IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In the Matter of the Estate of	)	
	)	
	)	CA No. 5506.MA
ROBERT N. GARDNER	)	
	)	

MASTER'S REPORT

Date Submitted: December 12, 2011
Draft Report: April 30, 2012
Final Report: October 24, 2012

Pending before me is a Caveat against the Allowance of an Instrument as a Will and Complaint to Invalidate Transfers of Property and Rescind Trust Agreement and Invalidate Transfers to Same in the Estate of Robert N. Gardner, deceased, which was filed by Philip B. Gardner (hereinafter "Philip") on May 20, 2010.[1] Respondents/Defendants Nancy Jenifer Haywood (hereinafter "Nancy") and Michael Haywood (hereinafter "Michael") filed an Answer to the Caveat and Complaint on June 14, 2010.[2] A three-day trial took place beginning on October 31, 2011. The parties thereafter submitted written closing arguments. This is my draft report in which I recommend that the Caveat be allowed, the Trust Agreements rescinded, and transfers of property invalidated as the products of undue influence.

I. Factual Background

Mr. Gardner was born on July 31, 1916. He was a member of the Tuskegee Airmen during World War II, and a Professor of Physical Education at Lincoln

[1] I use first names simply to avoid repetition and confusion, and mean no disrespect to the parties.
[2] Respondents/Defendants filed a Counterclaim with their Answer, seeking the admission to probate of a will dated February 5, 2008, and the corresponding appointment of Nancy as executrix. Michael is Nancy's husband.

University in Lincoln, Pennsylvania for 39 years. He served as a football, lacrosse, and wrestling coach during most of his tenure there. Mr. Gardner was married and had two children, Eileen and Philip. Both children were well-educated. Philip graduated from Harvard with a B.A. in psychology, and obtained his PhD in psychology from Stanford University in 1982. Mr. Gardner's wife developed a mental illness. Her bizarre behavior led to marital difficulties, and in 1990, Mr. Gardner contacted Clare Milliner, a Pennsylvania attorney who specialized in family law. Milliner initiated divorce proceedings for Mr. Gardner, but the case ended with a property settlement, not a divorce decree. According to Milliner's testimony, Mr. Gardner had decided to remain married to his wife so she could inherit certain assets from him, which was his way of caring for her. Although the parties executed a property settlement agreement, Mr. Gardner also retained several joint accounts with his wife so she could inherit them when he passed away.[3]

Milliner prepared a will for Mr. Gardner, which he executed on October 10, 1990 (hereinafter "1990 Will"). In the 1990 Will, he made the following specific bequests: (1) $25,000 to Macalester College; (2) specific tools to his long-time friend Cyrus Jones; (3) marital residence and its furnishings on Elkdale Road in Lincoln to his wife Pauline; and (4) some investment fund accounts at T. Rowe Price Company (hereinafter "T. Rowe Price") to his daughter Eileen. He left his residuary estate to his son Philip. Philip was named the executor and Jones was the alternate executor. On November 21, 1991, Mr. Gardner executed a second will drafted by Milliner (hereinafter "1991 Will"). Again he gave specific tools to Jones, and the residuary estate to Philip, but he also made a specific bequest of a painting called "The Approaching Storm" to Nancy. Philip was named as

[3] Pauline Gardner predeceased her husband in 2009.

executor and Jones as alternate executor. There were no specific bequests made to Eileen in the 1991 Will, but Milliner recalled that Mr. Gardner understood that if he had a joint account with his wife or his daughter, each would inherit that account. According to Milliner, Mr. Gardner had intended to provide for his wife and daughter in this fashion. She also recalled that Mr. Gardner telling her that he had a friend named Nancy Salley (hereinafter "Mrs. Salley"), and that Nancy was her daughter.

Mr. Gardner revised his will again on October 31, 1996 (hereinafter "1996 Will"). Mr. Gardner gave Nancy the same painting as in the 1991 Will, as well as his sound system, which included CDs, cassettes and LP records. If Nancy did not survive him, this personal property would be included in his residuary estate. He gave his daughter Eileen two T. Rowe Price accounts, and provided that if he did not own those assets at the time of his death or if Eileen predeceased him, the gift would lapse. He gave Mrs. Salley a single T. Rowe Price account, and again provided that if he did not own that asset at the time of his death or should she predecease him, the gift would lapse. He left his residuary estate to Philip, but if Philip predeceased him, he named Nancy as alternate residuary legatee, and if both Philip and Nancy predeceased him, then his entire residuary estate would be left to his granddaughter Jenny, who is Philip's daughter. He named Jones as the executor of his 1996 Will, and Nancy as alternate.

Milliner recalled that in 1996, Mr. Gardner was very interested in the inheritance tax rate in Delaware and how Delaware law compared to Pennsylvania law. He also wanted to make sure that Milliner had the telephone numbers for Jones and Nancy. He told her that his son's name was on all of his investments and that they would go to Philip directly. Although Milliner recalled that Mr. Gardner was contemplating moving from

Lincoln University to New Castle County, the record indicates that Mr. Gardner retired from Lincoln University around 1990, and moved to an apartment complex called Christiana Meadows in Bear, Delaware at that time.

Mr. Gardner contacted Milliner again in 2001 because he wanted to correct Nancy's name from Nancy Jenifer to Nancy Haywood since she had recently married. He executed a new will on September 20, 2001 (hereinafter "2001 Will"), in which he gave Nancy all of his paintings, his coin collection, his Bose radio and Sony disc-man, but if she did not survive him, this personal property would be included in his residuary estate. He gave to his daughter Eileen two T. Rowe Price accounts. He gave to Mrs. Salley two T. Rowe Price accounts and his 33 RPM record collection, but if he did not own these assets at the time of his death or if Mrs. Salley predeceased him, then this gift would lapse. He gave Michael an exercise machine and set of weights. He gave his son Philip his residuary estate, but if Philip predeceased him, the residuary estate went to Nancy. If both Philip and Nancy predeceased him, he left his residuary estate to his granddaughter, but if Jenny was under the age of 21, then to Jones in trust for Jenny. Mr. Gardner again named Jones as executor and Nancy as alternate executrix. On the same date, September 20, 2011, Mr. Jones executed a health care power of attorney naming Jones as his agent, which was to take effect upon his incapacity as determined by his physician. Mrs. Salley was named successor agent. Milliner recalled that Mr. Gardner still wanted to provide for his wife and daughter, whom he now believed was suffering from the same mental illness as her mother. He felt, however, that his son Philip was the person who should rightfully inherit the bulk of his estate.

Milliner met with Mr. Gardner again on July 22, 2005. He executed a new will on August 17, 2005 (hereinafter "2005 Will), in which he again gave two T. Rowe Price accounts each to his daughter and Mrs. Salley, and left the residue of his estate to his son Philip. One significant change was, instead of the entire residue being left to Nancy in the event Philip predeceased his father, the residue was to be divided in half with one share going to Mr. Gardner's granddaughter and the other share to Mrs. Salley. In addition, he left Jenny's share in trust to be distributed in part when she attained the age of 30, and the remainder free and clear of trust when she reached the age of 40. Jones was named as trustee and executor. Nancy was again named as alternate executrix. Milliner described Mr. Gardner as having physical problems moving around and needing a cane, but "still as sharp as a tack." (Trial Tr. 27). She recalled that Mr. Gardner was very particular about what he wanted in his will, and was very careful to check the account numbers for the T. Rowe Price accounts. She saw no diminishment in his mental faculties. Milliner also met Jones twice that summer because he had driven Mr. Gardner to both appointments with her. Milliner's impression was that Philip did not live close by and Mr. Gardner relied on Jones, his oldest friend, to help him. In 2005, Mr. Gardner also executed a new health care power of attorney, with Jones as his agent and Mrs. Salley as successor agent if Jones was not available, and a financial power of attorney naming Jones as his agent to become effective upon a determination of his incapacity by his physician. Mrs. Salley was again named as successor agent if Jones was not available.

Philip had grown up on the campus of Lincoln University. After obtaining his doctorate degree in 1982, Philip worked in marketing and advertising until 1996, and

then was employed as a behavior specialist and clinical intake person. He lived for a time in Alaska, but thereafter he appears to have resided in Pennsylvania. In 2005, he was residing in Norristown, PA. Philip was divorced, and his daughter Jenny, who is now about 24 years old, lived in Boston. Philip described the period from 1990 to 2005 as his father's retirement years. Father and son had a friendly relationship; they talked at least once a week and got together once a month for dinner or to attend sporting events. Philip described his father's relationship with Eileen during this time as difficult because Eileen was engaged in the same bizarre lifestyle as their mother, who was suffering from paranoid schizophrenia, according to Philip.

Philip also knew that Mrs. Salley was a friend of his father's. Although Philip was not close to her, Mrs. Salley was someone who made his father happy, so Philip was pleased about the relationship. He knew Nancy casually, and described her as very gregarious and likeable. Mr. Gardner was very sociable and enjoyed hosting large parties at Thanksgiving and Christmas. Philip recalled Nancy coming to their house in Lincoln in the mid 1980s and "gushing" over it. (Trial Tr. 65). According to Philip, Mr. Gardner liked and trusted Nancy. He also liked her husband Michael. Nancy was able to get Mr. Gardner plane tickets through her work at Delta Airlines, and Philip and his father were able to go the World Series in Cincinnati, Ohio, with her assistance.

Jones knew Mrs. Salley and Nancy from Lincoln University. Mrs. Salley had helped to take care of Jones's mother when she was ill. He described Mr. Gardner's relationship with Mrs. Salley as a close one. He did not know Nancy very well until she and Michael started to visit Mr. Gardner's home after he became ill. However, he testified that he did not like Nancy's behavior because "she would always come in and

she would say, 'Dad, Dad.' And that was just sort of pseudo to me. .... [I]t was just so false, the word 'Father, Father.' It was as if she was trying to win his love or something." (Trial Tr. 222-23). Philip did not realize until much later that Nancy called his father "Dad." The record shows that Mr. Gardner once referred to himself as "Dad" in a note to Nancy. (Def. Ex. 7).

Philip described his father as an independent and private person. Mr. Gardner did not discuss his personal affairs or his financial affairs, and Philip never inquired about his father's financial affairs. Although Philip subsequently realized that Mrs. Salley, Nancy, and Michael had gradually become his father's new family, Philip was not concerned in the beginning. He described his father as getting along with everyone and very charming. According to Philip, Mr. Gardner was socially quite skillful and never made anyone feel excluded. Generous and outgoing, Mr. Gardner avoided conflict at all times. However, Philip also described his father as knowing what he wanted, and not tolerating anyone telling him what to do, especially his children.

Nancy testified that her mother first met Mr. Gardner in the mid-1980s.[4] Her mother was a counselor at Lincoln University, and by the early 1990s, she and Mr. Gardner were a "couple." Although they took occasional vacation trips together, they maintained separate residences. Nancy testified that at her mother's request, she helped Mr. Gardner find his apartment in Bear when he was separating from his wife. When Nancy purchased her townhouse in Greenbelt, Maryland in 1992, Mr. Gardner gave her approximately $9000 to help her at settlement.[5] Nancy testified that Mr. Gardner was

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[4] Nancy referred to Mr. Gardner as "Dad" several times throughout her testimony.

[5] In support of this testimony, Nancy introduced into evidence photocopies of four checks drawn on Mr. Gardner's Fulton Bank accounts: (1) Check no. 1181 dated July 21, 1992 in the amount of $3000, payable to Nancy K. Jenifer; (2) Check no. 1209 dated September 18, 1992 in the

best man when she and Michael got married in 1999, and that he gave them $1000 in cash as a wedding gift. Nancy testified that she planned her mother's trip with Mr. Gardner to Banff, Canada, and arranged for them both to fly free as her parents.

Jones described Mr. Gardner as his father, his brother, and his good friend. Mr. Gardner had hired Jones in 1974 to teach physical education and serve as head track coach Lincoln University. Mr. Gardner was his mentor, and traveled with Jones to every one of the 17 national championships in which his team participated. Jones called Mr. Gardner "Professor" or "Prof" throughout his testimony. Jones testified that Mr. Gardner gave him a lot of responsibilities before he had his stroke. Jones would go over to Mr. Gardner's house about once a week, and they would go through all of Mr. Gardner's finances. Jones knew the contents of his will and how much money Mr. Gardner had. According to Jones, Mr. Gardner told him, "Cyrus, if something were to happen to me, you take these gold pieces out. You take this to your house ..." Jones replied, "Prof, I can't take this out of your house." (Trial Tr. 202). Jones described the trip to lawyer in Kennett Square, when Mr. Gardner made him executor and gave him power of attorney to handle his financial affairs. After Mr. Gardner had his stroke and was hospitalized the first time, he asked every to leave his room except Jones, and then told Jones, "Remember, now, you are in charge. Any decisions to be made, you are to make them." (Trial Tr. 206).

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amount of $2071, payable to Fulton Bank; (3) Check no. 1216 dated September 19, 1992 in the amount of $1505 payable to Nancy K. Jenifer; and (4) Check no. 1383 dated July 29, 1993, in the amount of $750, payable to Nancy K. Jenifer. There was also a cashier's check issued by Fulton Bank dated September 18, 1992 in the amount of $2071, payable to Nancy K. Jenifer. Tab 9. Since Nancy testified that the check for $750 was a housewarming gift (Tr. 257), the total of the checks that Nancy claimed were given to help her purchase the property is $6576.

Mr. Gardner had been injured in a car accident in October 2004 and, as a result, had some bleeding in his brain. He refused any treatment at the time, but Philip noticed his father's health decline in 2005. Once, at a dinner with his father and Mrs. Salley, Philip told his father that he was worried about his health and asked how he was going to take care of himself. Mrs. Salley interjected, "It's none of your affair." (Trial Tr. 73-74). Philip chose not to respond to her remark, but he kept in contact with his father regularly throughout this time. On Saturday of Labor Day weekend in September 2005, Mrs. Salley called Philip and informed him that something had happened to his father a few days earlier, and that he was refusing to go to the hospital. When Philip arrived, Mr. Gardner was coherent and again refused to go to the hospital. The following day, Nancy and Michael arrived at the apartment and Michael observed symptoms of a stroke. Mr. Gardner was taken to Christiana Hospital, where he stayed for about two or three weeks. Philip described his father as suffering from slurred speech, memory loss, and lack of mobility while in the hospital. When Mr. Gardner was discharged and returned home, Mrs. Salley moved into Mr. Gardner's apartment to care for him full-time. Philip described her as very attentive to his father.

In October 2005, Mr. Gardner was well enough to attend a luncheon in his honor by former Lincoln University wrestling and football teams, where he gave a short speech. On November 9, 2005, Mr. Gardner underwent brain surgery after a CAT scan had shown continued bleeding in his brain. He was discharged from the hospital to a rehabilitation facility in Wilmington, where he remained until December 19, 2005. Philip described his father as delusional at this time, suffering from long-term memory loss and fixations, and confined to his bed or a wheelchair. Both Nancy and Mrs. Salley

interacted with Mr. Gardner's physicians at this time. Jones, who was Mr. Gardner's health care agent, felt as if he was being moved aside by the two women, and had become an "outcast." (Trial Tr. 232). However, Jones did not want to make Mr. Gardner angry, so he kept visiting his old friend and never said anything about the situation because Mr. Gardner was not in a "good strong mind." (Trial Tr. 232). Up until then, Jones described Mr. Gardner as "always pretty sharp," but after his brain operation in November 2005, Mr. Gardner declined.

In late February 2006, Mr. Gardner was readmitted to the hospital after suffering a severe stroke. According to her testimony, Nancy was told that he had three days to live, so she called Ralph V. Estep, an accountant who had helped Mr. Gardner prepare his taxes the previous autumn before his brain surgery. According to Nancy, Mr. Gardner needed to change his power of attorney because Jones had not been responding to doctors' calls, and the doctors had insisted that Mr. Gardner chose another agent to make decisions for him. (Trial Tr. 300-01). Estep brought an attorney with him to the hospital, and Mr. Gardner executed a document naming Nancy as his primary-decision maker. On cross-examination, Nancy acknowledged her signature and handwriting on a letter to Estep dated February 25, 2006, stating that Mr. Gardner needed a durable power of attorney for his banking and finances and wished to change the executor of his final will and living will. (Trial Tr. 414-15). Nancy also admitted that she probably had hand-delivered this document to Estep. On February 27, 2006, before he was discharged from the hospital, Mr. Gardner executed a new will and general durable power of attorney that

may have been drafted by Estep (hereinafter "February 2006 Will" and February 2006 POA").[6]

The February 2006 Will named Nancy as trustee of Jenny's trust and as executrix, in lieu of Jones. Estep was named as alternate executor. The February 2006 Will also designated Estep or his firm to provide all accounting, tax and financial advice, direction and services to support the Executrix in carrying out her duties. (Def. Ex. 15). The February 2006 POA named Nancy as primary agent, with Estep as successor agent, for handling both Mr. Gardner's financial and health matters. (Pl. Tab 7). After his February 2006 stroke, Mr. Gardner could no longer get out of bed or walk. He was discharged to return home with hospice care. At this time, according to Nancy, she started to pay his rent, utility and food bills, but she did not know about his investments. A few months later, in June 2006, Mr. Gardner became dehydrated and was readmitted to Christiana Hospital. From there, he was transferred to a rehabilitation facility until his discharge in early July 2006. According to Nancy, it was shortly after Philip visited his father at this facility when Mr. Gardner asked Nancy to call Estep so he could change his will. He continued to insist that he wanted to change his will so Nancy contacted Estep, who came to Mr. Gardner's apartment with an attorney to talk with Mr. Gardner. Nancy testified that Mr. Gardner told Estep that he wanted Nancy to be in charge, "the power of attorney, like she's been." (Trial Tr. 308). He also said, "I want to eliminate my son.

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[6] Estep, an accountant, was being investigated at this time for the unauthorized practice of law. On November 9, 2006, this Court issued an Order appointing Peter Gordon, Esquire, as a receiver to enter Estep's office and obtain possession of all files and documents relating to Estep's law practice, to identify his clients and notify them that Estep was not authorized to engage in the practice of law in Delaware, to assist Estep's clients in obtaining legal counsel, and to file accountings. The Court also ordered Estep to cooperate with the receiver in the performance of his duties. (Pl. Tab 8).

I've given him a good education. I no longer want him in my will." Mr. Gardner then told her, "Whatever happens, I want you always to take care of your mother." (Trial Tr. 309).

On August 8, 2006, Estep returned to Mr. Gardner's apartment with a lawyer and several witnesses, according to Nancy's testimony. The record shows that Mr. Gardner executed a new will (hereinafter "August 8, 2006 Will"), an irrevocable trust naming Estep as trustee (hereinafter "August 8, 2006 Trust") (Def. Ex. 16), and a new general durable power of attorney for financial matters naming Estep as his agent for financial matters (hereinafter August 8, 2006 POA") (Pl. Tab 6). The August 8, 2006 Will contained some specific bequests to Nancy and Mrs. Salley, and then stated: "I mention my son, Phillip B. Gardner. He is not omitted due to oversight or out of lack of love or affection, but rather because he has been previously provided for by other means." (Def. Tab Ex. 16). The residue of Mr. Gardner's estate was given to Estep, as Trustee for the Gardner Irrevocable Trust executed the same day. In the August 8, 2006 Trust, Mr. Gardner as Trustor irrevocably conveyed to Estep as Trustee, his investment accounts which will be discussed in some detail later. (Def. Ex. 16). The Trust property was to be used for the benefit of Mr. Gardner during his lifetime, and upon his death, the Trust was to continue for the benefit of Mrs. Salley. Upon the death of both Mr. Gardner and Mrs. Salley, the property was to be distributed outright and free of trust to Nancy. If Nancy was not then alive, the property was to be distributed to Michael, and if neither Nancy nor Michael was still living, the property was to be distributed to Nancy's intestate heirs.

On August 8, 2006, Jones tried to visit Mr. Gardner, but was barred from entering his apartment. Jones testified that when he saw those people in the apartment, he was not

happy because Mr. Gardner did not know what day it was or where he was. (Trial Tr. 247).

Jones described the relationship between Mrs. Salley and Philip after Mr. Gardner's stroke as a poor one. It was evident to Jones that Mrs. Salley did not want Philip to come to his father's apartment at all. Philip tried to obtain Jones's agreement to meet him at Mr. Gardner's apartment and to remain during the duration of his visits, but Jones refused because he did not want to get involved. Jones's own visits to his old friend continued until 2008, when he stopped visiting for several months because he felt was uncomfortable. Mrs. Salley would say to him, "Cyrus, I know you're trying to take Prof's money." (Trial Tr. 215-16). Jones was hurt by her accusations. Philip testified that he felt Mrs. Salley was taunting him because she was in complete control. Philip could not see his father or even talk to his father on the telephone without her assistance, and she would say negative things about Philip in front of other people. Once a year during the holidays, Philip would visit Mr. Gardner with Roger Cromwell. Cromwell lived in California, but his father and mother had been close friends and neighbors of Mr. and Mrs. Gardner in Lincoln, and he and Philip were friends. In December 2007, when Philip and Cromwell arrived at Mr. Gardner's apartment, Mrs. Salley would only allow one person to enter the apartment. Philip elected to have Cromwell visit with Mr. Gardner while he returned to the car. As Cromwell was leaving, Mrs. Salley told him to watch out for Philip because he was not a good person to be around. (Trial Deposition at 7). Philip's visits with his father became less frequent during 2008 because of the toxic environment Mrs. Salley created.

After Estep's office was raided in November 2006, Nancy received a letter from the court-appointed receiver, Peter Gordon, Esquire.[7] In February 2007, Gordon sent a second letter. Nancy testified that Mr. Gardner told her to meet with Gordon and find out what was happening. She and Michael met with Gordon in March 2007, and he accused Estep of theft because he could not account for Mr. Gardner's money. He advised her to have the February 2006 Will reviewed by a reputable attorney and gave her three names. Nancy made an appointment with Kathleen DeLacy, Esquire, who came to Mr. Gardner's apartment at Nancy's request. Nancy testified that Mr. Gardner had suffered a bad seizure on the morning of the appointment, and although she had called to cancel the appointment, DeLacy was already en route. Nancy testified that she informed DeLacy about Mr. Gardner's seizure and that his mental state was poor that day. After DeLacy left, Mr. Gardner was not impressed. According to Nancy, he said, "I never want to see her again." (Trial Tr. 437).

DeLacy met Mr. Gardner on Tuesday, April 17, 2007. She testified that when she arrived at his apartment, Mr. Gardner was seated at the dining room table eating his lunch. Although she described him as a very pleasant man, DeLacy could not obtain any information from him. Only when she asked if he had any children did he answer without hesitation. Mr. Gardner told her that he had two children and he told her their names. He could not answer any other question without prompting by Nancy. DeLacy described one incident of Nancy's coaching: when DeLacy asked Mr. Gardner whom he would want as his trustee, Mr. Gardner did not reply until Nancy said, "You remember. I

[7] *See* Exhibit A (Letter dated November 16, 2006, to Mr. Gardner from Gordon) attached to Verified Answer of Respondents Nancy K. Salley and Nancy Jenifer Haywood to Petition for Appointment of a Guardian of Person and Property of Robert N. Gardner, C.M. No. 13796-N.

do that for you now. Me and my husband do that for you now." At that point Mr. Gardner responded, "Oh, yeah, that's right. I would want her to do it." (Trial Tr. 473).

While she was attempting to interview Mr. Gardner, Michael was seated at the table, and Nancy was walking around the table offering Mr. Gardner food. DeLacy asked Nancy and Michael to leave the room so she could speak to Mr. Gardner alone. Michael remained seated and, although Nancy initially walked away, she came back into the room again. DeLacy was not able to get Mr. Gardner to tell her anything about his property. Finally, she prompted him about his children, Mrs. Salley, Nancy, and Michael. He then told her, "Well, yeah, I want everything to go --- I want all of them to get something." (Trial Tr. 470).

DeLacy informed Nancy that she was not comfortable drafting any new documents for Mr. Gardner at that time. She told Nancy that she would send a letter to Gordon with her recommendations. Nancy asked DeLacy if she would delay sending the letter because she and Michael were staying with Mr. Gardner the rest of the week, and if he became more lucid, she would bring him to DeLacy's office. DeLacy agreed, but Nancy called on Friday to inform DeLacy that they were not going to bring Mr. Gardner to her office. DeLacy testified that she was never informed that Mr. Gardner had had a seizure prior to her visit.

Sometime after this visit, Estep referred Nancy to the law firm of Sanclemente and Associates, where John J. Sullivan, Esquire, was working. Sullivan met with Mr. Gardner and prepared a new will and trust for him, which Mr. Gardner executed on February 5, 2008 (hereinafter "February 5, 2008 Will" and "February 5, 2008 Trust"). (Def. Ex. 2 & 3). The terms of the February 5, 2008 Will and February 5, 2008 Trust

were identical to the prior documents prepared by Estep except that Nancy was substituted for Estep as trustee and executrix, and Michael was named as alternate executor. Sullivan testified that he had been contacted by Estep and Nancy to assist Mr. Gardner in creating a new will to ensure that it was properly witnessed and notarized.[8] Sullivan recalled speaking with Mr. Gardner, who informed him that he wanted to leave the bulk of his estate to Mrs. Salley and Nancy, and that he wished to exclude his children because he had previously provided for them from his estate. Mr. Gardner also told Sullivan that Philip did not visit him. Sullivan testified that he believed Mr. Gardner was mentally competent and had the requisite capacity to execute legal documents on February 5th, noting that Mr. Gardner had commented about the attractiveness of the female paralegal who served as a witness.

On July 9, 2008, Philip filed a petition in this Court to be appointed guardian of his father, and alleged that Mr. Gardner had been unduly influenced by Nancy, who may have misappropriated his assets. On July 29, 2008, Nancy and Mrs. Salley filed an Answer opposing the guardianship petition, denying that Mr. Gardner was a disabled person, and alleging that Philip seldom visited his father and had not been close to his father for 15 years. On August 14, 2009, I appointed a professional guardian, Senior Partner, Inc., as interim guardian of the person and property of Mr. Gardner. Mr. Gardner passed away on May 15, 2010, at the age of 93. Philip only learned of the death of his father through his attorney. Neither he nor Jones knew of the whereabouts of Mr. Gardner's remains until the trial, when Nancy testified that Mr. Gardner's remains had been cremated and the ashes scattered in the garden of his former home in Lincoln. Both

[8] One of the concerns about Estep's unauthorized legal practice was that documents were not always properly witnessed and notarized.

Philip and Jones were very distressed that there had never been a memorial conducted for Mr. Gardner at Lincoln University.

II. Issues Presented

Philip argues that the evidence demonstrates that undue influence was exerted upon Mr. Gardner when he was under the care of Nancy, Michael and Mrs. Salley after his stroke in September 2005. According to Philip, although Mr. Gardner was well-cared for during this time, his funds were misappropriated by Nancy and he was influenced to sign estate planning documents when he was mentally incompetent. Mrs. Salley created a negative environment, excluding others from having contact with Mr. Gardner. Philip also argues that Mr. Gardner lacked testamentary capacity after his brain surgery in November 2005. Therefore, none of the estate documents that were executed after the 2005 Will are valid.

Nancy and Michael rely on the testimony of Nancy and Sullivan to argue that Mr. Gardner had the requisite testamentary capacity to execute the February 5, 2008 Will and Trust. In addition, they argue that since there was no medical testimony presented at trial regarding Mr. Gardner's testamentary capacity, Philip has not met his burden of proof as to lack of testamentary capacity. Nancy and Michael also argue that there was no showing that the February 5, 2008 Will and Trust were the product of undue influence. It was undisputed at trial that Nancy and Mrs. Salley had been excellent caregivers, and the record also shows that they and Michael had been an important part of Mr. Gardner's life for many years. Mr. Gardner had lost his wife and daughter to mental illness, and his son was not around often. The record also shows that Mr. Gardner was a generous man who had given Mrs. Salley and Nancy many gifts over the years, and regarded them as his

extended family. Any friction between Philip and Mrs. Salley, moreover, was not relevant because Mrs. Salley was not assisting with Mr. Gardner's finances or estate planning, only Nancy. Finally, Nancy and Michael argue that it is just as likely that Mr. Gardner had wanted to provide for them after his death because they had taken care of him as it was that Mr. Gardner had been the victim of undue influence.

III. Analysis

I do not need to address the issue of testamentary capacity because I have concluded that Philip has demonstrated by the preponderance of evidence that Mr. Gardner executed successive wills, trusts, and power of attorney documents while under the influence of Nancy, Michael and Mrs. Salley following his stroke in September 2005.

A. Undue Influence

Proving undue influence in a will contest requires the challenger to show: (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. *See In re Estate of West*, 522 A.2d 1256, 1264 (Del. 1987); *In re Kohn*, 1993 WL 193544, at *6 (Del. Ch. May 19, 1993); *In re Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983). In *Langmeier*, the Court stated:

> Undue influence is an 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 this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever 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.

466 A.2d at 403. Undue influence must be established by a preponderance of evidence. *West*, 522 A.2d at 164. Circumstantial evidence may be considered, but undue influence is not established if the evidence discloses one or more plausible alternative explanations for the testator's change of beneficiaries. *Id.* at 1264-1265; *see also In re Estate of Konopka*, 1988 WL 62915, at *5 (Del. Ch. June 23, 1988).

1. Susceptibility

Applying the above standards to the execution of the estate planning documents beginning in February 2006, the record shows that Mr. Gardner was susceptible to undue influence in February 2006. He had suffered a stroke in September 2005, and had undergone significant brain surgery in November 2005. His son described Mr. Gardner as confused and suffering from memory loss after the September stroke, and as delusional and close to being in a vegetative state after his brain surgery in November. Even discounting Philip's self-interested testimony, Jones clearly testified that Mr. Gardner's formerly sharp mental state declined after his brain surgery. Mr. Gardner then suffered a second, more severe stroke in February 2006 that left him incapable of walking. The doctors expected him to die and ordered hospice care. He survived, but was completely dependent upon others to attend to his needs.

2. Opportunity

Mrs. Salley moved into Mr. Gardner's apartment after his stroke in September 2005 to serve as his full-time caregiver. Nancy and Michael visited Mr. Gardner's home at least once a week. Thus, they had the opportunity to influence Mr. Gardner.

3. Disposition

The record shows that Mrs. Salley had a negative attitude toward Philip before and after Mr. Gardner's stroke. Jones observed her hostility toward Philip, and Philip sought to coordinate his visits with Jones because of the hostile environment Mrs. Salley created whenever Philip saw his father. While everyone agreed that Mrs. Salley was an excellent caregiver, her usurpation of Jones' role as Mr. Gardner's health care agent left Jones feeling like an outcast. Similarly, Nancy's intervention in Mr. Gardner's medical and financial affairs demonstrated her disposition to control Mr. Gardner. A review of Mr. Gardner's financial records reveals that Nancy, Michael, and Mrs. Salley had the disposition to use their influence for an improper purpose, i.e., to deprive Mr. Gardner of his chosen attorney-in-fact (Jones), replacing him with a new attorney-in-fact (Nancy), who would be in a position to control Mr. Gardner's personal and financial affairs to enrich themselves.

4. Actual Exertion of Undue Influence

Nancy admitted that after Mr. Gardner's hospitalization in February 2006, she contacted to Estep to change Mr. Gardner's power of attorney. The ostensible reason for this change was that Jones was not available whenever the doctors called regarding Mr. Gardner's medical treatment. However, not only was the power of attorney changed on February 27, 2006, but also a new will was executed that named Nancy as executrix pursuant to her letter of instructions to Estep dated February 25, 2006. Nancy testified that doctors had told her that Mr. Gardner had three days to live, and the record shows that on February 28, 2006, she wrote a check on Mr. Garner's Fulton Bank account in the amount of $2470 payable to Chandlers Funeral Home for cremation and 25 death

certificates.[9] Thus, Nancy expected Mr. Gardner to die soon. Rather than simply position herself to have legal authority to make medical decisions at this critical time, however, she also positioned herself to have legal authority over his assets while he remained alive and over his estate upon his death. These circumstances render Nancy's testimony suspect. Her testimony becomes even less credible upon examination of Mr. Gardner's financial records.

Mr. Gardner was a man of means. A calculation of his assets on or about January 31, 2006 shows that he owned $535,834.42 in numerous investment and bank accounts.[10] His average monthly fixed income at this time equaled $4553.45, and consisted of Social Security and VA benefits, and retirement/pension payments from Macalaster College and Lincoln University (TIAA-CREF).[11] In addition, he received several hundred dollars in interest payments each month from his investments. Before his September 2005 stroke, it appears from the record that Mr. Gardner prepared his own taxes because his American Express credit card statement of March 3, 2005, shows him making two purchases on February 16, 2005 of "H & R Block Online."[12] A review of his checking account shows that Mr. Gardner wrote two checks on January 9, 2005: (1) $190 to the Delaware Division of Revenue; and (2) $1938 to the United States Treasury. On April 5, 2005, he again wrote two checks: (1) $293 to the Delaware Division of Revenue; and (2) $2150 to the United States Treasury. On June 6 and June 7, 2005, Mr. Gardner wrote checks in the same respective amounts to the Delaware Division of Revenue and the United States Treasury. On September 5 and September 8, 2005, checks in the same respective

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[9] Pl. Tab B (Independent Accountant's Report by Dingle and Kane) at 11.
[10] *Id.* at 2.
[11] Pl. Tab B(4) (Fulton Bank statements).
[12] Pl. Tab B(1) (American Express statements).

amounts were made out to the United States Treasury and the Delaware Division of Revenue for Mr. Gardner's quarterly estimated taxes.

The first check in the record drawn on Mr. Gardner's account and made payable to Nancy (other than the 1992 and 1993 checks) was dated September 15, 2005, in the amount of $2500. No explanation is given on this check. Somewhat surprisingly, a second check made payable to the United States Treasury in the amount of $2150 is dated October 2, 2005, less than a month after his previous quarterly estimated tax payment had been made. From September 15, 2005 through February 20, 2006, Nancy wrote various checks to utilities, insurance companies, pharmacies, and others, including to Nancy and Mrs. Salley allegedly for household expenses. There is no record of any payment to Estep during this period, which undermines Nancy's testimony that Mr. Gardner had used Estep's help in preparing his taxes in the fall of 2005.

On February 20, 2006, right before Mr. Gardner entered the hospital after his severe stroke, Nancy wrote three checks, one to herself in the amount of $3000 for "expenses," one to Michael in the amount of $9500 for "anniversary gift" and another check to herself in the amount of $6500 for "anniversary gift." According to their marriage certificate, Nancy and Michael were married on March 5, 1999.[13] At trial, Nancy testified that Mr. Gardner once bought them a microwave for an anniversary gift. In contrast to Mr. Gardner's previous anniversary gift of a microwave and wedding gift of $1000, $16,000 appears unusual as a gift Mr. Gardner might have given or authorized. A reasonable inference to be drawn from the evidence was that Nancy, on February 20, 2006, feared that Mr. Gardner was so ill that he was going to die, so she wrote the checks

[13] Pl. Tab 7.

to herself and her husband using their approaching anniversary as an excuse to take this money. Mr. Gardner, however, survived this medical crisis.

On March 1, 2006, Nancy wrote a check to Estep in the amount of $1120 for "taxes/will." Nancy wrote several other checks to Estep: (1) $100 on April 30, 2006 for Mrs. Salley's taxes; (2) $2000 on July 28, 2006 for "motor (illegible)";[14] (3) $30,000 on August 8, 2006 for "investments;" and (4) $2500 on August 8, 2006 for services rendered.[15]

The August 8, 2006 Will and August 8, 2006 Trust established an estate plan which was designed to benefit Mrs. Salley, Nancy and Michael and to exclude Mr. Gardner's wife, daughter and son. The August 8, 2006 Trust explicitly listed the following property as being irrevocably given to Estep as trustee:

(1) T. Rowe Price nonretirement accounts for Investor No. 232016550;

(2) Legacy Treasury Direct Acct. No. 4800-117-7783;

(3) Legacy Treasury Direct Acct. No. 1300-089-6856;

(4) PNC Investments Acct. No. 38853811;

(5) Compushare Acct. No. 70312 for Aqua America, Inc.;

(6) Wasatch Funds Fund 027 Acct. 270008456;

(7) MetLife Contract No. 940013302;

(8) MBNA Acct. No. 57-083539-7; and

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[14] It is possible that this fee may have been for assisting in the transferring of title to Mr. Gardner's Lincoln Town Car to Mrs. Salley, which occurred some time before the guardianship petition was filed. See Verified Answer of Respondents Nancy K. Salley and Nancy Jenifer Haywood to Petition for Appointment of a Guardian of Person and Property of Robert N. Gardner, C.M. No. 1376-N, at ¶12.

[15] Estep was subsequently paid $500 on September 25, 2006 for "lawyers fee", $450 on April 17, 2007 for Mrs. Salley's taxes, and $475 on April 15, 2008 for 2007 taxes. Plaintiff's Tab B at 27.

(9) DWS Scudder Acct. No. 200799470.

As of January 1, 2006, Mr. Gardner's nonretirement accounts consisted of four mutual funds (Blue Chip Growth, Equity Income, Spectrum Income and Tax Free-Income) that had a combined value of $234,598.68. He also had a retirement accounts at T. Rowe Price (GNMA and Equity Income) whose combined value as of January 1, 2006 was $17, 833.31. The nonretirement accounts were transferred into the Trust on December 20, 2006, and the beneficiary of the IRA accounts was changed from the current beneficiary to Nancy pursuant to Estep's instructions.[16] The name of the beneficiary as of January 1, 2006 is not in the record, but in his 2005 Will, Mr. Gardner bequeathed his two IRA accounts to his daughter Eileen.

Mr. Gardner's Legacy Treasury Direct accounts do not appear to have been transferred into the Trust, at least not immediately. The record shows that one account (No. 4800-117-7783) was titled in the names of "Robert N Gardner or Philip B Gardner" as of March 3, 2006.[17] Its par value as of July 15, 2005, had been $55,000, but as of March 3, 2006, par value was $40,000. The next statement for this account, dated April 6, 2007, shows that it had been retitled as "Robert N Gardner or Michael Haywood" and the mailing address changed to Estep's. According to the Independent Accountant's Report, there was a March 2006 statement for the second Legacy Treasury Direct account (No. 1300-089-6856), showing title in the name of Robert N. Gardner or Nancy K. Salley

[16] Pl. Tab B(7). The records include a letter signed by Estep and Mr. Gardner dated December 11, 2006, referring to an earlier letter from T. Rowe Price dated August 28, 2006. As will be seen from other records, Estep sent letters of instruction dated August 18, 2006, to DWS Scudder and Compushare, and opened a new Wachovia account (No. 515-5204) on August 18, 2006, and subsequently deposited $30,000 into that account as trustee of the Robert Gardner Irrevocable Trust.

[17] Pl. Tab B(5).

with a par value of $90,000, which was drawn down to $70,000 by January 2007, and then transferred to an account titled in the name of the Irrevocable Trust.[18]

Mr. Gardner's MetLife Contract No. 940013302 contained a balance of $10,979.19 as of January 31, 2006. By letter dated August 18, 2006, Estep requested information regarding authority to make changes. He attached a copy of his August 8, 2006 POA and a letter dated August 8, 2006, signed by Mr. Gardner, asking MetLife to carry out Estep's requests.[19] This account was retitled in the name of the trust after Estep sent a letter dated December 11, 2006, with a certified copy of the February 8, 2006 Trust, and signed a Policy Service Request Form with Mr. Gardner on December 12, 2006. The record also shows that MetLife received a Policy Service Request Form signed by Nancy as power of attorney, dated January 19, 2007, seeking to remove the trust as beneficiary, and naming herself, Michael and Mrs. Salley in equal shares as the beneficiary, and to change the financial representative to PNC Investments.

Mr. Gardner's Compushare/Aqua America, Inc. account was owned by Mr. Gardner and Pauline Gardner, as joint tenants, and was valued at $4,730.88 as of January 31, 2006. Again, the record shows that on August 18, 2006, Estep sent a letter to Compushare. He sent a second letter dated December 11, 2006, also bearing Mr. Gardner's signature. Included in the records was a letter of instruction from Estep requesting re-registration of the Aqua America, Inc. shares from "Robert N. Gardner & Pauline R. Gardner JT TEN" to "Robert N. Gardner Irrevocable Trust." The letter stated that "Mr. Gardner has survived his wife."[20] According to Philip's testimony, Pauline

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[18] Pl. Tab B at 6.
[19] Pl. Tab B(3).
[20] Pl. Tab B(90.

Gardner died in 2009. It does not appear from the record that the shares were re-registered in the name of the trust.

No records from Wasatch Funds were introduced into evidence. According to the Independent Accountants' Report, this account was titled in Mr. Gardner's name alone, and had a value of $21,177.11 as of January 31, 2006.[21] It is unknown if this account was transferred into the trust.

Mr. Gardner's money market account at MBNA (No. 57-083539-7) was titled Robert N. Gardner POD Philip B. Gardner. As of January 31, 2006, its value was $14,255.50.[22] The funds in this account were transferred to a Ralph V. Estep, EAPA Fiduciary account at Delaware National Bank.[23]

DWS Scudder account number 200799470 was titled in the names of Robert N Gardner and Philip B Gardner, Joint Tenants, and had a value of $82,644.59 on January 31, 2006.[24] Using the same format as before, Estep contacted DWS Scudder in a letter dated August 18, 2006, along with a letter dated August 8, 2006 signed by Mr. Gardner.[25] In his August 18th letter, Estep requested information about making changes in this investment, and he furnished a copy of the February 8, 2006 POA. An instruction sheet was also sent to DWS Scudder by Estep seeking to change title of the investment to the trust. Estep had to complete a separate durable power of attorney form provided by DWS Scudder, which he completed on December 12, 2006. Mr. Gardner's signature appears on this document. The records from DWS Scudder include a computer print-out with a notation made on December 20, 2006 by Jennifer Tumberger, who wrote:

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[21] Pl. Tab B.
[22] *Id.* at 2, 6.
[23] *Id.* at 6.
[24] *Id.* at 2, 6.
[25] Pl. Tab B(6).

> I actually called Ralph, cause this is a joint acct and we have nothing that [sic] from the joint owner Philip … Ralph indicated that Philip is deceased and that they have no idea where he died or how they can get a death cert …. I told him that we would need a COO form completed and his death cert before we can process … he said to fax him the COO form and he will see what he can do about the death cert … jlt[26]

This account remained titled in the names of the joint tenants, Mr. Gardner and Philip.

While Estep was attempting to change the titles on Mr. Gardner's accounts and either falsely or mistakenly representing that Philip and Mrs. Gardner were deceased, Nancy was in control of Mr. Gardner's checkbook. At trial, Nancy testified that she wrote checks to herself to pay for household expenses, including reimbursing her mother for food, paying the aides in cash as they had requested, and buying whatever Mr. Gardner needed in the way of clothes and supplies. She provided numerous receipts, but admitted that if there was any money left over, she kept the funds to pay for her own expenses. According to Nancy, she incurred a great deal of expense traveling back and forth. She described the money as "replacement wages" because she could not work while taking care of Mr. Gardner, [27] and testified that Mr. Gardner had authorized her actions.

A review of the records from September 25, 2006 through December 28, 2006 provides a snapshot picture of Nancy's management of Mr. Gardner's assets. Receipts allegedly signed by an aide named Dionne Fletcher total $1745 during this period.[28] Mr. Gardner's rent during this period had been paid in advance by check no. 2651 dated March 13, 2006.[29] During this time period, Nancy also wrote separate checks to Delmarva Power, and for bills such as car insurance, renter's insurance, and a home

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[26] Pl. Tab B(6) at 166.
[27] Trial Tr. 362.
[28] Def. Ex. 8.
[29] Pl. Tab B at 11.

health care service for Mr. Gardner, as well as for her mother's separate household expenses.[30] During this time period, Nancy also wrote six checks to herself for household expenses totaling $21,300. Subtracting $1745 for the aide costs, and an estimated $1000 per month expense for groceries for two people, $16,555 remains unaccounted for. The record shows that Mrs. Salley and the aides were providing the daily care for Mr. Gardner, while Nancy and Michael visited on a weekly basis. Nancy had retired in 1999 with an annual pension of $18,000, and thereafter had worked occasionally as a make-up consultant. At the relatively young age of 51 or 52, Michael had retired on May 1, 2005 with an annual pension of $7500.

In addition to these six checks, Nancy also wrote herself a check dated December 21, 2006, in the amount of $7500 as a Christmas gift to pay for kitchen cabinets. At different times, she wrote checks in large amounts to Michael, some of which she claimed were expenses for renovating their townhouse for Mr. Gardner to live with them. She claimed that Mr. Gardner authorized everything, but admitted that she did not discuss each check with him. She claimed that she and Michael only went on one vacation during the time they cared for Mr. Gardner, a cruise to Alaska, which had been a gift to them by Mr. Gardner after they had to forego a trip to the Carolinas when Mrs. Salley had to be hospitalized. This cruise apparently took place in June 2007, because credit card statements on Mr. Gardner's account show Nancy making an $840 purchase at a jewelry store in Skagway, Alaska on June 5, 2007. Seven months earlier, Nancy had obtained her own credit card on Mr. Gardner's American Express account. She testified that Mr. Gardner had authorized her to obtain a card after an American Express representative had called the house to verify the addition of a new card holder, implying that she used her

[30] *Id.*

power of attorney to apply in the first place. Her first credit card transaction occurred on December 2, 2006, in Silver Spring, Maryland, when she charged $682 at a frame store.[31] Subsequent statements show that Nancy charged: (1) her airplane ticket for departure to an unknown destination on April 1, 2007; (2) a hotel upgrade in Hilton Head, South Carolina on July 6, 2007; (3) $500, which I presume was a deposit, to Royal Caribbean on October 2, 2007;[32] (4) a purchase of tourist tickets at the Biltmore Estate in Asheville, North Carolina on May 8, 2009; and (5) an unusual hotel charge in Miami Beach, Florida on April 27, 2010, which appears to have been credited back to the account on April 26, 2010. Nancy testified that she always considered her American Express card as her personal card to use as she pleased. She charged a total of $42,187.85 on Mr. Gardner's American Express account.[33]

Between August 21, 2007 and September 24, 2007, Nancy also wrote four checks totaling $42,250 to herself and Michael for "reserves."[34] At trial she testified that Mr. Gardner had told her that if he were hospitalized, she was to take money out of the bank for expenses in case he died. However, during cross-examination, she admitted that the dates on which the checks had been written did not correspond to any time when Mr. Gardner was admitted to hospital, and conceded that the funds might have been used for household expenses or her own expenses.

The record shows that Nancy diverted thousands of dollars from Mr. Gardner's accounts to subsidize her and her husband's lifestyle even though it was her mother, Mrs. Salley, who was the primary caregiver to Mr. Gardner. Nancy's testimony throughout

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[31] Pl. Tab B(1).
[32] Pl. Tab B(1). This charge was later credited back to the account on September 9, 2008, which was after Philip's guardianship petition had been filed.
[33] Pl. Tab B at 30.
[34] Pl. Tab B.

the trial was replete with inconsistencies and contradictions. Furthermore, I find her testimony that Mr. Gardner told her that she could write checks whenever she wanted and to "go take the money" simply incredible.[35] I find that a reasonable inference to be drawn from the evidence is that Nancy hired Mr. Estep to help her gain control over Mr. Gardner's assets, and it was Nancy, and not Mr. Gardner, who determined how his money was to be spent and his estate distributed. DeLacy witnessed Nancy coaching Mr. Gardner during their April 2007 interview. Subsequently, Nancy turned again to Estep to find another attorney who would ensure that the estate planning documents that she and Estep had put in place were properly executed. She sought out Estep again even though she had been told by Gordon that Estep may have been stealing money from Gardner.

Although Mr. Sullivan found Mr. Gardner to be competent to execute a will on February 5, 2008, he did not ask Mr. Gardner how he had otherwise provided for his children, nor did he question Mr. Gardner's comment that Philip did not visit him. Nearly three years had passed since Mr. Gardner had suffered the severe stroke that rendered him completely dependent upon others. For over three years, he had been in the nearly exclusive control of Mrs. Salley, Nancy, and Michael as Mrs. Salley made Philip and Jones both so uncomfortable that their visits to Mr. Gardner had become less frequent, but their visits had not stopped. In light of their ongoing financial exploitation of Mr. Gardner, undue influence by Nancy, Michael and Mrs. Salley is the only plausible explanation for Mr. Gardner's execution of the documents prepared by Sullivan, as well as the August 8, 2006 Will, August 8, 2006 Trust, August 8, 2006 POA, February 27, 2006 Will and February 27, 2006 POA prepared by Estep .

5. Result Demonstrating the Effect of Undue Influence

[35] Trial Tr. At 355.

The financial exploitation of Mr. Gardner during his lifetime benefited primarily Nancy and her husband Michael. The financial exploitation began before February 27, 2006, and by her appointment as Mr. Gardner's power of attorney and executrix of this estate, Nancy solidified her position of power over his assets and estate. The February 5, 2008 Will and February 5, 2008 Trust, like the August 8, 2006 Will and August 8, 2006 Trust, were designed to benefit primarily Mrs. Salley after Mr. Gardner's death, but Nancy was in a position to control the property as trustee of the Gardner Irrevocable Trust. Several months after the execution of the 2008 documents, Sullivan videotaped Mr. Gardner to demonstrate that he was competent to execute a will. However, Mr. Gardner's mental state had deteriorated so that he was no longer able to answer questions about his family members or explain what he wanted to do in a will. Afterward, Mrs. Salley called Philip and said, "You are not going to win, and you shouldn't come here anymore."[36] Only through court intervention during the guardianship proceeding was Philip able to visit his father again.

I conclude that Philip has demonstrated by the preponderance of evidence that: (1) Mr. Gardner was susceptible to undue influence on February 27, 2006, August 8, 2006 and February 5, 2008; (2) Nancy, Michael and Mrs. Salley had the dispositions to exert undue influence for an improper purpose; (3) Nancy, Michael and Mrs. Salley had the opportunity to exert undue influence; (4) Nancy, Michael and Mrs. Salley actually exerted undue influence; and (5) the February 27, 2006 documents, August 8, 2006 documents and February 5, 2008 documents demonstrate undue influence. These sets of documents shall be declared void as the products of undue influence, and the request for

[36] Trial Tr. at 148.

the admission to probate of the February 5, 2008 Will shall be denied. In addition, the 2005 Will shall be declared valid and admitted to probate.

IV. Conclusion

For the reasons stated above, Philip has demonstrated by the preponderance of the evidence that the documents executed on February 27, 2006, August 8, 2006, and February 5, 2008, and all beneficiary changes and transfers of property after February 27, 2006 were the produce of under influence and are void. Once this report becomes final, Nancy shall have 90 days to submit a formal accounting of her expenditures of Mr. Gardner's property beginning on February 27, 2006 until Mr. Gardner's death to determine the extent of the property that was used for Mr. Gardner's benefit. To the extent that Nancy cannot demonstrate that Mr. Gardner's funds were used for his benefit, she may be surcharged that amount. Once this report becomes final, counsel shall confer and submit an order in conformity with this decision to the Court within 10 days.

V. Exceptions to the Draft Report

Respondents have filed two exceptions to my draft report. First, Respondents contend that I erred in concluding that Mr. Gardner was susceptible to undue influence without having opinions of medical experts to rely on. Second, Respondents contend that I erred in placing the burden on Nancy to account for her expenditures of Mr. Gardner's property.

Regarding the first exception, Respondents argue that Philip had the burden of proving each element of undue influence and that without introducing expert medical testimony on this issue, Philip could not carry his burden of proving that Mr. Gardner was susceptible to undue influence. As a result, they argue, I erred in concluding in my

draft report that Mr. Gardner was susceptible to undue influence. Respondents cite *In re Cauffiel*, 2009 WL 527495, at *7 (Del. Ch. Dec. 31, 2009); *In re Langmeier,* 466 A.2d 386, 402 (Del. Ch. 1983); *Stone v. Stant*, 2010 WL 2734144, at *7 (Del. Ch. July 2, 2010); and *Tucker v. Lawrie,* 2007 WL 2372616, at *8 (Del. Ch. Aug. 17, 2007), in support of their argument that the Court relies upon the opinions of medical experts in deciding whether a decedent was a susceptible testator for the purposes of finding undue influence. Citing *In re Estate of Wilson*, 2003 WL 22227850, at *2 (Del. Ch. Sept. 25, 2003), a case where the petitioner failed to present any medical testimony and relied only on lay witnesses, Respondents contend that expert medical testimony is required to demonstrate susceptibility since the Court in that case failed to find that decedent had been a susceptible testator.

Respondents' reliance on *Wilson* is misplaced because in that case, petitioner's evidence of susceptibility only consisted of testimony that the testatrix had shown signs of confusion, which "scant" evidence was "overshadowed" by contrary medical testimony offered by the testatrix's long-time family physician. *Id.* In contrast, here there was substantial testimony that Mr. Gardner's mental and physical condition had begun to deteriorate after his stroke in September 2005, his condition had further declined after his brain surgery in November 2005, and Mr. Gardner was expected to die as a result of his second more serious stroke in late February 2006. Not only did Philip and Jones testify concerning Mr. Gardner's weakened physical condition and lack of mental acuity, but Nancy herself testified that after Mr. Gardner's brain surgery in November 2005, he began having seizures and had to be put under restraints. After Mr. Gardner had his second stroke in February 2006, Nancy testified that the doctors expected the 89-year

old man to die within three days. After his discharge from the hospital in late February 2006, Mr. Gardner could no longer walk and had rough days depending upon how bad his seizures were, according to Nancy. The testimony was undisputed that Mr. Gardner was in poor health and completely dependent upon others to care for him, manage his financial affairs, and even hold a telephone for him.[37] Respondents now would have me ignore this evidence because no physician testified at trial.[38] In the absence of any Delaware court decision explicitly requiring expert medical testimony on the issue of susceptibility, I decline to alter my conclusion that Mr. Gardner was susceptible to undue influence during this time period. Respondents' first exception, therefore, is dismissed.

Respondents' second exception concerns the formal accounting that I ordered Nancy to provide of her handling of Mr. Gardner's finances. Respondents argue that since Philip had the burden of proof regarding undue influence, he also had the burden of showing which expenditures were not used for Mr. Gardner's benefit. According to Respondents, Philip failed to make such a showing because William Kane, the certified public account who had prepared a report of Mr. Gardner's finances that was admitted into evidence,[39] did not conduct an actual audit of the expenditures. Respondents also contend that Mr. Gardner regarded Nancy as a daughter and, therefore, Philip had the burden of overcoming the presumption that any property transfers to Nancy were a gift, citing *Lingo v. Lingo*, 2009 WL 623720, at *12 (Del. Ch. Feb. 26, 2009) (Master's Final

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[37] Trial Tr. at 402, 428.

[38] Pursuant to the pretrial stipulated order, all pleadings and exhibits filed in the contested guardianship matter involving Mr. Gardner, including "medical summary and determination of incompetency," were admitted into evidence. DI 41. Nevertheless, Respondents objected to Philip's testimony when he referred to other physicians' evaluations that had been summarized by Dr. Carol A. Tavani in her expert report prepared for the contested guardianship proceeding. Pl. Tab A(1).

[39] Pl. Tab B.

Report). According to Respondents, Philip failed to present clear and convincing evidence that these transfers were not gifts.

In his report, Kane provided a list of Mr. Gardner's assets and their values as of January 31, 2006, as well as: (1) a summary of Mr. Gardner's financial accounts and their balances from January 2006 through 2009; (2) a summary of cancelled checks from Mr. Gardner's Fulton Bank account beginning December 19, 2005 through October 5, 2009; and (3) a summary of Mr. Gardner's American Express account statements from 2005 to 2010.[40] According to the report, Nancy wrote checks on Mr. Gardner's account to her husband Michael from February 20, 2006 to September 19, 2007, in amounts that totaled $35,500.00. Nancy wrote checks on Mr. Gardner's account to herself from September 15, 2005 through October 5, 2009,[41] in amounts that totaled $243,447.20. Nancy described the majority of the checks made payable to herself as "household expenses." Some of the other checks payable to Nancy were described as "gifts" or "reserve," and others had no notation describing the alleged purpose of the expenditure. Nancy also obtained a card in her own name on Mr. Gardner's American Express account, on which she charged $42,167.85 in goods and services for herself starting in December 2006.[42]

Although the record shows that Mr. Gardner referred to himself as "Dad" on a note written to Nancy in 1992,[43] Nancy was not his daughter. The record shows that as early as 1991, Mr. Gardner had sufficient affection for Nancy that he made her a specific

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[40] *Id.* The actual statements on which Kane based his report were also introduced into evidence. *See* Pl. Tab B (1) – (10).
[41] It is not clear from the record whether Nancy wrote all of these checks. Nancy testified that Mrs. Salley may have written some of the checks at the beginning of this time period; however, Mrs. Salley did not normally handle finances, according to Nancy.
[42] Trial Tr. 377-378.
[43] Def. Ex. 7.

bequest of a painting in his will. In subsequent wills, Mr. Gardner expanded his bequest to Nancy to include all of his paintings, his sound system, and his coin collection. When DeLacy interviewed Mr. Gardner in April 2007, she did not believe him capable of executing a new will, but she did observe that Mr. Gardner was able to provide the names of his two children without any prompting. Thus, he was still capable at that time of distinguishing between Nancy and his two natural children.

The primary reason that I decline to extend the mantle of a close family member -- and with it a favorable presumption -- to Nancy is because after Mr. Gardner's stroke in September 2005, the nature of the relationship between Mr. Gardner and Nancy changed as Mr. Gardner came to depend on Nancy to handle his financial affairs and to assist Mrs. Salley in caring for him. This new relationship that developed between Nancy and Mr. Gardner was of such a confidential or dependent nature as to give rise to a fiduciary relationship, *see Coleman v. Newborn*, 948 A.2d 422, 429 (Del. Ch. 2007), even before Nancy was appointed Mr. Gardner's attorney-in-fact on February 27, 2006.[44] Nancy, therefore, owed a duty of loyalty to Mr. Gardner, which obliged her to act in the best interest of Mr. Gardner and to refrain from taking advantage of or exploiting his vulnerability and affection at a time when he was completely dependent upon her and her mother.

A large portion of Mr. Gardner's money was paid directly to or used for the benefit of Nancy, her husband, and her mother after Nancy started handling Mr. Gardner's finances following his stroke in September 2005. A self-dealing transfer is

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[44] Pl. Tab 7, pp. 124-129. The general durable power of attorney only gave Nancy the authority "to make limited gifts to any or all of [Mr. Gardner's] parents, children or lineal descendants in amounts not exceeding the amount which qualifies for the annual exclusion of gifts under the Internal Revenue Code § 2503 ...." *Id.* at 127.

voidable in equity unless the agent can show the fairness of the transaction. As Mr. Gardner's agent, Nancy had the burden to rebut the presumption of fraud by showing the fairness of these transactions. However, a review of the evidence shows that the payments Nancy had described as "gifts" far exceeded in value any gift Mr. Gardner previously had given her and her husband, which strongly suggests overreaching by a fiduciary. Nancy's explanation for the "reserve" payments was shown on cross-examination to be lacking any credibility. Furthermore, the payments Nancy had described as "household expenses" were not supported by receipts in most cases, and Nancy admitted that she may have kept some of these funds for herself.

At trial, Nancy claimed that Mr. Gardner had consented to her having an American Express credit card, had authorized the gifts, and had encouraged her to use his money for her and Michael's expenses and Alaskan vacation. Even assuming Nancy's self-interested testimony to be credible, there is no evidence that Mr. Gardner received impartial advice from a competent and disinterested third person and fully understood what he was doing before conferring such benefits upon Nancy. *See id. See also Dorman v. Plummer*, 2001 WL 32645, at *6 (Del. Ch. Jan. 9, 2001); *White v. Lamborn*, 1977 WL 9612, at *5 (Del. Ch. Mar. 15, 1977). Nancy thus failed to overcome the presumption of fraud by showing the fairness of these transactions.

It is undisputed that Mrs. Salley served as a caregiver for Mr. Gardner during the last few years of his life. During this time, some of Mr. Gardner's funds were used to pay Mrs. Salley's personal expenses. In addition, Nancy hired aides to assist Mrs. Salley in caring for Mr. Gardner. There were other expenditures that may have been for Mr. Gardner's medical supplies, medications, personal needs, etc. In my draft report, I

ordered Nancy to provide a formal accounting of her handling of Mr. Gardner's funds. A formal accounting, supported by bank statements, receipts, invoices, cancelled checks, and other relevant documents, may give Nancy an opportunity to demonstrate that some of her expenditures were, in fact, incurred for the benefit of Mr. Gardner. In this manner, Nancy may be able to reduce the amount of money she might otherwise be required to compensate Mr. Gardner's estate for her self-dealing transactions and misuse of Mr. Gardner's property. Respondents' second exception is therefore dismissed.

Having dismissed both of Respondents' exceptions for the reasons stated above, I am adopting my draft report as my final report.