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Case Number 568,2014

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| **JOHN A. McCLOSKEY, personally and as Executor of The Estate of Edward McCloskey, THE ESTATE OF EDWARD McCLOSKEY.** | * * * * | **No. 568,2014** |
| **Respondents-Below, Appellants.** | * * | |
| **vs.** | * * * | **Court Below, Chancery Court of the State of Delaware,** |
| **RICHARD A. MCCLOSKEY,** | * * | **C.A. 6061- AGB** |
| **Petitioner-Below, Appellee.** | * | |

# APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

## NATURE AND STAGE OF PROCEEDINGS

On February 17, 2011, Appellee Richard McCloskey filed an Amended Complaint seeking, in part, specific performance of an oral promise to make a will, the imposition of a constructive and/or resulting trust over the subject real property, and the rescission of a 2008 deed conveying three (3) acres of the subject real property to Appellants based upon incapacity. The Court held a trial over four (4) days on April 22, 2013 through April 25, 2013, and concluded on June 24, 2013. At the end of the trial, the Court requested post-trial briefing.

Upon the completion of the post-trial briefing, the Court issued a Draft Report from the bench on December 3, 2012. The Appellants subsequently took exceptions to the Draft Report, and the Court requested further briefing on the exceptions. The Court then issued its Final Report on April 24, 2014, and the Appellants then took exceptions to the Final Report. [1]

On September 3, 2014, Chancellor Bouchard issued a Memorandum Opinion affirming the Master's Final Report and overruling the Appellants' exceptions. Appellants then filed this appeal and submitted their Opening Brief. This is the Answering Brief filed on behalf of the Appellee/Petitioner Below.

[1] All references to the trial transcript are designated "TT", followed by the page number in the trial transcript. All references to the Joint Exhibits are designated "JX" followed by the tab number in the Joint Exhibit notebook. All references to Appellee's Exhibits are designated "PX" followed by the tab number in the Appellee's trial notebooks. All references to Appellants' Exhibits are designated "RX" followed by the tab number in Appellants' trial notebook.

## SUMMARY OF ARGUMENT

I. WHETHER THE EVIDENCE PRESENTED AT TRIAL FAILED TO SUPPORT A FINDING OF AN ORAL CONTRACT TO MAKE A WILL? DENIED.

II. WHETHER THE FINDING OF THE COURT REGARDING THE ORAL CONTRACT TO MAKE A WILL FAILED TO COMPLY WITH THE STATUTE OF FRAUDS AT 6 DEL. C. §2715? DENIED.

III. WHETHER THE ORAL CONTRACT BETWEEN THE DECEDENT AND THE APPELLEE WAS NOT SUPPORTED BY ADEQUATE CONSIDERATION? DENIED.

IV. WHETHER THE ALLEGED ORAL CONTRACT WAS TOO VAGUE TO BE ENFORCEABLE? DENIED.

V. WHETHER THE 2008 DEED WAS IMPROPERLY RESCINDED? DENIED.

## STATEMENT OF FACTS

Background

Edward McCloskey was the father of the Appellee, Richard McCloskey, and Appellant, John McCloskey. (TT28) Edward was born on June 8, 1914, and he died on September 1, 2010 at the age of 96. (TT147; JX16) During his lifetime, he was married one time, to Mary, whom he divorced in approximately 1963. (TT32) At the time of trial, Richard was 72 years old, having been born on May 11, 1941. (TT26) His brother, John, is 11 years younger.

Edward's First Request for Richard to Live in his Home

In 1963, Edward asked his son, Richard, and Richard's wife Wanda, to move into his home to help care for Edward's father, Jerry, who was 77 years old at the time, and to assist with the family farm. (TT36-38,39,337,338,) As newlyweds with a new mobile home, Richard and Wanda did not need a place to live. However, they moved into Edward's home at his request, and Richard and Wanda have lived in that home for the past 50 years. (TT30,40,335)

When Richard and Wanda moved into the home, Richard's wife, Wanda, took over all of the chores for the three men in the household – her husband Richard, his father Edward, and Edward's father Jerry. (TT339,475) Wanda did all the domestic chores even when she worked a full-time job. (TT475) Wanda also

provided care for Jerry as he aged. If Edward had not asked Richard to move in, he would not have done so. (TT39)

Farm Family and Improvements Made by Richard to the Home in Exchange for Edward's Promise

The McCloskey family always farmed in some capacity, and after Richard and Wanda moved into Edward's home in 1963, Richard began to farm the property on a full-time basis. In 1963, the home was dilapidated, and numerous improvements were necessary. (TT33,34,46) Thus, over the next 10 years, Richard paid to "close-in" the front porch, add a bathroom downstairs, replace the roof, and add a new cement patio. (PX23) In 1975, Richard paid to install siding on the house, replace all the windows upstairs, and install a French drain. (TT45)

On each and every occasion, from the very first improvement, Richard asked his father whether he wanted him (Richard) to pay for the improvement, and on each occasion, Edward always informed Richard that he (Richard) should pay for the improvement because the property was going to be Richard's one day anyway. (TT46,340,341) It is undisputed that Edward never paid for a single improvement after Richard moved into his father's home. (TT349) Moreover, Richard and Wanda paid for the utilities and household food. (TT40,340)

Edward's First Will

In 1977, Edward asked Richard to find a lawyer to draft a will when he was 63 years old. (TT65) In response, Richard made an appointment with an attorney, who drafted Edward's first will. (TT65,66) The will was dated June 13, 1977, and it left the subject property to Richard in fee simple, thus memorializing Edward's promise to his son. (TT64-65; JX1)The 1977 will also left John a separate farm in fee simple which was larger than the subject property. (TT66,67,644) Significantly, Richard and/or Edward shared the contents of the 1977 will with John, so that John was informed about what he would receive upon Edward's death. (TT67,642)

During this time, John's resentment of his brother Richard emerged while they were farming the family land together. (TT618) Richard always worked very hard throughout his entire life, and he expected the same of his brother. Eventually, tension built between John, his wife Linda, and Richard. (TT624) In 1980 or 1981, John had an argument with Richard and quit farming with him, without advance notice. (TT782,940)

Edward's Second Request to Richard to live at his Home, and Richard's Continued Improvements

In 1981, Edward's father, Jerry, died when he was 95 years old. (TT73,75) After Jerry's death, Richard and Wanda discussed whether they would continue to live in Edward's home, and as a result of that discussion, Edward told Richard that

he wanted them to continue to live with him to help him out. (TT75,76,220,355,356,646) At that time, Richard and Wanda could have moved to a house on a 238 acre parcel that they had purchased in 1978. (TT76,77) However, based upon Edward's request, Richard and Wanda decided to stay with Edward, and thereafter, Richard paid for additional improvements by remodeling the kitchen and bedroom, upgrading the mechanicals, and installing shutters, a new well, a swimming pool, and grain tanks. (TT52-63,70-73,77,78;PX23,PX24,PX26) On each occasion, Edward told Richard to pay for the repairs and improvements because the property would be his one day anyway. (TT72,73)

Edward's 1991 Codicil

In 1991, when Edward was 77 years old, he again asked Richard to make an appointment with an attorney to draft a codicil to his 1977 will. Richard did so, and Edward executed a codicil dated June 14, 1991. (JX2) The codicil again left Richard the subject property in fee simple, and the larger, Turner farm to John. (TT79,80)

Beginning of Edward's Mental Decline

In 1995, when Edward was 81, he began to show signs of impaired cognitive function, and his relationship with his daughter-in-law, Wanda, began to change. In particular, Edward mistook Wanda for his own wife, and one day when she came home from shopping, Edward kissed her and touched her inappropriately.

(TT83,229,366-368,486-488) Edward thereafter expressed extreme jealousy of Wanda whenever any farm employees were on the property to assist with the farming operation. (TT85,86,245,488,489)

Richard continued to pay for repairs and improvements to the property by running electricity to the barn, insulating the office of the house, making plumbing upgrades, renovating the kitchen in the amount of approximately $74,000, and installing irrigation in the amount of approximately $113,000. (TT87,88) Before each repair or improvement, Richard asked his father whether he should pay for the expense, and on each occasion, Edward told Richard that he should pay because the property would be his one day anyway.

1997 Will

In 1997, Edward made the first significant change to his estate plan. In April, 1997, Edward wrote a note dated April 25, 1997 that indicated that Wanda had scolded him. (RX33) Shortly thereafter, according to John, Edward requested John to schedule an appointment with a lawyer to make changes to his estate plan. John did so and participated in the office conference with the lawyer. (TT654,655) John was intimately involved with the changes to Edward's estate plan, as evidenced by the notes that John wrote and dated May 9, 1997 and May 11, 1997. (TT852, RX38)

On the way to the appointment with the lawyer, John discussed the changes that his father planned to make to his will. (TT657) Despite knowing this information, John never told Richard about the appointment, or Edward's intentions. (TT96,97,654) He also admitted he was not concerned about the effect that his secretiveness would have on his relationship with his brother. (TT662)

Edward's change to the 1977 will eliminated Richard's fee simple interest in the subject property, and instead, left Richard a life estate. (TT95,96,863-865; JX3) Edward never told Richard about the change. (TT96) Unaware, Richard continued to pay thousands of dollars for improvements to the subject property thereafter. Richard only found out about the change after Edward died in 2010. (TT96) Richard testified that he would not have continued to pay for the improvements if he had known that he was only left a life estate. (TT100) As John explained, he kept the 1997 will a "secret from everyone." (TT948)

John's Facilitation of Negative Feelings Against Richard

In April, 2000, when Edward was 86 years old, John helped his father write a list of complaints about his brother, Richard. (TT671) According to John, he sat with Edward for two to three hours and listened to him recite specific details about a number of events spanning 30 years or more. (TT674,675) When asked why he thought it was important to record Edward's comments and have him sign a

document, John simply answered: "So the rest of the family would know down the road." (TT682)

A month later, John took his notes and gave them to his wife, Linda, who then typed them up for Edward to sign. (TT669;JX21) John never shared any of this information with Richard, who remained in the dark about what his brother had done until after Edward's death. The substance of the notes reflects additions and edits made by both John and Linda. (TT672,673,676,881,884,1003-1006) In fact, John conceded at trial that he prompted his father to write about some of the grievances. (TT673) At trial, Richard and Wanda rebutted the allegations in the document prepared by John and his wife. (TT254-286,371,494-499)

Edward's Declining Health; John Takes Unilateral Control of Edward's Medicine

In 2001, Edward had knee replacement surgery when he was 87 years old. Thereafter, Edward's need for care increased, and he slept downstairs in his home and began to use a walker. (TT376) Edward also started to exhibit poor personal hygiene, to the point where Wanda had to remind him to brush his teeth every day. (TT377,501) By this time, Edward could not live on his own. (TT380) Edward could no longer bathe or dress himself without assistance. (TT118,119,122) Significantly, between 1997 and 2001, John stated that Edward had experienced "a couple strokes". (TT664) At this time, John unilaterally took control of Edward's medications, but he did not discuss Edward's medications with Richard or Wanda

despite the fact that Edward lived with them and were providing his primary care. (TT126,686) By this time, Edward was taking Exelon for dementia. (TT128; JX18)

John Takes Unilateral Control of Edward's Finances

In the early 2000s, John also took unilateral control of Edward's finances, because Edward could no longer manage them himself. (TT687) After John took control of Edward's finances, he refused to pay Richard or Wanda for any of Edward's daily living expenses from Edward's funds. (TT378,500) Instead, Richard and Wanda paid for those expenses.

2003 - Edward's Inappropriate Behavior

In the spring of 2003, when Edward was 89 years old, he made inappropriate advances toward and comments to, his two six-year-old granddaughters while in his home with Wanda present. (TT136,389-392) Specifically, Edward asked one of his granddaughters if she wanted to sleep with him, and he asked the other granddaughter if she wanted to see his "pee-pee" as he pointed to his genitals. (TT132-135,506-509,512-514) The granddaughters were upset by these comments, and Wanda admonished Edward on both occasions. (TT510) After Wanda scolded Edward for his inappropriate behavior, Edward's demeanor toward Wanda became mean. (TT136,392)

Edward's Second Significant Change to his Estate Plan - 2003

The import of Wanda's scolding appeared several months later, when in July 2003, Edward made the second significant change to his estate plan. Again, John scheduled the appointment with a lawyer for Edward to change his will, and again, John participated in the office conference with the lawyer. (TT698) John's explanation for sitting in the office conference was "[b]ecause they didn't tell me not to." (TT698) Like before, John remained secretive. He specifically instructed the lawyer's office not to send any correspondence to Edward's home in order to prevent Richard and Wanda from knowing what was happening. (TT696;JX4) The 2003 will eliminated Richard's life estate, and instead, provided him one year to reside on the subject property after Edward's death. (JX5) Neither John nor Edward ever told Richard about this substantive change. (TT702,901)

Jordan McCloskey's Observations 2001-2004

Between 2001 and 2004, Jordan McCloskey resided in the McCloskey home with Richard, Wanda, and Edward approximately four nights per week. Jordan is Richard's daughter-in-law. (TT540) During this time, she observed Edward yelling to himself daily about different family members and events, which made her uncomfortable. (TT545,546,581) Jordan also heard Edward promise the farm to Richard "multiple times", and she described Edward's comments in detail. (TT548,549,582,583) Even after she moved out of the home in 2004 following her

marriage, she heard Edward tell Richard to pay for improvements to the property because "it's gonna be yours [Richard's] anyway." (TT550)

Jordan also described John's secretive behavior in the 2002-2003 time frame, for example, by visiting Edward when Richard and Wanda were not home. (TT563) She specifically recalled an incident when John came over to visit Edward when Richard and Wanda were not home, not realizing that Jordan was present. On that occasion, John was standing over Edward (who was sitting at the kitchen table) holding a plain piece of white paper over several papers underneath, thus covering the writing. John told his father: "Sign here dad. Sign here. Okay. Sign here. Date. Sign here." (TT563,564,594,595) When John saw Jordan, he gathered his papers and left. (TT564)

2005 to 2008

By 2005, Edward exhibited significant confusion, memory loss, and cognitive impairment. (RX53) On November 22, 2005, Edward's family doctor declared him incompetent. (RX40)

2008 Deed - John Has Edward Convey Property to Him

Despite Edward's incompetence, three years later John had his father convey 3 +/- acres of property to him in 2008, which was carved out of the subject property and added to John's adjacent parcel. (TT729,732,946,947;PX28) John took the 3 acres even though he knew that the 2003 will conveyed the property to

him and his sister. (TT730) Edward conveyed the property to John without any consideration. (TT732) John did not disclose to the attorney who prepared the deed that Edward had been diagnosed with Alzheimer's or that he had been declared incompetent. (TT732)

Edward died on September 1, 2010 at the age of 96. As executor, John mailed a copy of the 2003 will to Richard, which was the first time Richard was notified that he only had one year to live on the subject property after having lived there for the previous 47 years. Upon reviewing the 2003 will, Richard was stunned. (TT130)

John's Positions and Attitude through the Trial

Throughout the case, John maintained one continuous, inflexible position: that the Court should honor his father's 2003 will, regardless of the consequences to Richard, and ignore the prior 60 years of history, the relationships between the parties, the prior promises made, Richard's detrimental reliance thereon, and John's own duplicitous conduct. In John's view, the 2003 will was, and is, the beginning and the end of the story. In fact, when asked why he thought the 2003 will was fair, John's response was only: "Because that is [ ] my father's will." (TT704)

Aside from his callous resentment for his brother, John's credibility on numerous factual issues was undermined by continuous alterations in his trial

testimony, particularly when he was confronted with prior testimony. For example, John impeached himself by giving contradictory testimony regarding his knowledge of Edward's safe. Allegedly, Edward kept $100,000 in cash in his safe. (TT233,234) At trial, the following exchange occurred between John and his attorney:

Mr. Shrum: Did you ever at any point open your father's safe with or without your father being present?
John: No.
Mr. Shrum: So did you ever see that safe open personally first hand witness?
John: No. (TT793)

The next day of trial, the following exchange occurred between John and his attorney:

Mr. Shrum: Did your father tell you that he had kept those documents in his safe?
John: Did he tell me?
Mr. Shrum: Yes.
John: No. I was upstairs and saw him have the safe open. (TT828)

Likewise, John gave contradictory testimony regarding his discussions with Edward about changes to Edward's 1997 will. At trial, John first testified that he did not have any discussions with Edward about planned changes before they drove together to the lawyer's office in 1997. (TT944) However, when confronted with his notes dated May 9, 1997 and May 11, 1997, John conceded that he discussed the changes with Edward a month before they met the lawyer. (TT944;RX38)

Appellants' Misrepresentations in the Statement of Facts

Appellants' Opening Brief contains several factual misrepresentations which fail to comport with the trial record. As an initial example, Appellants allege on page 5 that "[i]t is clear that Richard and Wanda began to resent the additional care Edward needed as he aged, which ultimately proved the basis for the deterring relationship between them." For support, Appellants cite to TT690. However, a quick review of that page from the trial transcript reveals nothing to support this factual allegation.

As a further example of the Appellants' factual misrepresentations, Appellants claim that "[n]o one other than Richard, Wanda or Jordan McCloskey ever heard Edward" make the statement that the property would one day belong to Richard. Appellants are wrong, because they ignore the testimony of Chuck Holliday, who testified that he heard Edward tell Richard that the property would be given to Richard on two different occasions. (TT444,462)

On page 12 of his Opening Brief, Appellants make a bold and absolutely false representation against Appellee and counsel, by stating: "Although Petitioner did not turn over any documents from the decedent during discovery phase in this matter, what documents the Estate was able to locate showed quite clearly that Edward was interested in and kept records of his financial dealings." To the contrary, any and all documents regarding Edward's estate plans, health care,

finances, and personal matters were produced by Appellee to the Appellants during discovery, and in fact, many of those documents appeared in the Joint Exhibit notebook, as well as the Appellants' own Exhibit notebook.

On page 13 of his Opening Brief, Appellants contest that Richard paid for improvements to the property. Particularly, the Appellants state on page 13 of their Opening Brief:

> The specifics of the record regarding the alleged promise and any such repairs or improvements deserve closer scrutiny. . . . . Most of the items listed on joint Exhibit 24 as "improvements", in actuality upon closer inspection were merely repairs or maintenance issues that Richard, Wanda and the family enjoyed the use of since they resided at the home for over 50 years.

The Appellants' assertion is betrayed by the documents showing the numerous improvements paid by Appellee, including the following: adding a bathroom downstairs (1974), adding a cement patio (1974), adding aluminum siding (1975), installing a French drain (1975), installing electric upstairs (1976), installing electric heat in the living room and kitchen (1976), installing a new well (1979), installing a swimming pool (1979), installing central air upstairs (1991), building a new barn (1994), and remodeling the kitchen (1995).

## ARGUMENT

### I. THE EVIDENCE SUPPORTED A FINDING OF AN ORAL CONTRACT TO MAKE A WILL.

a. Question Presented:

Did the evidence support a finding of an oral contract to make a will?

b. Scope of Review:

When the Court sits as the trier of fact, it determines the weight to be given to witness testimony on any particular issue. In determining the weight and credibility of witness testimony, the Court must consider the fairness, interest, or bias of each witness, the opportunity to know of the circumstances about which each witness testifies, and all other facts and circumstances that test the accuracy of the witnesses' testimony. *In Re Langmeier*, Del. Chan., 466 A.2d 386,405 (1983) (*citing Benson v. Wilmington City Ry. Co.*, Del. Super., 75 A. 793 (1910).

Appellants contend that the Chancellor got the facts wrong. Thus, their arguments do not invoke the *de novo* standard of review. Instead, their arguments invoke the standard for Supreme Court review of findings of fact by a trial court: "We review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong." *Reserves Development LLC, et. al., v. Crystal Properties LLC,* Del. Supr., 986 A.2d 362, 367 (2009) (citing *Levitt v. Bouvier,* Del. Supr., 287 A.2d 671, 673 (1972); see also *Marciano v. Nakash*, Del.

Supr., 535 A.2d 400 (1987) (holding that the Supreme Court was not free to reject a Vice Chancellor's factual findings unless they were without record support or not the product of a logical deductive process). With this standard in mind, the Appellee will address each of the Appellants' arguments set forth in their Opening Brief.

c. Merits of Argument:

As noted in the Chancellor's Memorandum Opinion, the Appellants' arguments implicate various factual findings and credibility determinations made by the Trial Court. In this case, Chancellor Bouchard "independently reviewed the entire record of this case and carefully considered the demeanor of the witnesses" from the trial transcript and the videotape. (Mem. Op. at p. 27) Following his independent review, the Chancellor agreed with "each of the factual and credibility determinations in the Master's well-reasoned report." *Id.* Appellants now file this appeal in a last attempt to reverse the decision.

The Appellants first dispute the Court's factual finding that Edward made an enforceable contract with Appellee to convey him the subject property. As support, the Appellants regurgitate prior positions and self-serving, conclusory allegations from prior briefs.

Initially, the Appellants take issue with the Court's citation of *Hunter v. Diocese of Wilmington*, Del. Chan., 1987 WL 15555, Allen, Ch. (August 4, 1987),

which was cited simply for the basic elements of a contract required under Delaware law: 1) a promise, 2) offered to another, 3) with some consideration flowing to the first party, 4) which is unconditionally accepted by the second party. The Court's citation of this case stood for nothing more, and the Chancellor's Opinion analyzed in detail how the Appellee's evidence fulfilled the legal requirements to establish a contract under Delaware law.

Unsatisfied with the Court's analysis, Appellants simply "dispute that any 'promise' was made by Edward to the Appellee." (Appellants' Opening Brief at p. 19) Tellingly, the remaining portion of the Appellants' argument on this issue recycles positions already set forth in their prior briefs without any additional legal analysis or argument, or a single citation to the record, as to how the Court erred in its interpretation of the facts to find that Edward entered into an oral contract to make a will to leave Appellee the subject property.

More egregiously, in order to prop up their argument with substance, the Appellants make up facts in an effort to create a different record from that which was presented at trial. For example, on page 19 of the Opening Brief, Appellants state that "Edward did not ask for any repair or improvement to be made to his home." There is no evidence to support this assertion. As another example, Appellants contend that Edward's acceptance of the improvements "could just as easily been intended to mean that if the Appellee wanted to make the suggested

improvement or repair, the Appellee should pay for it." (Opening Brief at p. 20) Such a suggestion consists of conjecture and speculation, offered with the hope that this Court will now accept a new interpretation of the facts.

The Appellants next attempt to distinguish *Eaton v. Eaton*, Del. Chan., 2005 WL 352910 (December 19, 2005) from the instant case, based upon the fact that the two sons in *Eaton* did not live with their father, and that the sons did not dispute that their father made a promise to leave two of them the subject property. While the facts in *Eaton* are different from the facts of this case in those two respects, the main point in *Eaton* was that the party seeking to enforce an oral contract to make a will must establish that the part performance "occurred in reliance on the oral agreement, suggesting a *quid pro quo* arrangement." *Id.* (citing *Bousch v. Hodges*, Del. Chan., 1996 WL 652762 at *6 (1996)).

In this case Richard presented, and the Chancellor found, clear and convincing evidence suggesting a *quid pro quo* arrangement, where Edward promised to make a will leaving Richard the subject property in fee simple in exchange for Richard's agreement to care for his father and pay for all repairs and improvements to the property. Consistent with the elements set forth in *Eaton*, Richard proved the following at trial:

a. <u>A promise on the part of one party to act or refrain from acting in a given way</u> (TT 33, 26-38, 46, 72, 73, 337, 357, 340; PX23, PX24, PX25, PX26)

Chuck Holliday and Jordan McCloskey both testified that they heard Edward promise Richard the property on several occasions. (TT 444, 462, 548, 549, 582, 583) Neither witness was a beneficiary of any of Edward's wills, thus, both should be considered disinterested, corroborating witnesses.

Further, Edward memorialized his promise to Richard in writing by executing the 1977 will leaving Richard the subject property in fee simple. (JX1) Edward subsequently confirmed his promise to Richard again in writing by executing the 1991 codicil leaving Richard the subject property in fee simple. (JX2) Richard continued to make improvements to the subject property thereafter.

b. A promise offered to another in a manner in which a reasonable observer would conclude that the first party intended to be bound by acceptance.

i. Edward never paid for any repairs or improvements to the property over the 47 years that Richard and Wanda resided there when Edward was living. (TT349) The lack of evidence to show that Edward paid for repairs or improvements over the 47 year period indicated that Edward intended to be bound by his promise that he would leave the property to Richard.

c. Consideration flowing to the first party (Edward)

After moving onto the property in 1963 at Edward's request, Edward again asked Richard and Wanda in 1981 to live in his home to care for him as he aged. Thereafter, Richard paid for numerous repairs and improvements to the property,

totaling thousands of dollars, itemized above in the statement of facts, and reflected by the numerous receipts in Petitioner's exhibit notebooks. (TT45, 52-63, 70-73, 77, 78, 149, PX23, PX24, PX25, PX26) From the mid-1990s, when Edward first started to exhibit impaired cognitive function, until his death in 2010, Wanda and Richard provided personal care to Edward by taking care of him.

d. Consideration is accepted by the second party (Richard) verbally or through performance

Richard and Wanda accepted Edward's promise to leave Richard the property by paying for the improvements and caring for his father. The care provided to Edward over many years by Richard and Wanda, including the cooking, cleaning, bathing, personal grooming, laundry, and other personal services, reflected Richard and Wanda's acceptance of Edward's promise to leave Richard the subject property.

While Appellants raise the specter of opening the "floodgates" of "unwarranted litigation" if the Chancellor's decision stands, such hyperbole is unwarranted. The facts in this particular case reflect that rare situation where an oral promise to make a will is proven by clear and convincing evidence. In this case, the Chancellor's conclusion that Edward orally promised to make a will leaving Richard the subject property was supported by clear and convincing testimony from four witnesses, two of whom were third-party witnesses without

any legal or financial interest in the outcome, as well as numerous documents spanning five decades.

Understandably, if the only evidence in this case to support Edward's promise consisted of Richard and Wanda's sole testimony and nothing else (in the form of documentation or corroborating testimony), then perhaps the Chancellor would have found differently under the clear and convincing standard required by Delaware law. However, Richard and Wanda's unrefuted testimony was supported by hundreds of pages of documentation and other witnesses that proved Richard's performance of his agreement, and Edward himself left evidence of his promise in the form of his 1977 will and 1991 codicil, which devised the subject property to Richard upon his death.

For these reasons, Appellants' first argument on appeal should fail.

## II. THE ORAL CONTRACT TO MAKE A WILL COMPLIED WITH WELL-SETTLED EXCEPTIONS TO THE STATUTE OF FRAUDS.

a. Question Presented:

Did the oral contract to make a will comply with well-settled exceptions to the statute of frauds?

b. Scope of Review:

When the Court sits as the trier of fact, it determines the weight to be given to witness testimony on any particular issue. In determining the weight and credibility of witness testimony, the Court must consider the fairness, interest, or bias of each witness, the opportunity to know of the circumstances about which each witness testifies, and all other facts and circumstances that test the accuracy of the witnesses' testimony. *In Re Langmeier*, Del. Chan., 466 A.2d 386,405 (1983) (*citing Benson v. Wilmington City Ry. Co.*, Del. Super., 75 A. 793 (1910).

Appellants contend that the Chancellor got the facts wrong. Thus, their arguments do not invoke the *de novo* standard of review. Instead, their arguments invoke the standard for Supreme Court review of findings of fact by a trial court: "We review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong." *Reserves Development LLC, et. al., v. Crystal Properties LLC*, Del. Supr., 986 A.2d 362, 367 (2009)

c. Merits of Argument:

Appellants' next argument on appeal consists of approximately a page and a half, and is based upon the Statute of Frauds set forth at 6 Del. C. §2715. This argument can be dispatched quickly by noting that this Court previously has recognized an equitable exception to the Statute of Frauds as it relates to oral promises to make a will. *Sheppard v. Mazzetti*, Del. Supr., 545 A.2d 621 (1988) (finding clear and convincing evidence that a son met his burden of establishing the existence of an oral promise by his father to devise the family home to his son in return for the son's promise to continue to manage the family business and care for his father for the rest of his life).[2]

Accordingly, while the Appellants evoke the "fear factor" by suggesting that the Chancery Court's Memorandum Opinion "would create new case law not recognized in any other jurisdiction", the Appellants undermine their own argument by noting in their very next argument that oral promises "to make a will are recognized in Delaware." (Opening Brief at p. 28)

[2] Even the annotations following 6 Del. C. §2715 in West's Delaware Code Annotated specifically reference the cases creating an exception under Delaware law to the statute of frauds, when there is evidence of actual part performance of an oral agreement to make a will.

## III. THE ORAL CONTRACT BETWEEN APPELLEE AND HIS FATHER WAS SUPPORTED BY ADEQUATE CONSIDERATION.

a. Question Presented:

Was the oral contract between Appellee and his father supported by adequate consideration?

b. Scope of Review:

When the Court sits as the trier of fact, it determines the weight to be given to witness testimony on any particular issue. In determining the weight and credibility of witness testimony, the Court must consider the fairness, interest, or bias of each witness, the opportunity to know of the circumstances about which each witness testifies, and all other facts and circumstances that test the accuracy of the witnesses' testimony. *In Re Langmeier*, Del. Chan., 466 A.2d 386,405 (1983) (*citing Benson v. Wilmington City Ry. Co.*, Del. Super., 75 A. 793 (1910).

Appellants contend that the Chancellor got the facts wrong. Thus, their arguments do not invoke the de novo standard of review. Instead, their arguments invoke the standard for Supreme Court review of findings of fact by a trial court: "We review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong." *Reserves Development LLC, et. al., v. Crystal Properties LLC*, Del. Supr., 986 A.2d 362, 367 (2009)

c. Merits of Argument:

Appellants' third argument on appeal is really not an argument at all, because the Appellants fail to cite any specific factual errors made by the Chancellor in his Memorandum Opinion. Instead, the Appellants recycle arguments raised in their prior arguments and briefs. Be that as it may, with respect to whether there was adequate consideration to support Edward's oral promise to leave Richard the subject property in fee simple, the Chancery Court specifically noted in its Memorandum Opinion the following:

> Having independently reviewed the entire record in this case and carefully considered the demeanor of the witnesses from my review of the videotape, I agree with each of the factual and credibility determinations set forth above for the reasons explained in the Master's well-reasoned report. In my opinion, moreover, it would be inequitable to deny Richard the benefit of the bargain he struck with his father because Richard dutifully performed his end of that bargain for 47 years, from the date he moved back to the Property in 1963 until Edward died in 2010. (Memorandum Opinion at pp. 27-28)

Accordingly, under the deferential standard of review afforded to the Court below, the Appellants' argument here must fail.

## IV. THE ORAL CONTRACT WAS CLEAR SO AS TO BE ENFORCEABLE.

a. Question Presented:

Was the oral contract clear so as to be enforceable?

b. Scope of Review:

When the Court sits as the trier of fact, it determines the weight to be given to witness testimony on any particular issue. In determining the weight and credibility of witness testimony, the Court must consider the fairness, interest, or bias of each witness, the opportunity to know of the circumstances about which each witness testifies, and all other facts and circumstances that test the accuracy of the witnesses' testimony. *In Re Langmeier*, Del. Chan., 466 A.2d 386,405 (1983) (*citing Benson v. Wilmington City Ry. Co.*, Del. Super., 75 A. 793 (1910).

Appellants contend that the Chancellor got the facts wrong. Thus, their arguments do not invoke the *de novo* standard of review. Instead, their arguments invoke the standard for Supreme Court review of findings of fact by a trial court: "We review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong." *Reserves Development LLC, et. al., v. Crystal Properties LLC*, Del. Supr., 986 A.2d 362, 367 (2009)

c. Merits of Argument:

Appellants' fourth argument on appeal also repeats a prior argument made by the Appellants in their previous briefs below – that the agreement between Richard and Edward was "too vague to be enforceable." (Opening Brief at p. 30) Again, the Court's factual findings on this issue were amply supported by the record. (TT46)

From the Appellee's testimony, there is little doubt that both Edward, on the one hand, and Richard, on the other hand, understood that Edward was referencing the entire parcel of property, both the improvements and land, when he referred to the "property" as "it."

The Chancellor's conclusion is further buttressed by the vast scope of the improvements that Richard and Wanda made to the home, outbuildings, and the land itself, where Petitioner's Exhibits 23, 24, 25, and 26 reflect broad improvements to all three categories, from new roofing and remodeling of the home, to the new barn built in 1994, to the installation of irrigation affixed to the land in 1995.

Finally, and most importantly, both the 1977 will and the 1991 codicil made it clear that Edward promised Richard the entire parcel of property, where the 1977 will stated in Article II, Clause A, the following:

> I give, devise and bequeath my home farm and all the contents in the house situate thereon, where I reside, being approximately 1 mile east of Felton, on the north side of Route #12, to my son, Richard A. McCloskey Sr. (JX1)[3]

This language reflects Edward's intent to devise the home, improvements, and land together when he promised the "home farm" to Richard upon his death, in fee simple, in exchange for Richard's care of his father (and grandfather, Jerry), and his payment of all repairs, improvements, and maintenance expenses. Accordingly, Appellants' claim of ambiguity regarding Edward's promise is untenable.

[3] The 1991 Codicil reaffirmed the previous devise of the subject property to Richard set forth in the 1977 will.

## V. THE RESCISSION OF THE 2008 DEED WAS PROPER.

a. Question Presented:

Was the rescission of the 2008 deed proper?

b. Scope of Review:

When the Court sits as the trier of fact, it determines the weight to be given to witness testimony on any particular issue. In determining the weight and credibility of witness testimony, the Court must consider the fairness, interest, or bias of each witness, the opportunity to know of the circumstances about which each witness testifies, and all other facts and circumstances that test the accuracy of the witnesses' testimony. *In Re Langmeier*, Del. Chan., 466 A.2d 386,405 (1983) (*citing Benson v. Wilmington City Ry. Co.*, Del. Super., 75 A. 793 (1910).

Appellants contend that the Chancellor got the facts wrong. Thus, their arguments do not invoke the *de novo* standard of review. Instead, their arguments invoke the standard for Supreme Court review of findings of fact by a trial court: "We review questions of fact for abuse of discretion and accept a trial judge's findings unless they are clearly wrong." *Reserves Development LLC, et. al., v. Crystal Properties LLC*, Del. Supr., 986 A.2d 362, 367 (2009)

c. Merits of Argument:

Finally, Appellants dispute the Court's decision to rescind the 2008 deed from Edward to John, based on its finding that "Edward could not validly convey that property . . . because Edward lacked capacity at the time the deed was signed." (Memorandum Opinion at p. 28; Opening Brief at p. 34)) Particularly, Appellants dispute the Court's finding that Edward "lacked capacity when he executed the 2008 Deed." (Memorandum Opinion at p. 40) The Appellants' contentions are astonishing given the evidence presented at trial.

Appellants' Exhibit 40 revealed that in 2005, Edward was declared incompetent, in writing, *by his own doctor*. (RX40) The doctor's letter, dated November 22, 2005, stated as follows:

> It is my professional opinion that he [Edward] is currently not competent to manage his own financial and medical affairs and has not been since January 2005.

Thereafter, between 2005 and 2008, Edward suffered a stroke and Bell's Palsy. For Appellants dispute the Court's factual finding that Edward lacked sufficient capacity to execute the 2008 deed, despite the medical records presented at trial, is to ignore reality. The record clearly indicates that Edward was incompetent, incontinent, and unable to manage his financial and personal affairs for several years before 2008, when John McCloskey had his father execute the deed. Based upon Edward's documented incompetency and John's self-dealing to obtain the

property from his father without consideration, the Court properly rescinded the 2008 deed, thus restoring the 3+/- acres to the original parcel. Accordingly, this last argument must fail as well.

## CONCLUSION

For all of the reasons set forth above, Appellee respectfully requests the Court to affirm the Memorandum Opinion issued by the Court below.

Respectfully submitted,

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