SAM GLASSOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: December 15, 2012
Decided: January 2, 2013

Grayling R. Davis
966 Warren Avenue
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Re: *Davis v. Estate of Mary S. Perry*,
Civil Action No. 2419-VCG

Dear Counsel and Mr. Davis:

This matter is before me on a petition to review the Will of Mary S. Perry. The Petitioner, Grayling Davis, is the grandson of the Decedent, Mary S. Perry. Mr. Davis's mother, the daughter of the Decedent, predeceased her; Mr. Davis is the Decedent's sole heir at law. The Decedent executed a will on May 14, 2001 (the "Will"). Davis filed this action, contesting the Will on grounds of undue influence and lack of testamentary capacity.

The Decedent's Will is peculiar in that its single dispositive paragraph bequeaths the Decedent's real property to a relative, Walter Howie, and

specifically attempts to disinherit Davis.[1] The Will (although it was drafted by a Delaware attorney, Darryl Fountain) contains no residuary clause. As a result, other than the parcel of real property bequeathed to Howie, the entirety of the estate passes under the laws of intestate succession. In a prior decision in this matter, I found that the disinheritance language of the Will was ineffective to prevent Mr. Davis from taking the property which passed, not by will, but by statute.[2]

Davis challenged the Will on grounds of undue influence and lack of testamentary capacity.[3] After a one-day trial held on December 19, 2011, I found in a Bench Decision that Davis had failed to demonstrate undue influence.[4] I reserved decision on the issue of testamentary capacity,[5] and permitted post-trial briefing.[6] This is my decision on that remaining matter.

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[1] Resp.'s Trial Ex. 2, Will of Mary S. Perry, Art. IV.
[2] *Davis v. Estate of Mary S. Perry*, C.A. No. 2419-MG, at 2 (Del. Ch. Mar. 12, 2010) (Master's Report).
[3] *See* Pre-trial Stip. & Order 1, 4 (Nov. 30, 2011).
[4] *Davis v. Estate of Mary S. Perry*, C.A. No. 2419-MG, at 231-32 (Del. Ch. Dec. 19. 2011)(TRANSCRIPT) (hereinafter "Trial Tr.").
[5] *Id.* at 230:12-15.
[6] Though Trial was held in December 2011, the Petitioner requested extra time to file his Opening Brief; the Brief was not filed until October 2012. The Respondent's Answering Brief was filed on November 2, 2012. The Court wrote to Mr. Davis, giving him until December 15, 2012 to file a Reply Brief, if he so desired. No Reply Brief was received by that date. Mr. Davis contacted the Court by telephone after the December 15, 2012 deadline, asking for an extension. He was directed to file a written request for an extension if he wished for the Court to consider his request. No written request has been received as of this date. As a result, I have decided the issue based on the Opening and Answering Briefs. The submitted date for this decision reflects the date Mr. Davis was given as a deadline to file his Reply, December 15, 2012.

A decedent is presumed to have testamentary capacity when she creates an otherwise-valid will.[7] The burden is on the challenger of the will to demonstrate that the testatrix lacked the minimal capacity required to make a will.[8] In order to possess that minimal capacity, a testatrix must be able to exercise judgment.[9] She must understand that she is committing a testamentary act, as well as comprehend the natural objects of her bounty and, generally, the extent of the property she owns.[10] Because I find that Davis has failed to demonstrate that Mary Perry lacked testamentary capacity on May 14, 2001, I find the Decedent's Will to be valid.

The evidence concerning capacity is rather sparse. I have carefully considered the medical records placed in evidence.[11] When Ms. Perry executed her Will in 2001, she was an elderly widow living alone. At the time, she was still driving and living a relatively independent life. Shortly after executing the Will, she moved in with a relative, William Smith. Subsequently, her health declined and she was admitted to a nursing home. By the time of a hospitalization in 2003—two years after executing her Will—she was found to be incompetent by her physician, triggering a power

[7] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987)(discussing the requirements and burden of proof for challenging a testator's testamentary capacity).
[8] *Id.*
[9] *Id.*
[10] *See id.* ("[T]he law requires [the testator] to have known that she was disposing of her estate by will, and to whom.").
[11] Pet.'s Trial Ex. 1, Medical Records of Mary S. Perry from 1999-2003.

of attorney in favor of Mr. Smith.[12] Her health continued to decline until her death in 2006.

While it is clear that Ms. Perry was elderly and suffering from a number of ailments, including depression and, at some unknown point, an apparent stroke, there is nothing in the medical records in evidence indicating that she was incompetent at the time she made her Will in 2001.

The testimony as to her condition is likewise not conclusive. Bessie May Ross, who knew the Decedent well, testified that she was sometimes confused as early as the time she made her Will.[13] The Petitioner, Mr. Davis, was incarcerated in Massachusetts at the time and was not in contact with the Decedent, except by telephone.[14] He testified, however, that she seemed confused to him on the telephone.[15] The fact that a testatrix suffers from confusion does not prevent her from creating a valid will if on the day the will is executed she is not confused and possesses an understanding of her property and the natural objects of her bounty.[16] The interested testimony

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[12] *See* Resp.'s Trial Ex. 1, Letter from Dr. Robert M. Wilson, Jr. 1 (June 6, 2003)("Please be aware that our patient Mary Perry, is not capable of making her own informed decisions at this time. Mrs. Perry's family will need to make all important decisions regarding Mrs. Perrys [sic] medical health and finances.").
[13] Trial Tr. 26:21-27:17.
[14] Trial Tr. 74:2-3, 75:9-12, 77:17-20.
[15] Trial Tr. 94:16-95:10.
[16] *See West*, 522 A.2d at 1263 (finding that a testatrix possessed testamentary capacity to make a will, despite evidence that she had appeared disheveled and confused days before the will was drafted).

of Mr. Davis, as supported by the testimony of Ms. Ross and the medical records, is insufficient to overcome the presumption that on May 14, 2001, Ms. Perry had that capacity to create a will.

In addition, there is evidence which strengthens the presumption of capacity. The Decedent's attorney, Darryl Fountain, testified that she was competent to create a will at the time the Will was executed.[17] He testified that the Will represented Ms. Perry's final wishes at the time it was signed.[18] William Smith and his brother, Marvin, the Administrator of the Estate, both testified that Ms. Perry was competent in the year 2001,[19] as did another witness, Irene Millican-Mann, who saw Ms. Perry frequently in 2001.[20] Since the Smiths are interested in this litigation, and because of the evident hostility between Ms. Millican-Mann and the Petitioner,[21] I give none of these testimonies great weight. They do, however, present a consistent

[17] Trial Tr. 38:17-19.

[18] Trial Tr. 38:13-16. As Mr. Davis points out, Mr. Fountain is a disbarred Delaware attorney. *See In re Darryl K. Fountain*, 913 A.2d 1180, 1189 (Del. 2006) (explaining the reasons for Mr. Fountain's disbarment). I have taken this into account in assessing the credibility of his testimony, together with the fact that he arranged a loan from Ms. Perry to one of his relatives during the time that he represented her. Trial Tr. 45:4-24.

[19] Trial Tr. 103:15-104:7. Mr. Marvin Smith, the non-beneficiary administrator under the Will, drove Mrs. Perry to Mr. Fountain's office to sign the Will on May 14, 2001. *Id.* Marvin testified that Mrs. Perry gave him directions to the office and seemed to be aware of her assets and family members. *Id.* Mr. William Smith testified that, in May 2001, Mrs. Perry was "competent in doing anything that she did." Trial Tr. 164:3-10.

[20] Trial Tr. 211:13-16, 216:8-15.

[21] *See, e.g.*, Trial Tr. 220-21.

picture of Ms. Perry as an intelligent, strong-willed, and beloved figure in her family who knew her own mind and was able to act upon it.

The Will itself is consistent with this view. Without elaborating further, the disinheritance clause regarding Mr. Davis does not seem unusual in light of the circumstances in which he found himself at that time. Mr. Davis argues that the lack of a list of property to be distributed, as well as the lack of a residuary clause in the Will, indicates that his grandmother did not know her mind at the time of execution.[22] It seems much more likely to me, however, that the lack of a residuary clause was a scrivener's error; the Will in its administrative provisions refers to Ms. Perry's great-grandchildren[23]—Mr. Davis's children—and I suspect that a residuary clause in their favor was simply omitted from the Will. This error, if error it was, has redounded to Mr. Davis's benefit, as he receives the residue of the Estate under the statute of intestacy.

Such evidence as exists, therefore, taken as a whole, moderately supports the presumption that Mary Perry created her Will with testamentary

[22]Trial Tr. 91:15-21 ("I feel given my discussions with my grandmother that she was in no condition to sign any will. I don't want to -- not only in 2001 but in 2002 or 2000 or even '99 given the fact that you have to know what the nature of your property is. And no one goes into the will and doesn't give away their property.").

[23] Resp.'s Trial Ex. 2, Will of Mary S. Perry, Art. III (May 14, 2001)("If my great grandchildren, other legatees or devisees in this Will shall die with me under such circumstances that it cannot be determined which of us survived the other, then my great grandchildren . . . shall be presumed to have survived me for the purpose of the Will.").

capacity. Having determined that Mary Perry had capacity to create a will on May 14, 2001, and having earlier decided that that Will was not the product of undue influence, I find the Will of Mary Perry to be validly executed, and Mr. Davis's petition to invalidate the Will is denied.

Finally, Mr. Davis has moved to be appointed successor administer of Ms. Perry's estate, in anticipation, no doubt, that the Will would be struck down.[24] Given my decision here, such an appointment would be inappropriate. As a result, Mr. Davis's Motion to Appoint the Plaintiff as Successor Administrator of the Estate is denied.

To the extent that the foregoing requires an order to take effect,

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[24] Mot. Appoint Pl. Successor Admin. Estate 1, Oct. 2, 2012.