IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF VIRGINIA ROGERS, Deceased	:	**ORPHAN'S COURT DIVISION**
	:	**No. 41-10-0476**

OPINION AND ORDER

Harry L. Rogers, Jr. and his wife, Virginia C. Rogers accumulated substantial wealth during their life together. They acquired real estate and grew investments. Throughout their lives they shared their wealth in part with their three children, Christine Kindon, Catherine Laubach and Harry L. Rogers, III.

On June 24, 1991, they executed a Revocable Living Trust Agreement forming the Rogers Family Trust. The trust was funded with their real and personal property as designated in the Trust Agreement.

On February 22, 1999, they executed a First Amendment to the Trust. On June 24, 1999, they executed a Second Amendment to the Trust. The Second Amendment deleted the First Amendment in its entirety. Further, the amendment directed that upon the death of the surviving settlor, the family farm would be distributed to Harry, III.

Virginia Rogers died on November 12, 2009. Little did Mr. Rogers know that the substantial pain he suffered as a result of his wife's death would only be exacerbated by subsequent litigation involving the administration and substance of the Trust. Indeed, it is likely that in retrospect, Mr. Rogers wishes he never accumulated one cent over which he would be subject to such controversy.

The Trust Agreement provided that upon the death of Virginia Rogers, the trust would be divided into two shares, Trust A and Trust B. The trustee of Share B was designated as Emerson W. Knyrim, with the alternate trustee being designated as William C. Sherwood.

Unfortunately, both Mr. Knyrim and Mr. Sherwood renounced their appointments as trustees. On March 29, 2011, Mr. Rogers, as trustee of Trust A and Settlor, executed a document entitled "Third Amendment Rogers Family Trust" as well as another document exercising his special Power of Appointment under paragraph 6.03 of the Second Trust Agreement.

On April 14, 2011, Mr. Rogers (hereinafter "Petitioner") filed a Petition to appoint trustee because the main trustee and alternate trustee for Trust B renounced and he was unable to secure either a corporate or an individual trustee who was agreeable to all of the beneficiaries of the trust. The Petition sought the appointment of Christine Kindon, because all of the beneficiaries except Harry L. Rogers, III ("hereinafter Respondent, Hal or son") agreed to this individual being named trustee of Trust Share B.

In his response to the Petition to appoint trustee, son not only opposed the request to appoint his sister as trustee of Trust Share B, but he also requested that the Third Amendment and the exercise of Power of Appointment be set aside due to undue influence on the part of Ms. Kindon and a lack of testamentary capacity by his father.

Following the initiation of the litigation, in an Order dated December 5, 2011, the Court appointed Emerson Knyrim and Ann Taylor as interim co-trustees of Trust Share

B. Furthermore, by Order of Court dated March 15, 2011, the Court directed that 50% of the trust assets be placed in Trust Share A and the remaining 50% of the trust assets be placed in Trust Share B.

The Third Amendment to the Rogers Family Trust executed by Petitioner on March 29, 2011 ratified, confirmed and republished the original Trust Agreement dated June 24, 1991 but also deleted a successor trustee provision. Ms. Kindon was designated to serve as the successor trustee of Trust Share A as well as any other trust share by which Petitioner was capable of appointing a trustee.

The trust Power of Appointment also executed by Petitioner on March 29, 2011 exercised the power of appointment as set forth in Article 6.03 of the original Trust Agreement and directed that upon Petitioner's death, the trustee of Trust Share B distribute, following a specific devise to his granddaughter, all of the rest, residue and remainder of the trust estate in equal one-third shares to his children. (Petitioner's Exhibit 10).

Hearings were held on this matter on March 16, 2012, March 30, 2012 and July 2, 2012. During the hearings, the Court had a substantial opportunity to observe Petitioner.

Throughout hours of testimony, Petitioner sat patiently listening to the testimony of the various witnesses. He occasionally appeared attentive and focused but also appeared disconnected during substantial periods of time. He interacted with his attorney in a seemingly appropriate manner. He reviewed documents as they were referenced in the testimony. On occasion, he made references to certain portions of the documents to his

attorney.

His mannerisms and demeanor were such that the Court had some concerns regarding his competency. What particularly struck the Court is that during testimony regarding the loss of Petitioner's wife, Petitioner broke down crying sometimes more obvious than others, but then composed himself.

James Malee first testified on behalf of Petitioner. He has been a licensed attorney in the Commonwealth of Pennsylvania since 1990. He concentrates his practice on elder law and estate planning.

Mr. Malee first met Petitioner, his son and daughter Ms. Kindon following Mrs. Rogers' death. They came to Mr. Malee because of the trustee vacancy and the inability to reach an agreement as to who would be named as the substitute trustee.

All of the beneficiaries of Trust Share B except Respondent agreed that Ms. Kindon would be the trustee. Petitioner was steadfast in his intent to have his daughter named the trustee. Mr. Malee described his decision as "unwavering."

During one of the initial meetings with Mr. Malee and the family members, Respondent indicated to Mr. Malee that in his opinion, Petitioner was "not competent to handle these things or make decisions." Additionally, Respondent informed Mr. Malee that if a change in Petitioner's estate plan was made, Respondent would challenge it.

Accordingly, Mr. Malee met alone with Petitioner and discussed with him the necessity of having Petitioner evaluated by an independent professional to determine Petitioner's testamentary capacity.

Respondent's objections to Petitioner's competency were somewhat perplexing to Mr. Malee in light of Respondent's willingness to accept gifts from the Petitioner in the preceding years. For example, Petitioner transferred his interest in a hunting club to his son as well as hundreds of acres of property in Canada.

Following the evaluation by Dr. Richard Dowell, a neuropsychologist, which confirmed Petitioner's testamentary capacity, Mr. Malee met with Petitioner "at least twelve or more times" over a period of "several months." Mr. Malee met with Petitioner "alone" to discuss Petitioner's options and to determine Petitioner's wishes with respect to his estate planning matters.

According to Mr. Malee, Petitioner was clear in what he wanted. Specifically, he wanted his daughter to become the trustee of Trust Share B, he wanted his daughter to be the "back-up trustee" with respect to Trust Share A, he wanted the farm property to be sold and he wanted the trust estate, following his death, to be distributed in three equal shares.

Mr. Malee also had the opportunity to observe Petitioner's interactions with both his daughter Christine and his son. Petitioner was greatly concerned that his son would evict his other daughter Catherine from the farm. He wanted Catherine to be able to live on the farm as long as she was alive. Petitioner had great reservations about his son and his son's willingness to abide by his father's wishes.

There was nothing in the relationship between the Petitioner and his daughter Christine that caused Mr. Malee any concern about undue influence. He described Christine's role as a "secretary" with respect to the Petitioner and as a "referee" between

Petitioner and Respondent.

Mr. Malee described Petitioner as a strong willed, self-made, determined individual who was clear in his wants and desires. Petitioner had previously deeded the farm to Christine along with restrictions that evidenced his testamentary intent, including but not limited to, protecting his daughter Catherine and providing a place for her to reside during her lifetime.

Mr. Malee admitted to reviewing all of the prior estate planning documents that had been previously prepared and executed by Petitioner and the decedent. To the extent those documents no longer reflected Petitioner's wishes, Mr. Malee drafted new documents which were reviewed and signed by Petitioner.

Among the areas explored on cross-examination of Mr. Malee was the Deed that the Petitioner, both individually and as trustee of the Rogers Family Trust, gave to Ms. Kindon on or about June 9, 2010. (Petitioner's Exhibit No. 13).

Mr. Malee conceded that the Deed was "very one-sided" with respect to Ms. Kindon but explained that it was clearly the Petitioner's desire to convey his entire interest in the farm to his daughter. He cautioned, however, that he explained to the Petitioner that he did not believe that the Deed would be able to "stand up" to legal scrutiny in that the Petitioner could not "convey" what he did not "fully have."

Mr. Malee further explained that he was directed by Petitioner not to discuss the Deed with Respondent. He explained that this was not unusual in that Petitioner did not like to discuss his financial matters with others and that it was Petitioner's "standard

practice" to keep certain financial and property matters secret in order not to create any conflict between the family members.

Another area of discussion centered around the Power of Attorney executed by Petitioner on September 6, 2010. Mr. Malee explained how he thoroughly reviewed the document with the Petitioner explaining the provisions of it. He was available for and did in fact answer questions posed by the Petitioner and also addressed the Petitioner's concerns. He acknowledged that the Power of Attorney granted significant "powers" to Ms. Kindon but that the Petitioner's decision with respect to such was knowing, intelligent and voluntary.

Another area addressed on cross-examination concerned Dr. Richard Dowell, the Neuropsychologist who was retained by Mr. Malee in order to evaluate the Petitioner's capacity and competency. Mr. Malee explained that he provided some documentation to Dr. Dowell prior to the assessment but did not participate in the assessment process. He did recall providing Dr. Dowell with the "legal standards for testamentary capacity."

On re-direct examination, Mr. Malee emphasized Petitioner's willingness to change his mind over time in order that Petitioner's estate plans could best meet his needs and desires. In addition to not only changing documents over the years, the Petitioner gifted assets to his children, including but not limited to, the Canadian real estate as well as real estate located in Pennsylvania, which he gifted to Respondent.

Dr. Richard Dowell testified as well on behalf of Petitioner. Dr. Dowell is licensed by the Commonwealth of Pennsylvania and practices as a Clinical Neuropsychologist. He has been in practice for 25-plus years. He has vast clinical experience

in assessing individuals to determine their competency and testamentary capacity. He has been qualified in this Court on numerous occasions as an expert in neuropsychology and permitted to give his opinion on capacity and competency issues. Among his professional duties are evaluations for the Area Office of Aging with respect to individuals whose competency may be questioned. Dr. Dowell was admitted, without objection, as an expert in this matter.

Dr. Dowell was previously contacted by Mr. Malee for the purpose of examining the Petitioner to determine Petitioner's competency and testamentary capacity. He was not enlisted to support any particular findings; rather he was enlisted to perform an objective evaluation after which, depending on Dr. Dowell's conclusions, Mr. Malee could then proceed accordingly on behalf of the Petitioner.

Dr. Dowell subsequently met with Petitioner at Mr. Malee's office to perform an assessment. Among other things, Dr. Dowell's assessment of the Petitioner included a clinical interview for the purpose of obtaining a childhood history, an educational/occupational history, a social history and a medical history. The clinical interview also sought specific personal, financial and medical information.

The assessment also included a mental status examination, neuropsychological tests, academic tests and psychological tests. The specific tests administered, their results and Dr. Dowell's interpretations of the results are all set forth in his Neuropsychological Consultation Report, which was marked and admitted as Petitioner's Exhibit No. 16.

Dr. Dowell concluded that the Petitioner retained his capacity with no limitations. He explained that Petitioner demonstrated deficits in only one out of five functional areas, that being memory/learning. Because there was the presence of only one deficit among the five functional areas, the criteria for a diagnosis of dementia were not met. Dr. Dowell also noted that this particular memory/learning deficit was not unusual in individuals, like the Petitioner, who were over 85 years of age.

Dr. Dowell concluded that Petitioner met the criteria for having the requisite testamentary capacity. More specifically, Dr. Dowell concluded that the Petitioner had the ability to identify family members, relationships, the legal issues at hand, his and his family's role or stake in the legal issues and a basic understanding of his desires including some foundation for his beliefs.

On cross-examination, Dr. Dowell conceded that he did not assess the Petitioner with respect to any susceptibility to undue influence by others.

He acknowledged that an Environment Observer Report was prepared by Ms. Kindon and that it reflected her being "protective" of her father. Dr. Dowell explained that because of her "defensive response" and her "underreporting", he did not use her information in rendering any conclusions.

While Dr. Dowell concluded that the Petitioner was able to identify his banking institution, basic sources of income and approximate assets, including his farm, Dr. Dowell was not aware that at the time of the initial evaluation, Petitioner had previously transferred ownership of the farm to his daughter. Dr. Dowell conceded that the Petitioner

did not discuss the specifics regarding his bank account or investments. Nonetheless, Dr. Dowell confirmed that the Petitioner had a basic understanding of his general assets, his income and "how bills are paid."

Dr. Dowell conceded that during the assessment, the Petitioner "often lost the topic at hand" and needed to be redirected, but that Dr. Dowell did not consider this unusual.

While cross-examination of Dr. Dowell evidenced that certain assumptions may not have been entirely accurate, the conclusions that Dr. Dowell reached were consistent with his general findings with respect to the Petitioner and Petitioner's test scores.

Moreover, Dr. Dowell did not consider the areas of inquiry on cross examination to be significant from a clinical standpoint. For example, while Petitioner may have technically transferred his interest in the farm to his daughter, Petitioner retained a life estate and had in fact bought the farm and lived on it for many, many years. It would not be unusual at all for Petitioner or someone else under these circumstances to claim that it was still "his farm."

Christine Kindon next testified on behalf of Petitioner. She is Petitioner's daughter.

In October of 2010, she agreed to act as Petitioner's power of attorney. Her brother, Respondent, called a family meeting and indicated that his wife, as she had done previously, would no longer act "as the agent or power of attorney" for Petitioner.

On Petitioner's farm property, Ms. Kindon explained that there are actually two houses. There is a farm house as well as a "little house" or "cottage." Petitioner lives in

the farm house while Catherine and her husband live in the cottage.

In describing Petitioner's health, Ms. Kindon explained that he is in "very good health." He is capable of taking his own medication, capable of using the microwave and feeding himself, and capable of managing his financial affairs. While Ms. Kindon will review the bills and write the checks, Petitioner also reviews them and signs them. Petitioner recently renewed his permit to carry a firearm.

Ms. Kindon explained in detail the circumstances under which the farm property was deeded to her by her father. Following her mother's death, Petitioner went from house to house staying with his different children. Eventually, Catherine moved into the cottage with her husband.

In March of 2010, Petitioner asked Ms. Kindon if she would buy the farm. Petitioner eventually became more persistent indicating that he "really wanted to do this and he was very upset about the way things were."

At Petitioner's request, Petitioner, Mr. Knyrim and Petitioner's two daughters met with Tammy Weber, Esquire, an attorney with the firm who had prepared Petitioner's estate planning documents. As a result of this meeting, Petitioner and the others, "were all given the impression that [Petitioner] had [the] power to do whatever he wanted over the trust."

Petitioner and Ms. Kindon then reviewed the tax assessment on the property and determined that the value was $234,000.00. Ms. Kindon explained that she had $200,000.00 in a retirement account. She, however, declined to consummate the deal.

Nonetheless, Petitioner continued "bugging [her] for the next couple months."

Petitioner continued to insist that Ms. Kindon purchase the property. He wanted to be sure that not only could he stay there until he died but that his other daughter, Ms. Kindon's sister, could also stay there. He wanted Ms. Kindon to be responsible to make sure that "this happened."

There were also a few other restrictions and/or conditions that were discussed with respect to the property. Ms. Kindon insisted that 50% of the oil and gas rights be reserved for her two siblings. Ms. Kindon also insisted that Respondent be permitted to farm the property even though Petitioner was reluctant to allow such because of the "constant chaos and conflict."

Petitioner did not want Respondent to know about the Deed to Ms. Kindon. In fact, when the Deed was filed at the courthouse, Petitioner requested that the Recorder of Deeds not publish it.

With respect to the "agreement" made part of the Deed transferring the property to Ms. Kindon, it was done at Petitioner's "direction." He reviewed it, corrected it, changed it and Ms. Kindon retyped it.

Following the execution of the Deed, Petitioner decided to utilize the services of another attorney recommended by Mr. Knyrim, in that Ms. Weber's fees appeared excessive in Petitioner's opinion.

Ms. Kindon further explained how Petitioner had transferred certain properties to his children. For example, prior to her mother's death, Petitioner had transferred

one-fifth of the hunting club to Respondent. Soon after his wife's death, Petitioner transferred his remaining two-fifth interest. The total three-fifth interest amounted to approximately 60 acres. Petitioner and his wife also transferred 600 plus acres of Canadian real estate. 300 acres went to Ms. Kindon and her husband. The remaining 300 plus acres went to Respondent and his wife. This property was "removed from the trust." Furthermore, 22 acres of real estate in Shrewsbury Township was also transferred to Respondent for one dollar. This property as well was "removed from the trust" prior to Petitioner's wife's death.

In 2001, Respondent also purchased farm equipment (Petitioner's Exhibit No. 18) from Petitioner for the price of $18,075.00. It was not, however, until December of 2011 that Respondent started making payments. Apparently, a revised payment agreement was negotiated between Respondent and Petitioner.

As well, Respondent also negotiated the purchase of an old Jeep from Petitioner for the total price of $250.00.

Ms. Kindon then testified concerning her understanding of what authority was given to her by virtue of the Power of Attorney signed by her father. Although she acknowledged her vast powers, she specifically noted that Petitioner was capable of "knowing everything" so "everything that [she has] always done [she has] gone through [Petitioner]."

Petitioner was insistent that he did not want Respondent to be his financial and healthcare power of attorney. As well, Hal wanted Ms. Kindon to be the power of attorney. Hal did not want "the job."

With respect to the replacement trustee position, Ms. Kindon explained that she was a "mediator for a long time" between Petitioner and Respondent. It was always a "power struggle" between Respondent and Petitioner. Petitioner wanted to appoint Ms. Kindon and did not want to appoint Respondent. Ms. Kindon did not influence Petitioner in this decision. At no time did Ms. Kindon improperly influence her father in connection with any of the decisions her father made with respect to his estate planning documents.

Ms. Kindon is well aware of her responsibilities through the designation by her father and is willing to accept those responsibilities as her father so desires.

On cross-examination, Ms. Kindon verified that her father's stroke or "mini stroke" occurred probably in May of 2009. She conceded that the transfer of the Canadian property, farm equipment and 22 acres Shrewsbury Township occurred well before her father's stroke.

With respect to the transfer of the Hunting Club "Stock", one-fifth was transferred before her mother died and the remaining two-fifths was transferred after her mother had died. While she did not know the date when her father first communicated to her brother when the stock would be sold or transferred, it was her brother who told her when in fact the stock was transferred.

Ms. Kindon acknowledged, as she did on direct examination, that her father transferred the farm to her in June of 2010. She insisted that her sister, Mr. Knyrim as well as Mr. Sherwood all knew that her father wanted to sell her the farm.

Ms. Kindon confirmed as well that she received a Power of Attorney from her

father on September 6, 2010 and the Power of Appointment on March 29, 2011. She acknowledged that during this general time period, her father had been seeing Dr. Finch and was actually referred to Dr. Wilson by Dr. Finch. She explained, however, that the whole purpose in seeing Dr. Wilson was to determine whether her father could drive. Apparently, none of the family members were comfortable with Mr. Roger's driving.

Following her mother's death and prior to Mr. Knyrim resigning as trustee on September 24, 2010, Ms. Kindon acted as his "secretary" helping Mr. Knyrim as he requested.

After Mr. Knyrim resigned, she assisted her father as requested to help with his "necessary banking" needs.

Following her mother's death, her father lived "back and forth" between his house and her house. In January of 2010, she started staying with her father at the farm. In March of 2010, her sister moved to the farm property and assisted her father as needed.

She was questioned extensively about the sale of the farm. She explained that she and her father had been in discussions for approximately three months. The final Deed and Agreement were typed at her father's request. Indeed, she explained that there were "various versions." These versions were reviewed by her father and then redone as suggested by him.

In explaining the terms of the Deed, she reiterated that the $200,000.00 price was agreed upon by her father and was based on the assessment and the amount of monies she had in her retirement account. The $200,000.00 that was paid was put in a money market

account in her father's name at the direction of Mr. Knyrim.

She readily acknowledged that the other terms and conditions set forth in the Agreement "came from" the "same type of deal" that was negotiated with respect to the Canadian property. She explained that Respondent could continue to farm the property if he wanted as he had done for the past eight to ten years. She specifically noted, however, that her father wanted Respondent off of the farm as early as 2010 because he had been "harassing" his father.

She explained in detail the value of the assets held by her father and/or the trust. She acknowledged that she is a beneficiary under Trust B, the power of attorney on her father's accounts, that all of the trust accounts are in her father's name over which she has power of attorney and that she has handled a vast majority of the banking on her father's accounts. She noted that her father receives approximately $4,400.00 per month in retirement and social security benefits that are put into an account in his name.

Overall, it appeared to the Court that Ms. Kindon was very sincere and candid in her testimony. She occasionally made self-serving statements that were not solicited as well as unsolicited derogatory statements regarding Respondent. This was somewhat understandable given the aggressive but valid cross-examination by Respondent's attorney.

It is evident to the Court that Ms. Kindon has kept very detailed records concerning the activities that she has conducted on behalf of her father. She appeared to the Court to be intelligent, direct, and consistent in her testimony and to have a good memory.

Catherine Laubach next testified on behalf of the Petitioner. She is his

daughter and she and her husband have lived on the farm property since March of 2010.

She has cared for her father in numerous ways such as cleaning his house, doing his laundry, providing his meals, staying with him during most evenings and putting his medication out.

She explained that her father can generally take care of himself, fix his meals, attend to his hygiene needs and make decisions affecting his wellbeing.

She explained that on at least one occasion in the past, her father heard the Respondent tell her that the day he gets possession of the farm, she and her husband would be "off the farm." She explained that her father was concerned about this as he wanted her to have a place to reside. She noted that her brother had in fact told her this on four separate occasions.

She noted as well that most recently in the fall of 2011, her brother had actually come to the farm and met with her father individually.

On cross-examination, she agreed that her father and the other family members had kept secret the Deed of the farm property to Ms. Kindon. She explained that her father decided not to tell her brother about the Deed. She confirmed as well that it was her father's "idea" to deed the property to her sister.

Petitioner then took the stand on his own behalf. He can best be described as a typical 89 year-old who was unfortunately losing some of his cognitive abilities. He was slow to answer some of the questions and appeared occasionally confused. On the other hand, he was responsive to a majority of the questions, had a good sense of humor and

engaged the attorneys in conversation. He appeared candid, honest and direct.

It is clear that his wife's death had a severe impact on him. Originally, his daughter-in-law, Diana, Respondent's wife acted as his power of attorney and "helped him out." At some point, Diana stopped acting as such and as a result, Petitioner decided to "appoint" his daughter, Christine.

He explained that it was his decision to deed the farm to Christine. He specifically noted that it was his "desire" that she have it because "she needed it, the others didn't." He explained that the "final blow" was when he heard that his son would not let his daughter Catherine live on the farm. He explained that his decision to transfer the farm to Christine did not happen overnight. The price in his opinion was "fair."

He explained that he wanted Christine to act as his power of attorney and trustee because he felt that she was "qualified" and that she would be "fair." He described her as a "level-headed young lady" who he trusted. He explained that while he had originally selected Emerson Knyrim, Mr. Knyrim had refused it and "he quit." He explained that he would not appoint his son because he could only appoint one and that his son could never act as a "co-partner."

He had a very difficult time acknowledging the documents at issue or remembering any of the details regarding the execution of the documents. On cross-examination, he noted that Mr. Knyrim quit "before" and when asked about whether he would be willing to consider Mr. Knyrim now, Mr. Rogers noted that he did not make decisions on "prospective situations" but really wanted to know why Mr. Knyrim quit in the

first place.

With respect to the farm, he noted that Christine deserved to have it and that the stipulations set forth in the Agreement were agreed upon by him. The oil and gas "business" never "materialized."

In discussing his specific assets, however, he appeared to have some difficulties. He thinks he owns a property in California although he was confused as to when he might have purchased the property. He owns, according to his recollection, a little bit of real estate in Canada. He acknowledged that he has savings and checking accounts at First National Bank in Hughesville and some accounts at Muncy but could not testify as to how much was in any of the accounts.

While he appeared to be candid, open and honest, he clearly had some cognitive deficiencies. It appeared to the Court that he may have been mistaking Christine for his other daughter Catherine on occasion. It also appeared that he had an extremely difficult time knowing the exact quantity and quality of his assets.

Petitioner rested and Petitioner's Exhibits 1 through 19 were admitted.

Respondent first called Dr. Michael Greevy. Dr. Greevy is a Licensed Psychologist having practiced Clinical Psychology for the past 31 years. He has a special emphasis in Clinical Gerontology. He was admitted without objection as an expert psychologist.

He was retained by Respondent to provide his opinion regarding Petitioner's testamentary capacity. He viewed numerous materials including the report of Dr. Dowell, Dr.

Dowell's previous testimony in this matter, the records of Susquehanna Health System including the records of Dr. Elangbaum and Dr. Finch, as well as the records of Dr. Wilson. He also reviewed the various diagnostic studies.

Based upon his review of the relevant records, Dr. Greevy concluded within a reasonable degree of medical certainty that the Petitioner suffers from Vascular Dementia. He noted that there are significant deficits in the Petitioner's memory as well as moderate deficits in Petitioner's executive functioning and motor functioning. He noted further that Petitioner has deficits in "labeling" and "word finding."

In commenting on the test results from the various doctors including Dr. Dowell, Dr. Greevy opined that his interpretation is different than Dr. Dowell. More specifically, he opined that the Petitioner was definitely suffering an impairment in areas that lead to a diagnosis of dementia. He noted that this conclusion was consistent with every expert except Dr. Dowell.

He concluded that at the time of the tests by the various doctors, the Petitioner lacked the necessary testamentary capacity. He noted that Petitioner previously suffered a stroke resulting in vascular dementia. As a result he has severe memory impairments affecting his cognitive functioning, behavioral deficits and interactive deficits.

While he noted that it would be difficult to give an opinion as to the onset of the lack of testamentary capacity, even referencing that it would be "speculation only", he did note that it existed as of the date of the records that he reviewed or prior to the execution of the disputed documents.

On cross-examination, he admitted that a limitation on his opinion was that he did not have an opportunity to visit with and examine the Petitioner. He noted that this was the first time he ever testified without actually seeing a patient. He readily expressed that he was somewhat uncomfortable with rendering an opinion under these circumstances.

He conceded as well that the interpretation of certain test results would necessarily rely upon the presentation of the patient which he did not have an opportunity to do. Further, he noted that he had no doubt that the Petitioner wanted to dispose of his property as indicated in the prior documents.

William C. Sherwood testified on behalf of the Respondent. He has known the Petitioner since 1988 when he moved to the area. He described his relationship with the Petitioner as a very good friend and "mentor with respect to farming."

Following the Petitioner's stroke in May of 2009, Mr. Sherwood noted significant deficits. Mr. Sherwood noted that the stroke had very much of an impact on the Petitioner. According to Mr. Sherwood, it affected his reasoning and short-term memory.

Mr. Sherwood explained, for example, that when he would take him to a Rotary meeting, it was obvious that "something was impaired." Petitioner could not express himself, could not think and eventually stopped talking.

Mr. Sherwood was well aware of Petitioner's and his wife's first estate plan. The two major objectives were to keep the farm in the family and to keep everything fair. He described the Petitioner and his wife as being very passionate about it.

After his stroke and his wife's death, he visited with the Petitioner and his

children. He eventually found out that Petitioner sold the farm to his daughter Christine. He was amazed at such a decision and he concluded that “Harry had to be led to do this.” Mr. Sherwood declined to continue on as a trustee in light of Mr. Knyrim’s resignation. He did not want to be “a referee” and did not want to “get into legal entanglements.”

He explained that over time he stopped seeing the Petitioner as much because he was always with his daughter Cathy. Additionally, he was not very talkative. He became “so dependent” on his two daughters Christine and Cathy.

He did confirm on cross-examination that the Petitioner was developing hearing problems and that this could possibility be a reason for his subsequent behaviors. He did acknowledge as well that Petitioner was a strong-willed individual, had got into arguments with his son, that there was a pattern of secrecy in the family, that Petitioner could certainly have changed his mind and, that the Petitioner did not like what his son had done with respect to the equipment.

During “private” conversations with the Petitioner, Petitioner did not, according to Mr. Sherwood, really know what was going on. Petitioner did not know, for example, that he had sold his land to his daughter.

Ann Sherwood testified on behalf of Respondent. She was previously employed as a nurse and knew Mr. and Mrs. Rogers since she and Mr. Sherwood moved to the area. She had a very close social relationship with them. She too verified that the original estate plan was to have the farm stay in the family by going to the son with the sisters getting a cash equivalent in order to make everything fair.

Following his stroke and his wife's death, the Petitioner changed dramatically. He "grieved" all the time, "wasn't himself." She definitely saw a decline in his mental capacity. He would never answer a question directly. He would usually answer by saying "I don't know." It was very difficult to have a conversation with him.

On one occasion, she and a friend of theirs, Nancy Dewire, met with Mr. Rogers for the purpose of discussing with him their opinion that the "girls" were trying to "undo" the trust and were being disrespectful to his wife's wishes. They explained to Petitioner that they felt he was in mourning and that it takes years to get over grieving. Petitioner's response was that it was his business and that his wife was "dead."

She did concede that while his appearance was good, there were instances of forgetfulness, disorientation and bewilderment. It was, however, not uncommon for Petitioner not to share his financial business with others.

Peggy Wood testified on behalf of Respondent. She is employed at First National Bank in Hughesville and has known the Petitioner and his wife for approximately 35 years.

She described the changes that occurred after Mrs. Rogers passed away in November of 2009. Generally, the Petitioner became far more introverted. She opined that she did not think Petitioner understands what is going on but conceded that it could possibly be because of his hearing loss.

Although the Petitioner used to be a regular at rotary meetings, he very seldom attends and when he does he is not at all active.

She specifically described an incident in which he visited the bank with his daughter Christine regarding the transfer of CD proceeds. Christine handled the entire transaction and the Petitioner did not at all participate. During the transaction, Christine looked at her father and asked “daddy is that alright” to which Petitioner responded “whatever you say.”

Cindy Shaner testified on behalf of Respondent. Petitioner and his wife “practically raised” her. She is their niece.

She works at Wolf Run Village in Hughesville as a nurse although she previously worked at Manor Care North in the Alzheimer Unit.

She described the changes in the Petitioner following his stroke. Specifically, he was far less verbal and suffered from memory problems. For example, he could not remember the day of the week or “where people had gone.” Approximately one year ago, he stopped calling her by her name. His memory has continued to get worse.

She did not believe that his symptoms were caused by his alleged increased hearing loss in that Petitioner has had hearing loss “for quite some time,” “since [she] was 10 years old.”

She also described the relationship between Petitioner and Respondent as “like a married couple.” There was always some tension, they argued, they swore a lot but they always made up. As Respondent got older, he started to respond in kind to the yelling that he received from Petitioner. She also described why she no longer visits the Petitioner. Although she used to visit quite often, she no longer visits with the Petitioner at his house

because “you can’t visit with him.” She described that his daughter Cathy is always there, monopolizes the conversation and answers all of the questions.

Nancy DeWire testified on behalf of Respondent. She has known the Petitioner and his wife for over 40 years. She described their relationship as “best of friends.” She described the changes in Petitioner following the stroke. Specifically, he has “not been right” since the stroke. She concluded that he “definitely” had a problem following his stroke. One could not talk to him about anything. She conceded that his symptoms became a “little worse” after his wife died.

Prior to his stroke and while his wife was alive, Petitioner and his wife discussed their estate plans with her. Specifically, they did not want any of the children to be trustees as to avoid any problems and that when the trust was first created everything between the children was designed to be “fair.” She conceded that after the initial estate documents were drawn up, the Petitioner and his wife discussed changes but they never discussed the details of the changes with her. She knew that Respondent was to get the farm because of the work he did on it and the “girls” were to get equal shares through other monies or assets.

She opined that following the stroke, the Petitioner was not “capable” of making any changes because of his mental condition.

Faye Cheesman testified on behalf of the Respondent. She has known the Petitioner and his family members since 1996 when she moved into the neighborhood.

She described the changes in Petitioner since his wife’s death. Specifically, he

became very forgetful. He could not remember many important things. For example, he asked on one occasion well after his wife's death if she knew "that Ginny died." He took his wife's death "very hard."

She too described the relationship between Petitioner and Respondent. She noted that Petitioner would often times complain about the way that Respondent farmed the property. They often times would argue about "Hal's farming methods." Petitioner did not speak well of Respondent because of the farming issues. She noted that Petitioner's daughter "Cathy fed into the arguments."

Although she previously visited with Petitioner, like the other witnesses, she stopped seeing him. She described that it reached the point that she felt that she was visiting Cathy and not "the Colonel." She described the Petitioner as not really knowing anything but just looking at his daughter Cathy. It also upset her that Petitioner would call his daughter Cathy, by his wife's name.

Dorothy Fague also testified on behalf of Respondent. She was close friends with the Petitioner and his wife for approximately 15 years.

She described in detail the many changes that she observed following Petitioner's stroke. For example, he became far less talkative, he was not able to conduct any conversation, and was generally "more frail."

Following his wife's death, he "was lost and acted lost." Previously, his wife had done everything for him. He did not seem to be able to make any decisions, seemed confused and went through a severe period of grieving.

She did note however that at "Ginny's funeral [the Petitioner] seemed like Harry."

Like the others, she had difficulty visiting with the Petitioner and eventually stopped because his daughter Cathy monopolized the conversations. Interestingly, for many years she did not even know that Petitioner's other daughter Chris "existed."

Joseph Pedro next testified on behalf of Respondent. He has known Petitioner and his wife for 45 years.

He too described the changes in the Petitioner after his stroke. Not only could he not carry on a conversation but Petitioner did not seem to understand what "they were talking about." He indicated that Petitioner lost his understanding because of his "thinking ability" and that he was "just not the same man."

Following the death of his wife, Mr. Pedro observed that the Petitioner's condition was "close to the same."

He described the relationship between the Petitioner and Respondent as a "normal arguing relationship" between a father and son.

Like the others he stopped visiting because he could not talk with "Harry" and that "Cathy takes over the conversation." He did not know Petitioner's daughter Christine very well.

Loretta Pedro, Joseph Pedro's wife next testified. Prior to Petitioner's stroke, she described their relationship as very good friends. They socialized often and visited approximately three to four times a week.

After Petitioner's stroke, you "could tell he had a stroke." He had memory problems, could not remember where he lived and "got lost" believing that he lived in a different residence than where he actually lived.

She too doesn't visit anymore because Petitioner does not say anything, "Cathy talks too much" and Cathy "prevents people from speaking with [the Petitioner]."

On one occasion, prior to his stroke, the Petitioner, his wife and the Pedros were discussing Petitioner's plans following his death. Mrs. Rogers noted that "Chris could not be trusted, Cathy was not capable and Hal will get blamed." Petitioner apparently agreed with this comment.

Beverly Walters, a neighbor of approximately 50 years testified. She had a very close relationship with Petitioner and his wife.

Following Petitioner's stroke, he "very much changed." She described him as not being "at home anymore" and as "just not being there." Following his wife's death, Petitioner "really went downhill."

Like the others, she did not visit with Petitioner at his house. She does not feel welcome because of his daughter Cathy.

Respondent Harry L. Rogers, III, known as Hal, testified on his own behalf.

Following his military service, he returned to the area and started farming his parent's property. He admitted that both he and his father had "type A personalities" and they would often have disagreements regarding farming practices. While they would argue back and forth, they always worked things out.

He started farming the family farm in approximately 1995. Approximately three to four years later, he discussed with his parents their plans with respect to the farm after their deaths. He was told by his parents that their plan was that Hal would get the farm and the "girls" would get equal monies otherwise.

He discussed in detail certain properties and assets that were transferred to him prior to his father's stroke. The 22 acres in Shrewsbury Township (hunting property) was sold to him by his parents in 2003 for approximately $5,000.00 which was the same price that his parents paid for the property. As early as 1997, his father had indicated to him that he wanted Hal to buy it.

Through a series of transactions, his father owned shares in a hunting club. In the mid-90's, his father gave certain shares to Hal. After his father's stroke but while his mom was still alive and in the hospital, his father indicated to him that he was transferring the remaining shares that he owned to Hal. Hal indicated that he did not necessarily want them but his father insisted "No, mom and I discussed this." His father subsequently wrote a letter to the hunting club and the transfer was confirmed at the next meeting.

His parents also owned 600 plus acres of property in Canada. Although it was initially planned that the property would go to all three children, Hal's parents decided to make a change expressing that the youngest daughter Cathy "couldn't handle" the property. Accordingly, the parent's decided to transfer approximately 300 acres to their daughter Chris and approximately 308 acres to Hal. Apparently, there was a stipulation that Cathy could use the property anytime for hunting and fishing. Hal insisted that he never pressured his parents

to transfer the property to him.

Following his father's stroke in April of 2009, Petitioner's personality changed tremendously. According to Respondent, it was like someone turned a light switch. His short-term memory "went away," he was tough to reason with and on many occasions he made no sense. For example, despite living in the farm house for many, many years, he insisted that he wanted to stay at his "old house." On another occasion, he was driving a jeep around the farm and inexplicably turned off into the woods and got stuck. He failed to recognize where he was driving. Prior to his stroke, he was very particular with his mowing patterns. Afterwards, his patterns became very random and on one occasion, he drove his mower down a hill where it got stuck.

After his wife's death, the Petitioner's deficits deteriorated even more. His memory problems worsened. He became far more argumentative. He insisted on feeding animals although there were no animals where he was staying with Respondent and his wife.

Petitioner had previously given a written power of attorney to Respondent's wife "Dee." Dee had been taking care of Petitioner's bills. An issue arose with respect to liquidating and/or transferring CD's and apparently Petitioner's daughter Christine created some issues. As a result, Dee informed Christine that she was "out."

In March or April of 2011, Respondent "found out" about the Third Amendment to the Trust as well as the trust power of appointment. He soon sat down with his father and confronted him with it. His father insisted many times that he did not "do this," he had no recollection of what it was, he did not know what was going on and he was just

trying to be fair.

Respondent did not find out that the farm property had actually been sold to Christine until July of 2011. He testified that the consideration of $200,000.00 was far below the value of the farm and entirely "not fair." Respondent is convinced that Petitioner's daughter Cathy has manipulated Petitioner and that Cathy is being manipulated by their sister Christine.

Following his wife's death, Petitioner lived with Respondent for approximately 20 days each month with the remaining days at the farm with Christine. In March of 2010, Petitioner moved back to the farm because Cathy and her husband had agreed to move into the smaller house on the farm.

After Petitioner moved out in March of 2010, he became much more argumentative with his son. Both had previously done many things together such as riding around the property in a jeep. While Christine wasn't around "that much," Respondent was of the opinion that both Christine and Cathy "cut him out." More specifically, he rarely got an opportunity to visit with his father alone. When he wanted to be with his father, he had to insist to Cathy that she leave them alone. One of the few times he was permitted to be alone with his father was when he discussed the Third Amendment. Hal also discussed the contract for the farm equipment that was executed between he and his parents in December of 2001. His father came up with the terms of the contract. Although Hal insisted on many occasions that he begin paying pursuant to the terms, eventually, Hal unilaterally decided to start making the payments.

Hal confirmed that his father suffered from major changes following his stroke which included a “big personality change, loss of being able to reason and memory problems.” He confirmed as well that his father never recovered from his stroke and in fact his condition deteriorated. Not only did his short-term memory fail but after time his long-term memory failed as well.

He indicated, for example, that if his father was not reminded to take care of his hygiene matters, he wouldn’t. He indicated that if his father wasn’t reminded to change clothes, he wouldn’t.

While his father has a daily routine, he doesn’t make calls, he doesn’t attend rotary; while he looks at his mail, Hal is not sure that he comprehends it. While he reads newspapers and magazines, he is unable to tell you what he had just read.

Many of his daily needs must be met by Cathy or his other caregivers. It is not deemed safe to leave him alone for a long period of time. When he is left alone, he cries and complains.

Despite the deterioration of his father’s health, Respondent conceded that his pistol carrying permit was recently renewed.

While his father and mother had made their initial estate plan known to Hal, he conceded that they changed their plan over time while actually giving assets to Hal which included the 22 acres Shrewsbury Township property, the Canadian land and the hunting club interest.

Hall agreed that he had no problem with Christine becoming the power of

attorney for his father “as long” as she did not use the power of attorney to benefit herself. Hal also conceded that his father was a headstrong individual and that it was entirely possible that he could have directed Christine or Cathy to not tell Hal about the deed transfer of the farm property.

Hal denies that with respect to some of the assets that he received, he dealt with his father as being “competent” while insisting that he was incompetent with respect to transactions and/or documents that did not favor him.

Hal also conceded that he told Christine that if any changes were made to the original documents “dad will suffer” because they will end up in court and that if they ended up in court it would take “a lot of money from the trust.” Hal denied saying that he would bankrupt the trust.

Diana (Dee) Rogers next testified. Since 1989, she has had a very close relationship with her in-laws.

She recalls discussions with her father and mother-in-law prior to the first trust in 1991. They wanted to keep the farm as a whole, keep it in one piece, not have it subjected to being subdivided by Christine and to give it entirely to Hal her husband. As well, they wanted to give insurance monies to their daughters to even things out but did not want any of the children to be trustees because of the potential fighting.

While she acted as power of attorney for her father-in-law over many years, she “resigned” in February of 2011 following a CD transaction in which she “felt” that Christine did not trust her anymore.

With respect to the Shrewsbury Township property, Petitioner and his wife had indicated to her prior to the second amendment that they wanted the property out of the trust and wanted to sell it to Hal for $5,500.00 which is the price they paid for it. In September of 2005, the money was exchanged and a deed was signed and recorded in November of 2005.

In August of 2010, she became aware of the fact that her father-in-law had deeded the farm to Christine. She took the deed to her father-in-law to discuss such. He indicated to her that he did not recognize it, he had no recollection of doing it and that it wasn't his signature. According to Diana Rogers, her father-in-law looked bewildered and did not "recognize the terms of the transaction."

When her father-in-law moved in with her and Hal following her mother-in-law's death for a period of approximately five months, they never discussed the trust, any amendments or the deed.

In the initial period after he moved out and back to the farm with Cathy, she and Hal visited "quite often." Soon thereafter, however, Cathy "would talk for dad" and they were "always being watched, like he needed supervision." She conceded that Christine was "not there very much." She recalled seeing her father-in-law in the courthouse during one of the initial proceedings. He asked why he was there and he had no recognition at all of the third amendment.

On cross-examination, she conceded that on one occasion during a period of time when her husband was "overworked, exhausted and distressed" he told his sister in

earshot of his father that once he got the farm, Cathy would have to move out.

Ms. Kindon was called again as a witness. She confirmed that the title to the farm is still in her name despite the fact that she was informed by counsel that the "deed is defective" and that in accordance with the "agreement" the taxes on the farm are still paid by her father.

Emerson Knyrim next testified. He is married to Petitioner's sister and has enjoyed a very good relationship with Petitioner for many, many years.

Following his wife's death, Petitioner went into a state of "deep mourning." Mr. Knyrim spent a considerable amount of time with Petitioner trying to get the Petitioner to understand the necessity of "initiating his duties under the trust."

He confirmed that during this time period, he had considerable questions about Petitioner's ability to reason. He described an incident wherein Petitioner was attempting to feed animals and was not aware that he did not own any sheep or cattle. He described an incident when he attempted to assist Petitioner with his 2009 personal income tax return and that many of the numbers did not "make proper financial sense."

In May of 2010, Mr. Knyrim, Petitioner, Cathy and Christine had an extended 2 ½ hour conference with attorneys at Marshall Parker & Associates. During this meeting, Petitioner said "maybe I should consider selling the farm." Throughout the meeting and many times unsolicited, Cathy said "Christine will buy it." Petitioner, however, was not willing to sell anything unless Mr. Knyrim okayed it. Remarkably, however, Mr. Knyrim found out that within three weeks, Petitioner had deeded the farm to Christine. Christine

actually brought the deed to Mr. Knyrim and advised him that this would solve the problem regarding the farm. Mr. Knyrim made a decision to resign as the trustee because in his mind the issues were clearly going to be a "legal matter."

Mr. Knyrim conceded that when the parties met with the attorneys at Marshall Parker in May of 2010, Petitioner was specifically informed by one of the attorneys that he had the ability to make changes to the trust. It made no sense to him however why the property would have been transferred to Christine. First, it was always clear that Hal would get the farm. Secondly, he had serious doubts about the Petitioner's cognitive abilities. When they first met at Marshall Parker in May of 2010, Petitioner looked at Mr. Knyrim and said "I don't know where I am."

Dr. Dowell again testified for Petitioner. He reviewed the transcript of Dr. Greevy's testimony and had two primary and one minor disagreement.

First he took issue with Dr. Greevy's conclusion that Petitioner suffered from agnosia. He indicated that agnosia, which is evidence of dementia, is a sensory disorder such as treating a person as an object. It is not an impairment of labeling. Specifically, when the Petitioner mislabeled his daughter as his wife, this would more properly be known as a disnomia and is not a criteria for dementia.

Secondly, he emphatically disagreed that the Petitioner suffered any kind of ataxia. Ataxia is the loss of skilled motor movement. His testing and observations confirmed that there was no ataxia whatsoever. Dr. Dowell observed Petitioner make, build and construct "things."

Finally, and incidentally, Dr. Dowell confirmed that the Petitioner did not suffer from any aphasia or language disorder contrary to what was testified to by Dr. Greevy.

DISCUSSION

The issues concerning who should be appointed the trustee and whether the Third Amendment to the Trust and Exercise of the Power of Attorney are valid, necessarily depend upon the capacity of the Petitioner. If the Petitioner had the requisite capacity and was not subject to undue influence, his decisions with respect to trustees may be determinative. Further, the amendment and exercise of power must be upheld.

The Petitioner will be deemed to possess testamentary capacity if at the time he executed the documents at issue, he knew those who were the natural objects of his bounty, he knew generally of what his estate consisted, and he knew what he desired to be done with it, even though his memory may have been impaired by old age or disease. Estate of Anton Vanoni, 2002 Pa. Super. 98, 798 A.2d 203 (2002); citing Brantlinger Will, 418 Pa. 236, 210 A.2d 246 (1965).

"Testamentary capacity exists when the testator has general knowledge of the natural objects of his bounty, the general composition of his estate, and what he wants done with it, even if his memory is impaired by age or disease." Estate of Reichel, 484 Pa. 610, 400 A.2d 1268, 1270 (Pa. 1979). "Neither old age, nor its infirmities, including…partial loss of memory, inability to recognize acquaintances, and incoherent speech, will deprive a person of the right to dispose of his own property." In Re: Bosley, 26 A.3d 1104 (Pa. Super. 2011), citing Estate of Hastings, 387 A.2d 865, 868 (Pa. 1978).

The burden of proof as to incapacity, in this matter, rests with the Respondent. Vanoni, supra., citing Heiney Will, 455 Pa. 574, 318. A.2d 700 (1974). The Respondent must produce clear and compelling evidence of the lack of testamentary capacity. Vanoni, citing Williams v. McCarroll, 374 Pa. 281, 97 A.2d 14 (1953). Clear and compelling evidence is "testimony that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Matter of Sylvester, 501 Pa. 300, 555 A.2d 1202, 1203-04 (1989).

The issue to be determined is whether the Respondent has carried his burden of proving by clear and compelling evidence that the Petitioner failed to have the required testamentary capacity at the time he executed the relevant documents. Did Respondent not know those who were the natural objects of his bounty? Did he not know of what his estate consisted? Did he not know what he desired to be done with his estate? While the Court has some concerns, it cannot conclude that Respondent has carried his burden.

In thoroughly reviewing the evidence and considering all of the circumstances, the Court is frankly left wanting. Indeed, all of the witnesses, for the most part, appeared credible and sincere.

The court is convinced that following his cerebral event (stroke or mini stroke), Mr. Rogers suffered impairments. As so many of his long time close friends and relatives testified, he became forgetful, introverted, far less talkative, appeared lost and just not the same. Following the unexpected loss of his wife soon thereafter, he went into a not surprising state of depression. As well, his personality changes and apparent cognitive

difficulties worsened. He exhibited clear infirmities.

On the other hand, there was credible testimony that when Mr. Rogers was specifically involved in his estate planning matters, whether it be in numerous discussions with Mr. Malee over several months, meetings with his family members, separate discussions with his daughters and even during his assessment by Dr. Dowell, he generally knew his assets, specifically knew his heirs and knew how he wanted to dispose of his assets.

There were also valid reasons to support Mr. Rogers' change of estate plan. He was greatly concerned that his daughter Catherine would not have a place to live in light of Hal's statements that he would evict her, once he got the farm. He was not happy with his son and was convinced that his daughter Christine would take care of matters pursuant to his wishes. Mr. Rogers further made in kind changes to his plan both prior to and after his stroke and wife's death, such as the sale of the Shrewsbury Township property, the deed of the farm to his daughter and the gifting of the Canadian Property. Indeed, prior to executing the documents at issue, he disposed of some of the property. It begs logic to suggest that Respondent would accept gifts of 304 acres of land in Canada, 22 acres of land in Shrewsbury Township, a Jeep and substantial farm equipment yet claim not shortly thereafter that his father lacked the testamentary capacity to dispose of other property.

The Court does find the testimony of the Petitioner, Mr. Malee, Ms. Kindon and Dr. Dowell to be credible, persuasive and ultimately determinative. The Court gives great weight to the testimony of Dr. Dowell who observed the Petitioner during the period when these documents were executed. Brantlinger Will, 210 A.2d 253. The Petitioner was

dissatisfied by the treatment he received from the Respondent. He had faith in his daughter. He knew generally what his estate consisted of and who his beneficiaries were. He chose to change his estate plan and his behaviors and statements reflected a clear desire to vest his one daughter with the authority to protect himself as well as his other daughter, and to then distribute the property following his death per his wishes.

Respondent also argues that in executing the documents at issue, the Petitioner was subject to undue influence by Ms. Kindon. The burden of proving undue influence is borne by the contestant. Bosley, Id.; Estate of Clark, 334 A.2d 628 (Pa. 1975). In this case it is not disputed that there is a presumption of validity in that the required formalities of the disputed documents were established. Bosley, Id.

In order to establish undue influence, the following elements must be established by clear and convincing evidence: (1) that Petitioner suffered from a weakened intellect at the time the documents were executed; (2) there was a confidential relationship between the proponent of the documents and the Petitioner; and (3) the person in the confidential relationship received a substantial benefit under the challenged documents. Bosley, Id., citing Estate of Reichel, 400 A.2d 1268, 1270 (Pa. 1979).

Once these three elements have been established by the Respondent, the burden will then shift to the Petitioner to prove that the documents were not obtained through undue influence. Bosley, supra.

The Court will address each of the undue influence factors separately.

First, the evidence was clear that Ms. Kindon benefits substantially from the

Third Amendment and Exercise of Power. She not only received a greater portion of her father's assets but more importantly, was appointed in control of her father's entire estate, had unfettered control of the trust assets, had extensive powers with respect to the assets, had absolute discretion over the trust and estate, and could be designated by herself as the residuary beneficiary of the whole estate. Estate of Stout, 746 A.2d 645 (Pa. Super. 2000); Estate of Levin, 615 A.2d 38 (Pa. Super. 1992); Adams Estate, 69 A. 989 (Pa. 1908).

The evidence was also clear that the Petitioner suffered from a weakened intellect. While there is no bright line test to identify a weakened intellect, it is typically accompanied by persistent confusion, forgetfulness or disorientation. In re Estate of Fritts, 906 A.2d 601 (Pa. Super. 2006). While an individual may be of sufficient testamentary capacity, he may be subjected to undue influence in the making of a particular estate document. In re Estate of Ziel, 467 Pa. 531, 359 A.2d 728, 733 (1976).

The "weakened intellect" that must be shown to establish undue influence "need not amount to testamentary incapacity." Burns Kabboul, 407 Pa. Super. 289, 308; 595 A.2d 1153, 1163 (1991). While "the testator may dispose of this property as he sees fit, the law is rigid in it insistence that one of weak mind, whether from inherent cause or by reason of illness shall not be imposed upon by the art and craft of designing person." Id. 595 A.2d at 1163.

The testimony of virtually every witness confirmed that following Petitioner's cerebral event and clearly after his wife's death his mind became at least somewhat inferior in reasoning power, factual knowledge and orientation. See for example Heffner Will, 19

Fid. Rep. 542, 546-7 (Monty. Cty. 1969). He exhibited varying degrees of confusion and forgetfulness.

The evidence, however, is insufficient to establish a confidential relationship. Neither the parent-child relationship or the existence of the power of attorney establish a confidential relationship because Petitioner clearly wanted Ms. Kindon to act occasionally as his attorney in fact to assist him with his financial affairs. Fritts, Id.

A confidential relationship exists when the circumstances clearly demonstrate "an overmastering influence on the part of the proponents." Estate of Angle, 777 A.2d 114, 125 (Pa. Super. 2001) . On one side, there must be an overmastering influence or, on the other side, weakness, dependence or trust. Fritts, Id., citing Owens v. Mazzei, 847 A.2d 700, 706 (Pa. Super. 2004). A confidential relationship "is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a partial abuse of power." Fritts, Id.; citing Etoll, Inc. v. Elias/Savior Advertising, Inc., 811 A.2d 10, 23 (Pa. Super. 2002). Similarly, "a confidential relationship exists whenever circumstances make it certain that the parties did not deal on equal terms." In re Bankovich, 344 Pa. Super. 520, 523, 496 A.2d 1227, 1229 (1985).

The relationship between Petitioner and Ms. Kindon was nothing more than a caring, loving relationship between a father and daughter. Ms. Kindon assisted her father as requested by him consistent with how she acted her entire life. She "stepped up to the plate" when Respondent's wife no longer desired to help. Furthermore, it is crystal clear that Petitioner sought the counsel of numerous other individuals prior to making certain financial

decisions. He held family meetings. He even met alone with Respondent on numerous occasions. He met numerous times alone with Mr. Malee. It begs logic to even suggest that there was an overmastering influence on Ms. Kindon's part. There is no credible evidence to support Respondent's contention that Petitioner was dominated or manipulated by anyone.

All in all, the record is devoid of sufficient evidence to establish a case of undue influence. No one controlled Petitioner's free will or decision making. In fact, the evidence establishes irrefutably that Petitioner's estate planning documents reflect his specific desires.

Conduct constituting undue influence "must consist of imprisonment of the body, mind, or fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or mental coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a restraint upon him in the making of the [documents]." Angle, Id. at 123. No such conduct existed under the circumstances of this case.

The final issue concerns who should be appointed as trustee. Petitioner's counseled designation shall control.

ORDER

AND NOW, this ___ day of September 2012, following hearings, argument and the submission of Briefs, the Court grants Petitioner's Petition to Appoint Trustee. Christine Kindon is confirmed as Trustee of Trust Share B of the Rogers Family Trust. The Court also confirms the Third Amendment to the Rogers Family Trust as well as the Power of Appointment under said Trust. Petitioner's legal fees shall be paid out of the Trust assets.

By The Court,

_____

Marc F. Lovecchio, Judge

cc: J. Howard Langdon, Esquire
Norman L. Lubin, Esquire
James Malee, Esquire
C. Edward S. Mitchell, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File