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Re: I/M of the Purported Last Will and Testament of
Grace W. McElhinney, deceased
C.A. No. 789-VCN
Dated Submitted: May 1, 2007

Dear Counsel:

An only son complains about his mother's decision to leave half of her estate to his aunt and his cousin who both assisted her during the last years of her life. He insists that his mother would have left her entire estate to him, instead of only half of it to his children and him, but for her lack of testamentary capacity and the undue influence exercised over her by his aunt and cousin. This post-trial letter opinion addresses those claims.

* * *

On August 24, 2001, Grace W. McElhinney ("Grace") executed her Last Will and Testament (the "Will")[1] and her Revocable Trust Agreement (the "Trust").[2] Through the Will, Grace transferred the assets of her estate to the Trust for final disposition. She designated her niece, Respondent Patricia Byler ("Byler), the daughter of Respondent Joan M. Pajerowski ("Pajerowski"), who was also Grace's sister-in-law, as executrix and trustee. In general, she left her estate as follows:

1. 20%—income for life to her son, Petitioner James McElhinney ("James"), with the remainder to be divided between her grandchildren (his children), John McElhinney and Melissa McElhinney,

2. 20%—to James,

3. 40%—to Byler,

4. 5%—to John McElhinney,

5. 5%—to Melissa McElhinney,

[1] JX 4.
[2] JX 5.

6. 10%—to Pajerowski.[3]

Thus, Grace left one-half of her estate to James and his children and one-half of her estate to Byler and Pajerowski.

* * *

Grace's prior will,[4] executed in 1995, had designated her husband as the sole beneficiary with James to inherit if her husband died first. Her husband died in 1996 and, shortly thereafter, Grace moved to Westminster Village, a retirement community in Dover, Delaware. James did little to assist his mother with the move.[5] Although James lived in New Castle, Delaware, less than an hour's drive from his mother, his contact with Grace was limited. He averaged, perhaps, one personal visit each month and had occasional conversations by telephone. Pajerowski, over time, came to fill the void and to provide the support that many in retirement facilities find helpful or necessary. For example, Pajerowski took Grace shopping, out to lunch, and to her medical appointments. She arranged for

[3] *Id.* ¶ First B. Several of the gifts were conditioned upon survival of the beneficiaries. All of the beneficiaries survived.
[4] JX 1.
[5] Tr. 186, 320-21. He and his wife helped with some unpacking.

birthday parties and invited Grace to her home to celebrate the holidays.[6] In addition, she visited Grace several times each week.

By 2001, Grace's health had started its decline. She was no longer as active as she had been and she was somewhat forgetful. Until the spring of 2001, Grace had been living in the independent living section of the retirement facility, but she fell; suffered an injury; and recuperated in the nursing home wing for several weeks. After her recovery, she moved to an assisted living apartment that allowed for more day-to-day personal support from the staff. Nonetheless, she continued to eat with others and go on outings, such as shopping and a Blue Rocks minor league baseball game.

In May of 2001, Grace decided, based in part on the recommendation of the staff at Westminster, that she should grant a power of attorney to handle her affairs in the event that she became unable to do so.[7] Grace initially asked Pajerowski to perform that function, but Pajerowski declined, citing her age and health, and, instead, recommended Byler. Pajerowski advised Grace to return to the attorney

[6] In contrast, James asked his mother to his home on only a very few occasions. He did try to visit with her within a few days of each Christmas.
[7] Tr. 111-13.

who had drafted her earlier will to prepare the power of attorney, but Grace did not want to travel to his office, approximately an hour away. Grace turned to Pajerowski for a recommendation, and she recommended David D. Finocchiaro, Esquire (the "Lawyer"). At Grace's request, Pajerowski arranged a conference between Grace and the Lawyer regarding the power of attorney[8] and took her to the Lawyer's office. While meeting with the Lawyer, and out of the presence of Byler and Pajerowski, Grace informed him that she wanted to revise her estate plan. She told the Lawyer that she wanted the change because "her son just wasn't basically giving her the time and attention that she thought, and she didn't think it was fair to give him 100% of the assets."[9] Indeed, she initially considered leaving James only $500, but the Lawyer persuaded her that her proposal was unduly harsh.[10] In addition, Grace explained her decision to leave a substantial portion of her estate to Pajerowski and Byler by noting that "she was lucky to have them because they would be helping her out and doing what it is that her son wasn't doing."[11]

[8] The power of attorney appears in the record as JX 6.
[9] Finocchiaro Dep. (JX 9) 42 (paraphrasing).
[10] Based on Grace's description of her relationship with her son, the Lawyer characterized that relationship as "strained." *Id.* 57.
[11] *Id.* 58 (paraphrasing).

The Lawyer met with Grace on three occasions (including the final meeting when the documents were signed), and neither Pajerowski nor Byler was present except during the execution of the Will and the Trust.[12] The Lawyer, an experienced practitioner who has prepared many wills, had no doubt as to whether Grace was competent and free of undue influence. He testified: "In my opinion, Grace was capable of thought, reflection, and judgment, and my documents reflected what it is that she wanted and not what someone else was persuading her to do."[13] He also expressed the view that the Will and the Trust were "the product" of "Grace McElhinney only."[14]

Nevertheless, perhaps anticipating that a partially disinherited son might contest his mother's desires, the Lawyer recommended that she be examined by her regular physician, Christopher Giles, M.D. (the "Doctor").[15] The Doctor met with Grace approximately two weeks before she executed the Will and the Trust. Although observing that she had some trouble with dates, he concluded: "[T]he

[12] Tr. 422.
[13] Finocchiaro Dep. 59.
[14] *Id.* 59-60.
[15] *Id.* 27-28.

patient [Grace] is capable of adequately understanding her actions and is competent to make changes in her estate plans and other arrangements which could include specification of power of attorney and advanced health care directives."[16]

James asserts that his mother lacked the capacity to make a will in the summer of 2001. He makes that claim even though he did not see his mother during the summer of 2001. Instead, he points to various examples of some deterioration of her health, such as the following. In the spring of 2001, she had moved from independent living to assisted living. Also, she had become more forgetful and, indeed, at times could not remember whether he had visited or the name of her only granddaughter. In addition, her eyesight suffered from cataracts, glaucoma, and macular degeneration.[17]

He also notes that in November 2002, a little more than one year after Grace signed the Trust, the Doctor diagnosed her with organic brain syndrome (a term "commonly used in reference to age-related memory changes").[18] James offers no

[16] JX 8. The Doctor did not deviate from this opinion, even with the benefit of Grace's subsequent medical history which he learned as he continued as her treating physician. *See* Giles Dep. (JX 10) 36.
[17] The evidence regarding Grace's ability to see well enough to read is ambiguous. The better inference is that she could read, although perhaps only with some effort.
[18] Giles Dep. 13.

evidence that explains the relationship between the November 2002 diagnosis and Grace's health in August 2001.[19] The Doctor testified that, in his opinion, the November 2002 diagnosis did not alter the opinion that he had reached in August 2001.[20]

James also presented evidence of Grace's further deterioration by 2003. For example, in January 2003, Grace was talking to Dick Robinson (her nephew) and referred to that "scoundrel Dick Robinson," obviously not realizing that it was Dick Robinson with whom she was speaking.[21] That lapse might be evidence of a severely deteriorated condition, but it appears to have occurred approximately seventeen months after she executed the Will and the Trust. That Grace may not have been competent in January 2003 provides little, if any, assistance to the effort to ascertain her capacity in August 2001.[22]

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[19] Giles Dep. 12-13.

[20] *Id.* 36. At his deposition, taken for trial, the Doctor reiterated his "medical opinion that [Grace] was competent [in early August 2001]." *Id.* 39. *See also supra* note 16.

[21] Tr. 6, 8, 13-14. The witness was uncertain as to whether the conversation occurred in January 2001, 2002, or 2003. The better inference from the testimony is 2003, but the uncertainty as to when it occurred seriously undercuts its usefulness.

[22] James relies upon other events occurring well after August 2001 in his effort to undermine his mother's capacity at that time. For example, he presented evidence that his mother talked about recently seeing her sister, Naomi, a year after Naomi had died. Naomi died in 2002; thus, the conversations cited by James as evidencing Grace's confusion, occurred in 2003, too long after execution of the Will and the Trust to be helpful to the Court.

James offered no specific evidence that either Pajerowski or Byler, in fact, exercised any influence over Grace when she revised her testamentary plans.[23] He merely observed that they had spent a lot of time with her, and, therefore, had "ample opportunity" to influence her.[24]

Grace died in August 2004.

* * *

James claims that Grace lacked the testamentary capacity to execute the Will and the Trust and that the dispositive scheme they implemented was the product of undue influence exercised by Pajerowski and Byler. Accordingly, James seeks that the Will and the Trust be declared invalid and that the Respondents be precluded from serving in a fiduciary capacity.

* * *

James bears the burden of proving his mother's lack of capacity to make a will because our law presumes that a testatrix is competent.[25] Similarly, he bears the burden of proving that undue influence caused Grace to adopt her testamentary

[23] Tr. 334. It appears that neither Pajerowski nor Byler knew that Grace was contemplating changing her estate plan when Grace made her first visit to the Lawyer's office.
[24] Tr. 348.
[25] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987); *In re Will of Wiltbank*, 2005 WL 2810725, at *5 (Del. Ch. Oct. 18, 2005).

plan with its reduction of James's expected take from her estate.[26] The standard for testamentary capacity is not disputed. "[O]ne 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. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act."[27] One challenging the capacity of a testatrix must also address our understanding that "only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will."[28]

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[26] *In re Last Will and Testament of Melson*, 711 A.2d 783, 786 (Del. 1998). The burden of proving both capacity and the absence of undue influence will shift to the sponsor of the will if "the challenger of the will is able to establish, by clear and convincing evidence, the following elements: (a) the will is 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." *Id.* at 788 (internal quotations omitted). *See also Tucker v. Lawrie*, 2007 WL 2372616, at *6 (Del. Ch. Aug. 17, 2007). The Lawyer, of course, drafted the Will and the Trust. Although he has known the Pajerowskis for some time and has performed some legal work for them (Tr. 114), there is nothing in the record to suggest any relationship or any benefit to the Lawyer that would have compromised his independence or interfered with the discharge of his professional responsibilities.

[27] *In re Estate of West,* 522 A.2d at 1263. The Trust is the document that causes the division of Grace's assets challenged by James. Whether the governing document is a will or a trust instrument is of no moment because the law of capacity and the law of undue influence apply with equal force to either.

[28] *Id.* Indeed, the formula has been characterized, perhaps a bit too facilely, as a requirement that the testator knows "that he is disposing of his estate by will and to whom he is disposing of it[.]" *Matter of Langmeier*, 466 A.2d 386, 402 (Del. Ch. 1983).

James relies upon isolated incidents which show little more than minor confusion on the part of Grace. The evidence from 2002 and 2003, well after execution of the Trust, offers no direct support for his position. Ultimately, the most obvious reason why Grace reduced James's share of the inheritance, his failure to spend much time with her and address her personal needs, also interferes with his ability to meet his evidentiary burden. He simply lacks much first-hand knowledge, and his wife's knowledge is no more persuasive than his.

Arrayed against the limited evidence tendered by James is the highly credible testimony of the Doctor and the Lawyer, both experienced in their professions, that neither had any reservations as to Grace's capacity to understand that she was disposing of her assets, to understand the scope and nature of those assets, and to know to whom she wanted them to pass.[29]

In short, the evidence presented by James would not have been sufficient to overcome the presumption of testamentary capacity. When weighed against the

[29] The Court expressly accepts their testimony as factually accurate and well-grounded in the principles of their respective professions.

testimony of the Lawyer and the Doctor, his effort to meet that burden clearly fails.[30]

Accordingly, James did not demonstrate, by a preponderance of the evidence, that his mother lacked testamentary capacity to execute the Will and the Trust.[31]

* * *

> Undue influence is an excessive or inordinate influence considering the circumstances of a particular case. 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 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 and not his own. It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner.[32]

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[30] James picks at the testimony of the Lawyer and the Doctor. Their recall is based primarily on notes; maybe the Doctor could have done a more thorough exam; maybe the Lawyer could have spent more time with Grace. In circumstances such as these, it is always possible to conjure up some set of additional steps that could have been taken to have allowed the professionals to have been even more persuasive in their conclusions. At the time of the Trust, Grace was still active; she was not on or near her death bed. Although some form of dementia would eventually interfere with her daily living, there is no evidence that, as of the time of the Trust, her ability to understand what she was doing was impaired in any material fashion.

[31] James acknowledges that his mother sometimes "was rational during the last year of her life," (Tr. 330) two years after executing the Trust. There were "good days" and "bad days" at that time. Given the relative and frequency with which he saw his mother, James's generalizations are entitled to little weight when it comes to demonstrating that she lacked the capacity to execute testamentary documents.

[32] *Matter of Langmeier*, 466 A.2d at 403.

A party challenging a will or a trust agreement may succeed on a claim of undue influence if he can establish the following five elements: (1) a susceptible testatrix; (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.[33]

James's argument boils down to the following: Grace's health had started to slip and she was somewhat dependent upon Pajerowski and Byler to meet certain personal needs and to help with her finances; they saw her on a regular basis; the only reason why Grace would not have left her entire estate to him was if she had been subjected to undue influence by Pajerowski and Byler. That, however, does not overcome the presumption that Grace executed the Will and the Trust of her own free will.

A review of the elements of an undue influence claim confirms this more general perception. First, Grace was not susceptible. It is true that her health had started to decline; she had moved into assisted living; and there was evidence of forgetfulness. She relied upon Pajerowski and Byler for important matters:

[33] *In re Norton*, 672 A.2d 53, 55 (Del. 1996).

transportation to medical appointments; shopping opportunities; entertainment; and the handling of her finances. There is, however, no evidence that she was not able to make her own decisions—as the product of the exercise of her free will—in August 2001, three years before she died. She understood the nature of her estate,[34] and, as she explained it to the Lawyer, she knew who she thought should benefit from the distribution of her estate. Pajerowski and Byler provided substantial help to Grace; that might explain why Grace sought to reward them with a share of her estate; it did not, without more, make her susceptible for purposes of an undue influence analysis.[35]

Second, Pajerowski and Byler may have had the opportunity to influence Grace because of the time they spent with her, but James had ample opportunity to spend time with his mother, an opportunity of which he did not regularly and fully take advantage.[36]

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[34] This is independently confirmed by the testimony of her financial advisor. Tr. 300.

[35] Reinforcing this conclusion is the testimony of the Lawyer, who concluded that Grace was making the decision of her own volition.

[36] James complains that Pajerowski knew of the reasons for his prolonged absence during the summer of 2001—a serious health problem—and that she did not inform his mother. James chose not to tell his mother about his health issues (perhaps a prudent step) but he must bear the consequences of his own decision. If he thought his mother should not know about his health problems, it is not clear why he would have expected Pajerowski to tell his mother something that he had chosen not to tell her himself.

Third, as to whether Pajerowski and Byler were motivated to seek to persuade Grace to make them beneficiaries for the estate plan, the evidence is subject to two reasonable inferences. First, there is no evidence that they in fact were inclined to persuade her for any improper purpose. Second, as James maintains, an opportunity to acquire assets by inheritance, one could infer, may motivate almost anyone's conduct.[37] James's argument may be plausible, but it does not, at least on these facts, establish the necessary disposition or intent by a preponderance of the evidence.

Fourth, perhaps the most important factor in this analysis is the absence, as conceded by James, of any evidence that Byler or Pajerowski exerted any pressure (or used any other form of inducement) to cause Grace to leave them a substantial part of her estate. James seeks to meet his burden here by looking to the final element of this analysis: whether the dispositive provisions of the Trust reflect the consequences of conduct that should be characterized as undue influence.

Fifth, at the core of James's argument is the perception that his mother would not have acted as she did in the absence of undue influence. The question,

[37] Tr. 366.

for the Court, however, is not whether it agrees with the steps taken by Grace. A testatrix, with testamentary capacity and free of undue influence, is entitled to leave her estate as she see fit. The law does not require that the entire estate be left to the only child. There simply is no entitlement to inherit. Grace left half of her estate to James (or his children); she did not—perhaps because of the urgings of the Lawyer—disinherit him. She chose to leave the other half of her estate to the two individuals who spent time with her, made her life better, and helped her when help was needed during the last several years of her life. Grace perceived, rightly or wrongly, that James did not meet her needs and did not attempt to meet her needs. Maybe James had good reasons for only seeing his mother once per month even though he was less than an hour away. James's actions are not the issue here, however. Instead, the existence of a plausible explanation for Grace's actions—an explanation that Grace articulated to the Lawyer—undercuts any claim that the Will and the Trust would not have resulted but for the exercise of undue influence by Pajerowski and Byler.

In sum, James failed to prove by a preponderance of the evidence that the Will and the Trust were induced by the undue influence of Pajerowski and Byler.[38]

* * *

Accordingly, the Petitioner's challenge to the Will and the Trust fails. Judgment will be entered in favor of the Respondents and against the Petitioner.[39] Costs will be awarded to the Respondents.[40] An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[38] Although James at one time suggested (but has subsequently abandoned) a broad-based fiduciary failing by Byler as Grace's attorney-in-fact, he has identified a limited aspect of the conduct of Byler and Pajerowski that deserves attention. Byler, in 2002 and 2003, wrote two checks to herself (one for $5,000 and the other for $5,200) from Grace's account under the power of attorney granted to her by Grace. Byler explained that Grace insisted on paying her for the work of writing checks and related functions. The amount of payment (based on the going rates for case managers) and possibly the idea of making such payments originated with Pajerowski. The only justification for the payment comes from the self-interested testimony of Byler and, to a lesser extent, Pajerowski. The sums are not insubstantial and payments of this nature are frequently the result of undesirable conduct by fiduciaries. Nevertheless, the Court accepts Byler's explanation because of (1) her credibility as a witness at trial and (2) the overall impression that Grace genuinely appreciated Byler's efforts and realized that her help was highly desirable and, perhaps, needed.

[39] Accordingly, the Will and the Trust are valid. It also follows that there is no reason to remove either of the Respondents as fiduciaries under either the Will or the Trust.

[40] Attorneys' fees will not be assessed against the Petitioner because there is no basis to deviate from the "American Rule." This action was not brought frivolously or otherwise in bad faith.