrs. Peterman's handwriting and is a letter addressed to her children:

> Dear Children, I did ask you, what you would would [sic] like to have, when I had gone to be with Dad.
>
> Donald, said he would like the home place, where we lived together so long. He didn't want some stranger to have it. I thought he just as well buy it as anyone.
>
> I didn't want a lot of legal problems. He signed over a good sum of money to me. I did have the property appraised.
>
> I also gave Donald the power-of-attorney. He is right here by me. It is easier for him to take care of things than it would be for the children farther away.
>
> He [and Jack] will also take care of my funeral. I realize Bob, is the oldest son, you all know he isn't well. I don't want to put another burden on him.
>
> Please love each other and get along to-gether.
>
> God has been good to all of us.
>
> May God's most choice blessings always be yours. I love you all. Mom
>
> P.S. Donald also gets the tractor. Donald paid for this also.

Finally, Donald has submitted an undated letter directed towards her children written in Mrs. Peterman's hand. That letter provides

> Donald signed CDs to me. They were verified by Priscilla Rogers and Clara Mahoney. I don't think it's necessary to state the amount, as that was between Donald and I. I have received all the interest from them myself. I saved as much as I could to divide between you children also the CDs to be divided just like I felt I should have done.
>
> I left the property to Donald. I would like for it to stay in the family. Everyone of the children are married and have a husband or wife. I know no one needs it, and everyone has a home. I'm sure you would not even want it.
>
> I'm looking forward to being with Dad. I miss him more every day. The days are so long. It seems like the night will never end. I'll be so happy when I see him. Also Doug and Paul.

In May 2005, Jack filed a complaint with the Attorney General's Office alleging that Donald was attempting to exploit Mrs. Peterman financially. Gary Tabor, Sr., of that office commenced an investigation into Mrs. Peterman's relationship with her family. Shortly thereafter, in June 2005, Mrs. Peterman was hospitalized twice for congestive heart failure. Her dementia, apparent at the time of Dr. Foote's diagnosis of January 26, 2005, became markedly worse during her hospitalization. She appeared confused and disoriented. She had to be restrained in a wheelchair to prevent her from harming herself, and threatened to "jump out a window." She was released from the second hospitalization on June 14. On June 30, 2005, Mr. Tabor concluded his examination, and reported that he found no financial exploitation from any of the parties. Unsurprising, Mr. Tabor pointed to the numerous and conflicting wills executed by Mrs. Peterman as evidence (in light of her dementia) of "undue manipulation from the family."

D) The Deeds in question

Meanwhile, Mrs. Peterman remained concerned that Tim be provided for at her death. She expressed this to Donald's son Steven, who was himself concerned that his father's "rights" to receive the home place would not be honored. Steven contacted his attorney, Walter Feindt, and asked Feindt to prepare a deed to convey Tim's place from

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> We will be watching for everyone of you. Our earnest prayer has always been that you will accept Christ as your personal savior, then what a homecoming we will have when we all get to heaven. Please love each other and be friends to each other. I love everyone of you. Mom.

Mrs. Peterman to Tim and Mrs. Peterman as joint tenants with right of survivorship, and to create a similar deed conveying the home place to Mrs. Peterman and his father, Donald, as joint tenants with right of survivorship.[10]

On June 29, 2005 Mr. Feindt went to Mrs. Peterman's house with the two deeds which he had drawn at Steven's direction. Mr. Feindt first explained to her the deed from Mrs. Peterman to herself and Tim jointly, and she signed this deed.[11] He then presented the deed which would transfer the home place from Mrs. Peterman to herself and Donald. At this point, Mrs. Peterman appeared confused. She did not understand the reason that this deed was being presented to her and declined to sign it. Steven called his father, and Donald soon arrived and showed "a piece of paper"— presumably some of the documentation which he had concerning the 1986 transaction — to Mrs. Peterman. According to Mr. Feindt, Donald told his mother that he had given her the money to buy Tim's place[12] and that she had promised that she would reimburse him or see that he got the home place in return. Mrs. Peterman denied that such a transaction had taken place and Mr. Feindt left, promising Steven that he would return if and when Mrs. Peterman agreed to complete the home place transaction. A few days later, Steven spent one or two

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[10] The home place parcels now included a small piece of land which had been purchased from Mrs. Peterman by DelDot years before and which was returned to Mrs. Peterman by DelDot on June 27, 2005, for $1,000.

[11] Tim has renounced any interest which he received from his grandmother in the June 29, 2005 deed.

[12] There is no evidence that Donald provided any of the money used to buy Tim's place.

hours with Mrs. Peterman, encouraging her to sign the deed on the home place to herself and his father. Eventually, she agreed and Mr. Feindt was summoned back to Mrs. Peterman's home. Mr. Feindt explained to Mrs. Peterman the concept of joint tenancy, and Mrs. Peterman executed the deed.

E) The Guardianship

After finding Mrs. Peterman mildly demented, Dr. Foote had scheduled an appointment with Dr. Kofahi for a neurological examination of Mrs. Peterman.[13] On July 12, 2005, less than a week after Mrs. Peterman had signed the deed on the home place in favor of Donald, Dr. Kofahi performed a general physical examination and a neurological examination of Mrs. Peterman. On a Folstein mini-mental examination, Mrs. Peterman scored 14 out of 30 possible points. Dr. Kofahi found that Mrs. Peterman's dementia was "moderate to severe."

Shortly thereafter, yet another mini-mental examination of Mrs. Peterman was administered. After the Tabor investigation had determined that no criminal activity had taken place with respect to Mrs. Peterman, the matter had been turned over to Adult Protective Services. Janet Harper-Wooley, a senior social worker for APS, visited Mrs. Peterman at her home on July 22, 2005. Ms. Harper-Wooley administered a Folstein

[13]Jack strongly advocated to both Drs. Foote and Kofahi that they should find Mrs. Peterman to be incompetent. The effect of such a finding, of course, would be to "freeze" Mrs. Peterman's estate plan as it was, with a will devising the home place to all the children, rather than to Donald.

mini-mental exam and Mrs. Peterman's score was 20-23 out of 30, indicative of mild dementia. During her visit, Ms. Harper-Wooley asked Mrs. Peterman who the tenants were in her nearby rental property, and Mrs. Peterman did not know. Ms. Harper-Wooley asked her whose name was on the deeds to her property, and Mrs. Peterman responded that her name, and perhaps that of her late husband, was on the deeds. Mrs. Peterman told Ms. Harper-Wooley that she did not have a will, but explained that if she made one she would give Tim his house and then everything would be shared equally with her children. Of course, all these factual statements were inaccurate. During the visit, Mrs. Peterman received a phone call to which, according to Ms. Harper-Wooley, Mrs. Peterman was too confused to respond. Following this visit Ms. Harper-Wooley ultimately recommended a guardianship be sought for Mrs. Peterman.

II Discussion

A) Mrs. Peterman's competence on July 6, 2005.

Jack contends that Mrs. Peterman was incompetent as of the time she transferred ownership of the home place to herself and Donald as joint tenants with right of survivorship on July 6, 2005. I agree.[14]

In order to be competent to enter a contract, an actor must understand the subject of the contract she is considering, and be able to formulate, and express, her interest with respect to that subject. The burden is on the proponents of incapacity to show that the actor was unable to reasonably understand the nature of the transaction and its consequences, or to demonstrate that she was unable to act in a reasonable manner in relation to the transaction and that the other party had reason to know this condition. Barrows v. Bowen, Del. Ch., No. 1454-S, Allen, C. (May 10, 1994)(Mem.Op.) at 4 (*citing* Restatement 2nd of Torts, § 15); *see* McAllister v. Schettler, Del. Ch., 521 A.2d 617, 621 (1986). While the contract at issue here, a deed made in gift and thus against the interest of the contracting party, requires the same test of competence as does any contract, the fact that the contract is against interest does require vigilance on the part of a court of equity. Mrs. Peterman is presumed to be competent to transfer her property, a presumption which will not be disturbed unless it is clear she did not comprehend her

[14] Because of my decision here, I need not reach the alternative grounds Jack has advanced for setting aside this deed, undue influence and fraud. However, with respect to undue influence it is clear that her advancing dementia made Mrs. Peterman a person susceptible to undue influence, and the actions of a number of family members toward Mrs. Peterman raise red flags with respect to the exertion of undue influence by family members in a position to do so.

ownership of the home place and the consequences of signing the deed transferring it into joint tenancy with Donald.

Mrs. Peterman suffers from Alzheimer's dementia. The increasing frequency with which she was directing Mr. Bayard to make changes to her will is evidence of that dementia, as well as of the pressure she felt from family members to accommodate to their wishes. By January, 2005, Mrs. Peterman had recently executed at least two previous wills that provided that the value of the home place was to be distributed among her heirs. And yet, as of January 13 of that year, Mrs. Peterman arrived at Mr. Bayard's office to ask him to create a will to accomplish just such a result, with apparently no memory that she had already created such a testament only a few months before. According to Mr. Bayard she was confused and unable to remember basic details of her life. At that time, as a prudent attorney, Mr. Bayard refused to draft a new will for Mrs. Peterman. Two weeks later, Dr. Foote found Mrs. Peterman to be mildly demented. On January 31, Mr. Bayard again met with Mrs. Peterman and at that time she "knew exactly what she wanted to do with what she owned, was not under any evident pressure from any of her children and expressed herself in a clear and articulate manner." In other words, Mrs. Peterman's mind was deteriorating, but like many Alzheimer's patients she had periods of great confusion and periods of relative clarity.

When examined by Dr. Kofahi on the July 12, 2005 it was Dr. Kofahi's opinion as a neurologist that Mrs. Peterman was moderately to severely demented, and no longer competent. Donald argues that Dr. Kofahi speaks accented English which Mrs. Peterman

must have been unable to comprehend, and that the doctor misinterpreted her difficulty as advancing dementia. It seems unlikely to me, however, that Dr. Kofahi, as a trained neurologist, is unable to differentiate between moderate to severe dementia and a simple language barrier. Far more likely is that Mrs. Peterman had continued to deteriorate since Mr. Bayard noted her confusion in January, and that she was having a particularly bad day. Shortly after the Kofahi examination, Janet Harper-Wooley made an unannounced check on Mrs. Peterman at her home. While Mrs. Peterman did significantly better on the mini-mental exam (scoring in the lower range of mild dementia) she was unable to answer such basic questions as who owned her home, to whom she was renting her nearby property, whether she had a will, etc. In short, at the time of the Kofahi exam a few days after the deed in question, as well as at the time of the Janet Harper-Wooley visit shortly thereafter, Mrs. Peterman was clearly incompetent to enter the transaction by which she made a gift of a joint interest in the home place to Donald.

What does this tell us about her competence as of July 6, 2005? The fact that she was suffering from Alzheimer's dementia, was deteriorating in condition and was incompetent on two specific days shortly after the questioned transaction, does not definitively answer whether she was competent on the date in question. Clearly, however, it overcomes the presumption of her competence. In other words, Mrs. Peterman was in July, 2005 in a state of diminishing mental prowess and on contemporaneous occasions presented herself as incompetent. Nevertheless, if there were some convincing testimony that she had a lucid interval during the time she made the gift

to Donald, she could have been competent to do so. However, the only evidence is that she had undergone an extended session with Steven during which he attempted to convince her to make the gift which she had been unwilling (or too confused) to make a few days before; that Mr. Feindt, after a brief discussion about the provenance of the parcels which comprise the home place, which she appeared to understand very well, determined that she was sufficiently lucid to contract, and presented her with the deed; and that after an explanation of joint tenancy by Mr. Feindt, she signed it.[15] Shortly thereafter, she had no memory of having made the gift to Donald. In other words, Mrs. Peterman made a gift against her own interest during a time when she was becoming increasingly confused and forgetful, a few days after being asked to make the same gift, which proposition she had rejected. A week later she was diagnosed by a neurologist as moderately to severely demented; and a few days thereafter had no memory of the transaction.

Donald was fully aware of his mother's inability to act in a reasonable manner with respect to the gift to him of an undivided half-interest, with survivorship, in the home place. He knew her long-time attorney had refused to accomplish the same result by will, on grounds of Mrs. Peterman's incompetence. He had attempted to convince her to make such a gift only a few days before at which time she was confused and was not

[15]Mr. Feindt went over with Mrs. Peterman the assembly of the parcels that comprised the home place. He noted that she seemed to have a good grasp of what constituted this property. Based upon that observation, he made a good-faith determination, which I find to have been erroneous, that Mrs. Peterman was competent to transfer her property by gift.

willing to agree to the gift. At that time, he attempted to convince her that she should give him the home place by attempting to persuade her that he had paid for Tim's place (which was untrue); nevertheless, she was unable or unwilling to agree to the gift at that time.

Donald points to Dr. Foote's testimony that at the time she found Mrs. Peterman mildly demented in January, 2005, the doctor nevertheless believed her competent to contract. Dr. Foote also testified that, during office visits in the summer of 2005, Mrs. Peterman's mental acuity appeared generally the same as it had in January. In light of the evidence I have referred to above concerning Mrs. Peterman's declining mental ability and increasing confusion, and taking into account the more-nearly-contemporaneous evidence relayed by Dr. Kofahi and Ms. Harper-Wooley indicating that Mrs. Peterman's dementia was advancing and that a few days after making the deed, she had no memory of it, I do not find Dr. Foote's opinion persuasive.[16]

I therefore find that Mrs. Peterman was incompetent to transfer her property by deed to Donald on July 6, 2005.

B) Donald's trust theory.

[16]Another neurologist, Dr. Fink, examined Mrs. Peterman December 2005, found her incompetent and opined that she must have been incompetent as of July 6, 2005. Because Dr. Fink's first examination of Mrs. Peterman occurred several months after that transaction, it is of lesser evidentiary value than the conclusions of Drs. Foote and Kofahi, however.

As the tedious (but, in fact, truncated) recitation of facts in this report indicates, there are numerous disputed facts concerning the agreement entered into between Mrs. Peterman and Donald in 1986. Fortunately, I need not resolve those disputes, because even if I were to resolve them in Donald's favor, he would be unable to prevail on his trust theory.

Unjust enrichment.

In order to demonstrate that equity should provide relief for unjust enrichment, Donald must demonstrate that his mother has unjustly retained a benefit or money or property of his in a way that violates the fundamental principles of equity and good conscience. *E.g.*, Schock v. Nash, Del. Supr., 732 A.2d 217, 232 (1999). In other words, unless Donald can demonstrate that his mother retains his property—here, purportedly, the certificates of deposit or their fruits—*and* that such a retention is violative of fundamental principles of equity, there has been no unjust enrichment. During the discovery period in this case, Donald refused repeatedly to disclose the source of the funds used to purchase the joint certificates of deposit, interest in which he signed over to his mother in 1986. Donald, however, stated forthrightly at trial the fact which he had guarded during discovery: his joint interest in the CDs was a gift from his mother.

The elements of a valid gift *inter vivos* have long been established. These are a donor competent to make the gift; that the gift was made with free will; that the donor intended to make the gift; that the donee was capable of receiving the gift; that the act of

gift be complete; that there is a delivery by the donor and acceptance by the donee; and that the gift must come into immediate and absolute and irrevocable effect. *E.g.*, Highfield v. Equitable Trust Co., Del. Super., 155 A. 724, 727 (1931). Where a present and irrevocable surrender of an interest in the property is not made, the property is not transferred by gift. *E.g.*, *Id.*; Farmers Bank of the State of Delaware v. Howard, Del. Ch., 258 A.2d 299, 301 (1969); In Re White, Del. Ch., C.M. 3265, Marvel, C. (Sept. 28, 1979)(Mem.Op.) at 2. Where there is no intent to make a present gift but instead to pass an interest at death, the interest created is at most a gift *causa mortis* which is revocable by the donor at will.[17] *E.g.*, Farmers Bank, 258 A.2d at 301; Hill v. Baker, Del. Super., 102 A.2d 923, 925-26 (1953). The fact, standing alone, that Mrs. Peterman placed Donald's name with hers on bank accounts or certificates of deposit is by no means dispositive of her intent to make a gift. *See, e.g.*, Farmers Bank, 258 A.2d at 301; Conforti v. Ignudo, Del. Ch., No. 6280, Hartnett, V.C. (July 27, 1981)(Mem.Op.) at 2 (holding that, absent evidence of intention to make an immediate gift of a bank account, joint ownership standing alone fails to prove gift *inter vivos*); In Re White (Mem.Op.) at 2.

Donald's own testimony was that his joint tenancy in the CDs was a "gift" from his mother, "just like" the joint CDs she created with other of her children and

[17] I make no determination here whether a valid gift *causa mortis* was created in the certificates of deposit, and, indeed, the evidence is insufficient for such a determination. A gift *causa mortis* requires delivery of the gift in anticipation of the donor's impending death.

grandchildren. The testimony of Ms. Rogers was that all the jointly-owned CDs purchased by Mrs. Peterman were purchased by her with her money, solely. None of the joint beneficiaries either contributed money to the CDs or withdrew money from them. They were not a current gift, but instead represented a testamentary device which, assuming Mrs. Peterman left them in place and passed away during their existence, would result in the money represented by the CDs devolving to the named co-tenant. Mrs. Peterman could have withdrawn the money from these CDs at any time. Upon their maturity, she could, and often did, roll over the funds into new CDs benefitting different children or grandchildren. In other words, Mrs. Peterman did not intend a present gift of the $60,000 (if that amount existed) in Donald's CDs. She intended that, if she died with the CDs still in place and with the beneficiary unchanged, he should receive them at that time. As with the provisions of her will, these CDs represented an intent to make a gift upon death, conditional on Mrs. Peterman not altering their ownership during her lifetime. A transfer of title into the name of a child creates a presumption that a present gift to the child is intended, but that presumption is rebutted by the evidence here.

Since the CDs were created solely with Mrs. Peterman's funds, and since she did not intend the proceeds to be a completed gift during her lifetime, there can be no unjust enrichment in favor of Mrs. Peterman from Donald renouncing an interest in the CDs. Presumably, those CDs, made over twenty years ago, have long since matured, and Mrs. Peterman, of course, remains alive. Accepting the facts in a light favorable to Donald, it is clear to me that what happened was that Mrs. Peterman had designated CDs as joint

with Donald, which he would receive upon her death if unchanged. Later, they agreed that he would instead take the home place under her will. Donald signed the CDs back into Mrs. Peterman's sole name, she changed her will so that he would receive the home place, and later she changed her mind and her will, and left the home place to all her children. The fact that Donald exchanged one testamentary provision for another does not make either irrevocable by the donor. Therefore, no unjust enrichment incurred.

The "contract" to make a will.

The same analysis must doom Donald's argument that this court should enforce a contract with his mother to make a will leaving him the home place. Contracts to make a will are recognized in Delaware and, where proved, will be enforced by imposition of a trust upon the property which the contract contemplated would be passed by a will. Eaton v. Eaton, Del. Ch., No. 286-S, Noble, V.C. (Dec. 19, 2005)(Mem.Op.) at 3. "A party attempting to enforce a contract to make a will must always appreciate, however, that the law looks askance at such contracts, with probate laws serving as the preferred means of devising property." *Id.* (citations omitted). As a result, a contract to make a will shall not be proved unless the existence, and terms, of the contract are demonstrated by evidence that is clear and convincing. *Id.* A rejection of the provisions of an otherwise valid will, by enforcement of the terms of a supposed contract to make some other will, "require[s] the closest and most careful scrutiny to prevent injustice being done." Rash v. Equitable Trust Co., Del. Super., 159 A. 839, 840 (1931).

It was Mrs. Peterman's intent, by placing Donald's name on the CDs, to retain ownership of these CDs until her death, at which point (assuming they remained unchanged) they would pass to Donald. At some point, she exchanged this conditional gift for another: a provision in her will by which he would get the home place. There was no consideration for making Donald a joint tenant in the CDs to start with, and no consideration for making him a beneficiary under the will. Regardless of the morality of reneging on a promise to make or preserve a testamentary disposition, Mrs. Peterman was under no legal obligation to maintain Donald as her beneficiary. There being neither unjust enrichment nor contractual rights here, a trust over the home place property in favor of Donald is not warranted.

Conclusion

Unfortunately, Mrs. Peterman's situation is proof that, while longevity is almost universally desired, it is no panacea. Of all the pieces of evidence submitted in this unfortunate litigation, the most poignant are the handwritten notes in which she asks one thing of her children, that they try to "get along," and love one another. That wish of an aged mother was not to be granted.

It is clear to me that Donald had a "deal" with his mother that, he believed, she was obliged to carry out; and that he attempted to have her fulfill this obligation. It is equally clear that other family members, principally Jack, believed that Donald was trying to take advantage of their mother, and responded in kind. The unfortunate result is described above. Mrs. Peterman, a woman in her nineties suffering from dementia, became the pawn in what was essentially the proxy for a will contest. After an extensive review of the record, it is clear to me that Mrs. Peterman did not know her own mind at the time she made the gift of an undivided interest in the home place to Donald on July 6, 2005. It is also clear to me that she told Donald that she would leave him the home place instead of cash in the form of CDs, and that she took steps to effectuate that gift, but eventually changed her mind. In changing her will to treat Donald equally with her other children, she neither unjustly enriched herself nor did she breach any contractual rights. For that reason, once this report becomes final, the attorneys should provide me with a form of order directing the production of a deed to transfer the home place properties back to Mrs. Peterman, solely.

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Master in Chancery

oc: Register in Chancery (KC)