COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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MASTER IN CHANCERY

NEW CASTLE COUNTY COURTHOUSE
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Re: *IMO the LW&T of Blanche M. Hurley, deceased, et al.*
C.A. No. 8473-ML

Dear Counsel:

Two brothers, who understood that their grandmother intended to divide the bulk of her estate evenly among her three biological grandchildren, were surprised to learn after her death that a valuable piece of property their grandmother owned instead was devised solely to their sister under a will and trust their grandmother executed six months before she died. In this action, the brothers challenge that will and trust as the product of

undue influence or a lack of testamentary capacity. Their sister, who is named as the trustee of the trust and the executrix of their grandmother's estate, has moved to dismiss the action for failure to state a claim under Court of Chancery Rule 12(b)(6).

Although Delaware's "reasonable conceivability" pleading standard is minimal, it is not meaningless, and it does not excuse a plaintiff from alleging sufficient factual allegations that, if proven, would entitle the plaintiff to relief. If, after assuming the truth of the factual allegations in the complaint, and after drawing reasonable inferences in favor of the plaintiff, the plaintiff could not recover under any reasonably conceivable set of circumstances, this Court must dismiss the complaint. Rule 12(b)(6) serves a gate-keeping function and ensures that a would-be litigant cannot impose on the other side the substantial costs of proceeding with litigation until the plaintiff can make out the bare facts necessary to support a claim.

This, the petitioners have not done. For the reasons that follow, I recommend that the Court enter an order granting the respondent's motion to dismiss.

FACTUAL BACKGROUND

The following facts are drawn from the complaint and the documents it incorporates by reference, giving the petitioners the benefit of all reasonable inferences. Todd Durden ("Todd")[1] and Tedd Durden ("Tedd," and collectively with Todd, the "Petitioners"), are Blanche M. Hurley's (the "Decedent") two biological grandsons. The Decedent died testate on October 10, 2012, at the age of 96, and was survived by her

[1] Because the parties and several relevant individuals share the same last names, I use the parties' first names for the sake of clarity and consistency. No disrespect is intended.

daughter, Marjorie Hurley-Sewell ("Marjorie"), Marjorie's three natural children, Todd, Tedd, and the respondent, Tamera Hazzard ("Tamera"), Marjorie's three adopted children, and several great grandchildren.

The petitioners allege the Decedent was represented for many years by George Smith, Esquire, who assisted the Decedent with estate planning. In 2003, the Decedent executed the Revocable Trust of Blanche M. Hurley. Between 2006 and 2009, the Decedent executed three amended or restated versions of that revocable trust. On September 27, 2011, the Decedent executed the Third Amended and Restated Revocable Trust of Blanche M. Hurley (the "2011 Trust"). Less than six months later, on March 13, 2012, the Decedent executed the Fourth Amended and Restated Revocable Trust of Blanche M. Hurley (the "2012 Trust"), along with a last will and testament (the "2012 Will"). The 2012 Will provided that the Decedent's entire estate would pass to the 2012 Trust.

The 2011 Trust and the 2012 Trust and 2012 Will, and the differences between the estate plans established in those documents, are the subject of this action. The Petitioners contend that the 2012 Trust and 2012 Will should be set aside by this Court and that the 2011 Trust should be reinstated. The 2011 Trust provided for the sale of the Decedent's properties at 204 2nd Street in Bethany Beach, Delaware and 7709 Barnum Road in Bethesda, Maryland, and directed that the proceeds of those sales would become part of the trust, with the trust funds being divided as follows: (1) one quarter of the principal to purchase an annuity paying $1,500 a month to Marjorie for a period of ten years, with

any remaining payments passing to the Petitioners and Tamera equally if Marjorie died before the annuity expired, and (2) the remaining principal distributed outright in equal shares to the Petitioners and Tamera. A life estate in a third property owned by Decedent and located at 206 2nd Street, Bethany Beach, Delaware, was given to Marjorie, with the remainder passing to Tamera. The 2011 Trust named Mr. Smith as the trustee and a second attorney as successor trustee.

The Petitioners, however, allege that Tamera was unhappy with Mr. Smith's representation of her husband's family, and therefore "arranged" for the preparation and execution of new estate documents by another attorney, Stephen Ellis, Esquire, who previously had represented Tamera and her family.[2] The 2012 Trust and 2012 Will that Mr. Ellis prepared altered the Decedent's estate plan in certain respects. For example, the 2012 Trust gave the property at 204 2nd Street, Bethany Beach, Delaware solely to Tamera, rather than providing for its sale and distribution of the proceeds equally among Todd, Tedd, and Tamera. The 2012 Trust also increased the amount of the annuity to be purchased for Marjorie and added two of Marjorie's adopted children as contingent beneficiaries of the annuity. Finally, the 2012 Trust and 2012 Will named Tamera as trustee and executrix, respectively, and designated Tamera's daughter as alternate successor trustee and alternate successor executrix, respectively.

The Petitioners contend the 2012 Trust and 2012 Will should be set aside, either because the Decedent lacked testamentary capacity when she executed those documents

[2] First Amended Verified Petition to Invalidate Will and Trust Amendment (hereinafter "Amended Pet.") ¶¶ 10, 12-13.

or because Tamera unduly influenced the Decedent to alter the estate plans memorialized in the 2011 Trust. According to the Petitioners, Tamera "arranged" for the preparation of the 2012 Trust and 2012 Will by Tamera's attorney, Mr. Ellis, rather than by Mr. Smith, who had represented the Decedent for several years, because Tamera was unhappy that Mr. Smith's representation of Tamera's husband's family had resulted in a significant reduction in her husband's potential inheritance.[3] The Petitioners also allege that, other than the 2012 Trust and 2012 Will, the Decedent informed them of all her estate planning decisions,[4] the Decedent was 96 year old,[5] had a tumor between her skin and skull that was removed in 2009,[6] and had unspecified "serious medical problems."[7] Importantly, the Petitioners concede the Decedent had sufficient capacity to execute the 2011 Trust less than six months before the 2012 Trust and 2012 Will were signed.

The Petitioners filed their initial "Verified Petition to Invalidate Will and Trust Amendment" on April 12, 2013. Tamera immediately moved to dismiss and to stay discovery while that motion was briefed and decided. On June 19, 2013, I issued a draft report recommending that the Court grant the motion to stay discovery. None of the parties took exception to that report and it became final on June 27, 2013. Counsel for Marjorie moved to intervene and to compel immediate enforcement of the consistent provisions of the 2011 Trust and the 2012 Trust. On June 6, 2013 I issued a draft report

[3] *Id*. ¶¶ 10, 12, 13, 17(B).
[4] *Id*. ¶ 15.
[5] *Id*. ¶ 4.
[6] *Id*. ¶ 14.
[7] *Id*. ¶ 17(A).

recommending that the Court grant the motion for enforcement. No party took exceptions to that report and on June 18, 2013 I entered an order providing, *inter alia*, that Marjorie's life estate in the 206 2nd St. property would take effect immediately and that the Decedent's estate would begin paying $1,500 a month to Marjorie until the litigation concluded.

The Petitioners filed an Amended Petition to Invalidate Will and Trust Amendment (the "Amended Petition") on July 9, 2013 and Tamera renewed her motion to dismiss the following day. At the conclusion of oral argument on September 24, 2013, I entered an oral draft report recommending that the Court grant the motion to dismiss. The Petitioners took exception to that report and the parties briefed those exceptions. This is my final report, in which I adopt my draft report and recommendation for the reasons that follow.

ANALYSIS

The motion before me arises under Court of Chancery Rule 12(b)(6), which allows the Court to dismiss a complaint if the petitioner does not assert sufficient facts that, if proven, would entitle him to relief. The governing pleading standard in Delaware to survive a motion to dismiss is "reasonable 'conceivability,'" which is less exacting even than the federal standard of "plausibility."[8] When considering the pending motion, I must accept all well-pleaded factual allegations in the Complaint as true, accept vague

[8] *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 & n.12 (Del. 2013); *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

allegations as well-pleaded if they provide the respondent with notice of the claim, draw all reasonable inferences in favor of the Petitioners, and deny the motion unless the Petitioners could not recover under any reasonably conceivable set of facts.[9] The Court, however, need not "accept conclusory allegations unsupported by specific facts or … draw unreasonable inferences in favor of the non-moving party."[10]

The fact that Delaware is a "notice pleading" jurisdiction does not excuse a petitioner from pleading facts in support of his claim.[11] Rather, with certain exceptions not at issue here, a petitioner need not allege facts with particularity in order to survive a Rule 12(b)(6) motion. Although the Petitioners need not "plead evidence," they must "allege facts that, if true, state a claim upon which relief can be granted."[12]

A. Lack of Testamentary Capacity

The Petitioners first allege that the 2012 Trust and 2012 Will are invalid because the Decedent lacked testamentary capacity at the time the documents were executed. The facts the Petitioners allege in support of this claim are: (1) the Decedent was 96 years old, (2) the Decedent had a tumor above her ear that was removed in 2009, and (3) the Petitioners believe the Decedent "had serious medical problems." The Petitioners argue the Court reasonably may infer that "a ninety-six year old woman who was suffering

[9] *Winshall*, 76 A.3d at 813; *Central Mortg. Co.*, 27 A.3d at 537 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[10] *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)); *Am. Capital Acquisition Partners, LLC v. LPL Holdings, Inc.*, 2014 WL 354496, at *4 (Del. Ch. Feb. 3, 2014).
[11] *MetCap Sec. LLC v. Pearl Senior Cent., Inc.*, 2007 WL 1498989, at * 4 (Del. Ch. May 16, 2007).
[12] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

from serious medical issues and had previous surgery for removal of a tumor in her head may not have possessed the testamentary capacity to execute amended estate planning documents only six months [before] her death."[13] The Petitioners concede, however, that the Decedent had testamentary capacity when she executed the 2011 Trust less than six months before she signed the 2012 Trust.

A person who makes a will must, at the time the document is executed, be capable of exercising thought, reflection, and judgment, and must know what she is doing and how she is disposing of her property.[14] The testator also must have sufficient memory and understanding to comprehend the nature and character of her act.[15] In other words, in order to possess the requisite capacity, the Decedent must have known that she was disposing of her estate by will, and to whom.[16] Only a modest degree of competence is required for an individual to possess testamentary capacity.[17] Delaware law presumes that a testator had sufficient testamentary capacity when executing a will.[18]

The allegations in the amended petition are minimal under the best of circumstances. It is debatable that a court could infer a lack of testamentary capacity from the mere fact that a testator was of advanced age, had surgery to remove a tumor three years before the estate planning documents were executed, and experienced

[13] Pet'rs' Opening Br. in Support of Exceptions to Master's Draft Report (hereinafter "Opening Br.") at 7-8.
[14] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).
[15] *Sloan v. Segal*, 2010 WL 2169496 (Del. May 10, 2010); *In re Estate of West*, 522 A.2d at 1263.
[16] *In re Langmeier*, 466 A.2d 386, 402 (Del. Ch. 1983).
[17] *In re Estate of West*, 522 A.2d at 1263.
[18] *Davis v. Estate of Perry*, 2013 WL 53991, at *1 (Del. Ch. Jan. 2, 2013).

unspecified "serious" medical problems. The Court cannot infer a lack of capacity solely based on a testator's advanced age, and advanced age coupled with surgery on a tumor and other non-specific medical problems does not, in my opinion, support a reasonable inference that a testator did not comprehend the nature and character of her acts when she executed testamentary documents. In any event, such an inference is not reasonable here because it is negated by the Petitioners' concession that the Decedent had testamentary capacity when she executed the 2011 Trust, two years after the surgery and six months before she executed the disputed documents.[19] None of the facts alleged in the complaint allow the Court to infer that the Decedent "lost" capacity in the six months between the signing of the 2011 Trust and the signing of the 2012 Trust and 2012 Will. According to the Amended Petition, the only thing that changed in that time was that the Decedent aged an additional six months. The surgery to which the Petitioners point occurred well before either the 2011 Trust or the 2012 documents were executed, and because the Petitioners concede the Decedent had capacity when she executed the 2011 Trust, the Court cannot reasonably infer that the surgery impacted the Decedent's competence in 2012. Without anything more than a generalized allegation regarding "serious medical problems," the Court cannot infer that those medical problems affected the Decedent's capacity in the six months between the execution of the 2011 Trust and the 2012 Trust and 2012 Will. Any such inference of a lack of capacity would be unreasonable under the facts Petitioners concede in the Amended Petition.

[19] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A. 2d 162, 169-70 (Del. 2006) (motion to dismiss may be granted if the allegations in the complaint effectively negate the claim).

B. Undue Influence

The Petitioners also charge the 2012 Trust and 2012 Will were the product of undue influence and must be set aside. There is a presumption under Delaware law that testamentary documents are the product of the testator's free will and are not tainted by undue influence.[20] If an estate plan memorialized in testamentary documents was induced by undue influence, the documents may be set aside by this Court.[21] In the context of a will, undue influence has been defined as:

> [A]n excessive or inordinate influence considering the circumstances of the 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 compel him to make a will that speaks the mind of another and not his own. It is immaterial how that is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will.[22]

Unfair persuasion is the "hallmark" of undue influence.[23]

Challenges to testamentary dispositions of property based on claims of undue influence require the Court to evaluate five elements: (1) the susceptibility of the donor to undue influence, (2) the opportunity to exert undue influence, (3) disposition or motive to do so for an improper purpose, (4) actual exertion of undue influence, and (5) a result

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[20] *In re Will of Melson*, 711 A.2d 83, 86 (Del. 1998); *Mitchell v. Reynolds*, 2009 WL 132881, at *9 (Del. Ch. Jan. 7, 2009).
[21] *Mitchell*, 2009 WL 132881, at *8.
[22] *In re Estate of West*, 522 A.2d 1256, 1263-64 (Del. 1987) (quoting *In re Langmeier*, 466 A.2d 386, 403 (Del. 1983)).
[23] *Mitchell*, 2009 WL 132881, at *8.

demonstrating its effect.[24] The party challenging a transfer as tainted by undue influence ordinarily bears the burden of proving these elements by a preponderance of the evidence.[25]

The Petitioners first allege that they should be excused from pleading facts supporting these elements, arguing "a general averment of undue influence is sufficient under notice pleading rules, without a specific allegation of the facts constituting the undue influence."[26] Because a claim of undue influence is a fact-intensive claim that often lacks direct evidence, the Petitioners contend they should not be required to plead facts meeting each and every element of the claim.[27] That argument, however, is not supported by the well-worn standard of a motion to dismiss, and to accept it would literally open any estate to a claim of undue influence by a dissatisfied beneficiary or disinherited heir. Although the standard under Rule 12(b)(6) is plaintiff (or petitioner)-friendly, the Court cannot accept conclusions unsupported by specific facts.[28] That the claims are fact-intensive does not excuse the Petitioners from satisfying Delaware's

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[24] *Stone v. Stant*, 2010 WL 2734144, at *8 (July 2, 2010) (citing *In re Estate of West*, 522 A.2d at 1264).

[25] *In re Estate of West*, 522 A.2d at 1264. The burden may shift if a petitioner proves by clear and convincing evidence that the testator was of "weakened intellect," the will was drafted by a person in a confidential relationship with the testator, and the drafter achieved a substantial benefit under the will. *In re Will of Melson*, 711 A.2d 783, 788 (Del. 1998). Nothing in the Amended Petition supports an inference that Tamera was in a confidential relationship with the Decedent or that Tamera drafted the 2012 Trust or 2012 Will. In fact, the Petitioners concede those documents were drafted by an attorney, and have alleged no facts regarding the nature of Tamera's relationship with the Decedent.

[26] Opening Br. at 9.

[27] *Id*. at 11, 12.

[28] *Growbow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988); *In re BHC Commc'n., Inc. S'holder Litig.*, 789 A.2d 1, 9 (Del. Ch. 2001).

pleading standards; conclusory allegations are not sufficient to allow a would-be plaintiff to explore through discovery whether any facts exist that might support those allegations.[29]

Turning then to the elements of the Petitioners' claim, the Amended Petition does not plead any facts from which the Court reasonably may infer the Decedent was a susceptible testator. There is no single definition or defining feature of susceptibility, but the analysis is informed by the subject's capacity.[30] Evidence of a testator's dependence on another, or a particular predisposition to accede to the demands of another person, may be sufficient to show susceptibility.[31] The Petitioners contend that this Court reasonably may infer susceptibility from the Decedent's age, the 2009 surgery to remove a tumor from behind her ear, and the Petitioners' vague allegations of "serious medical conditions." As previously discussed, however, it is not reasonable to conclude based on those allegations that the Decedent was susceptible to having her free will subverted by Tamera. Again, the surgery to which the Petitioners point is immaterial given their concession that the surgery had not impacted the Decedent's mental capacity when she executed the 2011 Trust. The mere fact that the Decedent was elderly and had one or more unspecified medical conditions is not enough to infer that Tamera could overcome the Decendent's free agency and independent volition so as to compel her to execute testamentary documents that were not consistent with her wishes.

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[29] *Nebenzahl v. Miller*, 1996 WL 494913, at *3 (Del. Ch. 1996).
[30] *Mitchell*, 2009 WL 132881, at * 9.
[31] *Id*.

Arguably, the Court may infer the remaining elements of undue influence from the allegations in the Amended Petition, particularly the allegations that Tamera lived close to the Decedent, was unhappy that an estate plan drawn up by Mr. Smith for members of Tamera's husband's family resulted in a decrease in her husband's potential inheritance, and sought out and took the Decedent to meet with Mr. Ellis. Those allegations, if true, could allow a court to infer that Tamera had an opportunity to exert undue influence, a disposition to do so, and actually exerted such influence. The 2012 Trust increased the amount Tamera received from the Decedent's estate, and therefore the Petitioners have alleged a result demonstrating the effect of the alleged influence. Nevertheless, the Petitioners' failure to plead any facts from which the Court may infer that the Decedent was susceptible makes the remaining elements of the claim irrelevant.

CONCLUSION

For the foregoing reasons, I recommend that the Court grant the respondent's motion to dismiss the Amended Petition with prejudice. This is my final report and exceptions may be taken in accordance with Court of Chancery Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery