

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF : NO. 41-20-0212  
Joel Oliver D'Hue, :  
Deceased : ORPHANS' COURT  
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:

**OPINION & DECREE**

AND NOW, following a Civil Non-Jury Trial on the *Petition for Citation to Show Cause Why Appeal from Probate Should Not be Sustained* filed by Ainsworth D'Hue and Janette D'Hue, the Court hereby issues the following DECREE.

***Background***

Joel Oliver D'Hue, a resident of Lycoming County, passed away on April 13, 2020 at the age of seventy-three. On May 6, 2020, Cedric D'Hue, Decedent's son, was appointed Executor of Decedent's Estate.<sup>1</sup> On May 28, 2020, the Register of Wills admitted to probate Decedent's Last Will and Testament ("Will"), a writing dated April 11, 2020. On June 25, 2020, Ainsworth D'Hue and Janette D'Hue ("Petitioners"), simultaneously filed an Appeal from Probate ("Appeal") and a Petition for Citation to Show Cause Why Appeal from Probate Should Not be Sustained ("Petition").

Within the Petition, Petitioners contend that the Will admitted to probate is invalid because Decedent was under the influence of strong medication and was drifting in and out of consciousness at the time the will was executed, and he therefore lacked the mental capacity to validly execute the Will. Petitioners allude that Marva Coulson, both a subscribing witness to and a beneficiary under the Will, took advantage of Decedent in his declining state. Petitioners further assert that the other subscribing witness, Angella Gibbs, did not realize at the time she attached her signature that she was witnessing a Will, but rather believed she was signing a business document. Finally, Petitioners contend that while the Will is notarized, the notary did not in fact witness Decedent executing the Will.

Petitioners are children of Decedent entitled to inherit under the intestate laws

of the Commonwealth. As Decedent has no prior executed Will, Petitioners have standing to challenge the probated Will.<sup>2</sup> The Will bequeaths: \$30,000.00 to Janette D'Hue; certain unimproved land, a Honda Accord hybrid, a Land Rover, and a Toyota Camry to Marva Coulson; a 2012 silver twin cab Silverado to Ainsworth D'Hue; and land in Saint Margaret's Bay, along with the residuary of the Estate to Cedric D'Hue.

On September 3, 2020, the Court received an Answer to Petition for Citation to Show Cause Why Appeal from Probate Should Not be Sustained ("Answer") filed by Cedric D'Hue ("Respondent"), the Executor of the Estate. Respondent in his Answer denies the various allegations as to Decedent's incapacity at the time of the execution of the Will, as well as the improper witnessing and notarization of the Will. Further, Respondent attaches as Exhibit A to the Answer, Oaths of Non-Subscribing Witnesses ("Oaths"), Charles Hanley and Taylor Kozak. These Oaths, which have also been filed separately with the Register and Recorder's Office, affirm that the signature on the Will is consistent with Decedent's handwriting. Respondent attaches as Exhibit B to the Answer the Affidavit of Cathy M. Byham, Notary Public, who affirms she personally witnessed the Decedent sign the Will in the presence of two witnesses on April 11, 2020. In New Matter, Respondent contends that while Decedent did not draft his Will personally, he was an active participant in creating its terms and condition, further asserting that Decedent fully understood and appreciated the meaning of the document at the time he signed it.

The Court issued a Decree on September 14, 2020, providing the parties ninety days to complete discovery. The Court simultaneously scheduled a half-day evidentiary hearing for December 17, 2020. Thereafter, the Court granted Petitioners' uncontested Continuance Request and moved the hearing to January 29, 2021. On

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<sup>1</sup> This Final Will and Testament was entered at trial as Proponent's Exhibit 1.

<sup>2</sup> See 20 Pa.C.S. § 908(a) (Any party in interest seeking to challenge the probate of a will. . .may appeal therefrom to the court within one year of the decree[.])" (emphasis added). Whether an intestate heir is a party in interest is elaborated upon in *In re Est. of Briskman*, 808 A.2d 928 (Pa. Super. 2002). In *Briskman*, the Superior Court noted that as the decedent's niece was an intestate heir, she would be a "party in interest" with standing to challenge the probated will had there been no prior will. However, the Superior Court held that because the decedent had a prior will that named the niece as a successor

December 30, 2020, the Court received the Executor's Motion to Release Escrowed Funds ("Motion"). Within this Motion, Respondent averred that he had loaned significant funds to the Estate, and requested that he be permitted to collect reimbursement from the proceeds of the sale of the Decedent's house while the hearing on the Petition remained pending. The Court scheduled this Motion to also be heard on January 29, 2021. As the time allotted for the evidentiary hearing on January 29, 2021 turned out to be insufficient, the Court by Decree dated February 4, 2021, scheduled the evidentiary hearing to resume on March 4, 2021. At the request of the parties, this date was continued multiple times. On March 1, 2021, Respondent filed an Amended Answer to the Petition. This Amended Answer is largely identical to the initial Answer, but withdraws the Affidavit of Ms. Byham.

The continued evidentiary hearing was ultimately held on June 9, 2021. In the interim period between the initial evidentiary hearing date and the resumed hearing date, the parties reached a stipulated agreement as to the Executor's Motion to Release Escrowed Funds. Therefore, the only matter for the Court to resolve is the Petition for Citation to Show Cause Why Appeal from Probate Should Not be Sustained.

### ***Evidentiary Hearing***

In opening argument, counsel for Petitioners summarized Petitioners' theory of the case. Petitioners allege that Decedent was incapacitated at the time of signing the Will and that his companion, Marva Coulson, had taken his hand and directed his signature. Petitioners thereby argue that Decedent's signature on the Will is effectively a forgery.

#### **I. January 29, 2021 Hearing**

##### **A. Janette D'Hue**

Petitioners called Janette Evone D'Hue ("Ms. D'Hue") as their first witness. Ms.

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trustee, but not as a beneficiary, the niece's interest in the outcome of the will contest was too remote and she therefore lacked standing to challenge the probated will.

D'Hue introduced herself as a resident of Miami, Florida, and the daughter of the Decedent. By way of background, Ms. D'Hue testified that she had grown up in Jamaica, and had not met her father until she was sixteen years old. She testified that she had since developed a good relationship with her father. Ms. D'Hue provided that in 2012, her father informed her that he had been diagnosed with multiple myeloma and would need a bone marrow transplant. From the span of 2012 to 2016, Ms. D'Hue transported her father to and from his various medical treatments. She averred that between 2012 and 2016 her father went through various periods of remission, but stated that he began significantly deteriorating in 2016.

Ms. D'Hue then spoke to Decedent's relationship with Angella Gibbs ("Ms. Gibbs"). Ms. D'Hue testified that Decedent and Ms. Gibbs had known each other for many years, and were in fact second cousins. Ms. D'Hue provided then when her father began experiencing health problems, he reached out to Ms. Gibbs, who was then living in Jamaica. Decedent made some six or seven trips to Jamaica to visit Ms. Gibbs. Initially, Decedent had intended to help Ms. Gibbs obtain a visa to the United States so she could stay with him as a caretaker. Unable to obtain a visa, in 2016, Ms. Gibbs and Decedent were married in Jamaica. However, Ms. Gibbs did not leave for the United States until early 2020. When questioned as to her perception of Decedent and Ms. Gibbs' relationship, Ms. D'Hue testified that her understanding was that it had begun as a business arrangement, but had blossomed over time into something more.

Ms. D'Hue further testified that in 2016, Decedent had reunited with Marva Coulson ("Ms. Coulson"), an ex-girlfriend. Ms. Coulson moved in with Decedent around this time and took over from Ms. D'Hue as Decedent's primary caretaker. Ms. D'Hue testified that at the time Ms. Gibbs arrived in the United States in 2020, Ms. Coulson was living with Decedent. The three ended up sharing a house in the months leading up to Decedent's death.

Ms. D'Hue spoke of her final meeting with her father. Ms. D'Hue testified that on Wednesday, April 8, 2020, she flew from Florida to Williamsport to visit her father,

who had just returned home from hospice care in Little Rock, Arkansas. She provided that at that time, Ms. Gibbs and Ms. Coulson were caring for her father, and that a hospice care worker would come in regularly as well. Ms. D'Hue stated that when she first arrived on April 8, her father was not in a coherent state. However, Ms. D'Hue testified that later in the evening, Decedent became lucid enough to speak with his children.

Ms. D'Hue testified that on the morning of Thursday, April 9, 2020, she and her two brothers gathered around Decedent, who was confined to his bed. Ms. D'Hue described Decedent as being in a contented state at this time, commenting that it had been too long since all three siblings had been in a room together. Ms. D'Hue testified that she returned to Florida after meeting with her father the morning of August 9, as her son had gotten sick and was not in a condition where he could travel to Williamsport alone. Before she left, Ms. D'Hue told her father that she would come back soon.

Ms. D'Hue testified that her future attempts to contact her father were mediated through Ms. Coulson. She testified that she called Ms. Coulson on Friday, April 10, 2020, asking to speak with her father. Ms. D'Hue averred that she received multiple texts from Ms. Coulson on Saturday, April 11, 2020. Ms. D'Hue testified that she called Ms. Coulson on Sunday, April 12, 2020, but received no answer. Ms. D'Hue then called Decedent's house phone and spoke with a cousin. Decedent ultimately passed away on Monday, April 13, 2020. Ms. D'Hue attempted to offer testimony that her efforts to speak with her father on April 10-12 were rebuffed by both Ms. Coulson and her cousin, who described Decedent as unresponsive. However, the Court sustained the Respondent's objection that such testimony was inadmissible hearsay, offered for the truth as to Decedent's condition when Ms. D'Hue lacked firsthand knowledge. The Court thereby struck this portion of Ms. D'Hue's testimony.

Ms. D'Hue explained that she and her brother, Ainsworth D'Hue had decided to bring the foregoing action because she questioned how the Will could have been validly executed on April 11, 2020, given her father's clearly deteriorated mental state.

She also testified that she was familiar with her father's signature from having received letters from him while she was in college in Jamaica. She averred that the signature on the Will was not her father's signature. When questioned on cross whether she was surprised that Ms. Gibbs had been left out of the Will, Ms. D'Hue confessed that she was not as she knew that Ms. Gibbs had signed a prenuptial agreement. Ms. D'Hue provided that Ms. Gibbs has been living with her since June of 2020.

B. Cedric D'Hue

Petitioners next called Cedric Axel D'Hue ("Dr. D'Hue") to testify. Dr. D'Hue introduced himself as a resident of Lafayette, Indiana, and the son of Decedent. Dr. D'Hue's educational background includes a bachelor's degree in chemistry and a master's degree in analytical chemistry. Dr. D'Hue holds a J.D. and a Ph.D. and works as a patent attorney. Dr. D'Hue testified that on February 20, 2020, while visiting his father in hospice care in Little Rock, Arkansas, he and Decedent had first discussed the terms of Decedent's Will. Dr. D'Hue testified that he had taken notes at that time regarding the content of the Will. Dr. D'Hue elaborated, however, that his father had been in no hurry to reduce the terms to writing, telling his son that he just wanted them to enjoy their time together.

Dr. D'Hue testified that he had next seen his father after flying to Williamsport on April 8, 2020. Dr. D'Hue averred that after meeting with family, he and Decedent had spent from 8:00 p.m. to 2:00 a.m. alone together in Decedent's room finalizing the terms of Decedent's Will. Dr. D'Hue testified that although Decedent was tired at this time, he was coherent and cognizant of what his assets were and how he wanted them distributed. Dr. D'Hue stated that little of substance was changed from their prior discussion on February 20, 2020; at most, terms were further clarified. Dr. D'Hue did provide that initially, his father had intended to disinherit his son, Ainsworth D'Hue, entirely. Dr. D'Hue asserted that he had argued in favor of at least bequeathing the Silverado truck to his brother. He testified that the \$30,000.00 had always been his father's intended bequest to Janette D'Hue.

Dr. D'Hue testified that he took a return flight home to Indiana the morning of

April 9, 2020. He testified that upon returning home, he quickly typed up a draft of the Will consistent with what he and his father had discussed, and then emailed his father a copy that same day. Dr. D'Hue testified that although he does not recall the manner in which it was communicated, Decedent soon relayed a request that Dr. D'Hue edit the Will to change all references to himself in the Will from "Joel Oliver D'Hue" to "Dr. Joel Oliver D'Hue," and similarly all references to his son from "Cedric Axel D'Hue" to "Dr. Cedric Axel D'Hue." Dr. D'Hue testified that his father placed a very high value on education, and was proud of the doctorate title held by both himself and his son.

Dr. D'Hue testified that he made these edits and then sent a final draft of the Will via email on either April 9 or April 10, he could not recall with certainty. Dr. D'Hue averred that he never received a response to the email, but added that he would have texted Ms. Coulson or left her a message to let her know once he had sent the final draft of the Will. He further testified that he had not otherwise contacted Ms. Coulson or his father from April 10, 2020 until his father's death on April 13, 2020. He explained that when his father had returned from hospice care, Decedent's treating physician had stated that Decedent would have up to a month to live. Further, nobody had contacted Dr. D'Hue once he returned to Indiana to alert him of Decedent's declining health. Dr. D'Hue averred that he therefore had not anticipated that his father would pass away so suddenly, adding that he had plans to return to Williamsport the following weekend. He expanded that he needed to return to Indiana to attend to his wife and four children.

When asked whether he was surprised Decedent had left him the majority of his Estate, while leaving relatively little to his other children, and nothing to Ms. Gibbs, Dr. D'Hue provided that he was not. Dr. D'Hue was not asked to elaborate on this opinion. When asked whether he had discussed the terms of his father's Will with his other siblings, Dr. D'Hue provided that he had not. He testified that he may have had one discussion of the Will with Ms. Gibbs, but was not sure. Dr. D'Hue provided that he had spoken to Ms. Coulson regarding the disposition of property in Saint Margaret's Bay owned by the Decedent. Dr. D'Hue testified that Ms. Coulson, not he, had

arranged for a notary to be present at the signing of the Will.

C. Angella Gibbs

Petitioners then called Angella Gibbs to testify. Ms. Gibbs introduced herself as the wife of Decedent, providing that they had been married in Jamaica on March 18, 2016. Ms. Gibbs testified that Decedent had visited her six or seven times in Jamaica between 2016 and January 18, 2020, which is when she moved to the United States. Ms. Gibbs explained that she delayed her interview for a green card because she was caring for a sick son.

Ms. Gibbs stated that she was a second cousin to Decedent, and that they had originally married because Decedent had needed someone to take care of him. However, Ms. Gibbs testified that she and Decedent had become closer during his various visits to Jamaica, and Decedent had communicated to her during one of these trips that he wanted them to have a more traditional husband and wife relationship. Thereafter, Decedent had Ms. Gibbs' name added to his account at JN Bank, telling her that he trusted that she would not go behind his back and withdraw large sums of money. Ms. Gibbs testified that she had signed a prenuptial agreement upon marriage and did not expect money from Decedent. However, Decedent had promised Ms. Gibbs that he would help her bring her children to the United States and have them obtain citizenship, save her oldest son who was over eighteen. Ms. Gibbs testified that Decedent was close to her sons and he was proud that they were doing well in school.

Ms. Gibbs testified that she had first met Marva Coulson in 2016 at her wedding, where Ms. Coulson was introduced to her as Decedent's caretaker. Ms. Gibbs averred it was only upon her arrival in the United States in January of 2020, that she learned that Ms. Coulson was in fact more of a live-in girlfriend. This immediately created tension in the house, as Ms. Gibbs felt misled. Ms. Gibbs stated that Ms. Coulson and Decedent shared a bedroom, while she had her own room. Ms. Gibbs testified that she served a caretaker role when living with Decedent, preparing breakfasts and dinners. She testified that Decedent in return had arranged to have

her oldest son stay with a relative in Florida.

Ms. Gibbs testified that Decedent had taken several trips during his final years to Little Rock, Arkansas for hospice care. She testified that Decedent took his final trip to Little Rock in March of 2020 to receive a bone marrow transplant, accompanied by Ms. Coulson. Ms. Gibbs said that while Decedent was in Little Rock, her own niece, who lived in the area, transported Decedent and Ms. Coulson around the city. Ms. Gibbs testified that in March of 2020 she had contacted Decedent in hospice care and told him she wanted a divorce due to his living situation with Ms. Coulson. Decedent agreed to arrange it upon his return to Williamsport.

Ms. Gibbs testified that Decedent returned home from hospice care on Wednesday, April 8, 2020. She averred that on first returning home Decedent was “out of it.” However, he had become somewhat more alert when visiting with his children on April 8 and 9. Ms. Gibbs testified that colleagues from UPMC, including Dr. Banks and his wife, had also visited Decedent on April 9, staying to talk with him until approximately 10:00 p.m. When asked on cross-examination whether Decedent’s colleagues, Charles Hanley and Taylor Kozak, were among those who visited Decedent, Ms. Gibbs testified that they may have been, but could not recall on what date that would have occurred. However, Ms. Gibbs said that upon waking up the morning of April 10, Decedent was no longer speaking, did not eat or drink, and lacked the energy to get out of bed. Ms. Gibbs testified that from this point until his death, Decedent was effectively catatonic.

Ms. Gibbs testified that on April 11, 2020, Kathy Byham, a notary, came by the house. Ms. Gibbs stated she had previously met with Ms. Byham to have certain documents notarized for her son to enroll in Loyalsock high school. She remembered that Decedent had mentioned at that time that Ms. Byham was a colleague and that he was responsible for sending her to notary school. Ms. Gibbs testified that she and Ms. Byham sat together in Decedent’s living room where Ms. Gibbs signed divorce papers, which Ms. Byham recorded in her notarial ledger. Ms. Byham also notarized certain documents provided to her by Marva Coulson. Ms. Gibbs testified that she stayed in

the living room with Ms. Byham the entire time that Ms. Byham was at the house. She averred that at no time did Ms. Byham enter Decedent's bedroom.

Ms. Gibbs testified that once Ms. Byham had left, she had entered Decedent's bedroom, where Ms. Coulson had been sitting with Decedent. Ms. Coulson had then approached Ms. Gibbs and asked her to sign a document that Ms. Coulson characterized as related to Decedent's work. Seeing that the document was notarized, Ms. Gibbs attached her signature without knowing specifically what the document was. Ms. Gibbs testified that Ms. Coulson then turned her attention to Decedent, telling him that she had some papers for him to sign. However, Decedent was at this point unresponsive. Ms. Coulson then placed a pen in Decedent's hand, and directed his hand in signing the Will. However, Ms. Gibbs testified that she only learned that this document was in fact the Decedent's Will following his death.

## **II. June 9, 2021 Hearing**

### **D. Ainsworth D'Hue**

Petitioners called as their final witness Ainsworth Wayne D'Hue ("Mr. D'Hue"). Mr. D'Hue introduced himself as a resident of Fresno, Texas, and the son of the Decedent. Mr. D'Hue works as a truck driver. Mr. D'Hue provided that he had arranged his trucking route so that he could arrive in Williamsport on April 8, 2020 to visit his father. Mr. D'Hue stated that when he arrived on April 8, Decedent seemed slow, lethargic, and not very lucid. Mr. D'Hue testified that he and his siblings spent most of the evening of August 8, 2020 reminiscing with their father, and then ended the evening with a prayer for their father. He stated that although Decedent was an atheist, he appeared to appreciate the sentiment.

Mr. D'Hue testified that he spoke with Decedent on the morning of August 9, 2020 for about thirty minutes to an hour before leaving to resume his trucking route. He stated that his father was again very groggy, as if having just woken from a deep sleep. Mr. D'Hue testified that he told his father he was leaving but that he would be back. His father had merely replied "okay" and chuckled. Mr. D'Hue averred that sometime after returning home he had tried calling Decedent, but Ms. Coulson, who

always mediated the calls, would not allow Mr. D'Hue to speak to Decedent. Mr. D'Hue testified that he had no further contact with his father prior to his death.

Mr. D'Hue admitted that he had a strained relationship with his father. Mr. D'Hue elaborated that he had a difficult childhood, and had been estranged from his father for many years in early adulthood. Mr. D'Hue testified that once he had children of his own he decided that he wanted them to have a relationship with their grandfather. Therefore, he reinitiated contact with Decedent. Over time, he and Decedent had repaired their relationship to a degree. However, Mr. D'Hue testified that he and his father had another falling out that rendered them estranged. He provided that after this falling out, he had tried contacting his father upon learning of his cancer diagnosis around 2012. This merely resulted in another argument and continued estrangement. Mr. D'Hue provided that he did not finally reconnect with his father until around December of 2019, when he visited Decedent while he was at hospice in Little Rock, Arkansas. Mr. D'Hue explained that he had been finally prepared to forgive the past in light of his father's declining health.

When questioned whether he had any conversations with Ms. Coulson regarding Decedent, Mr. D'Hue stated that he had several conversations with Ms. Coulson, as Ms. Coulson would direct all interactions with Decedent through herself. He testified that during his April 8-9 visit, Ms. Coulson had pulled him aside and told him that she would be entitled to Decedent's social security, as she had uprooted her life to care for the Decedent. Mr. D'Hue testified that he became angry in that moment, as he found Ms. Coulson's focus on money to be crass. Mr. D'Hue averred that he does not trust Ms. Coulson's motives.

When asked whether he was surprised by anything in the Will, Mr. D'Hue testified that he was surprised that nothing had been bequeathed to his own children, as he believed that Decedent had maintained a good relationship with his grandchildren. He was also surprised that so little had been bequeathed to Janette D'Hue, as his sister had cared significantly for Decedent during his illness. Mr. D'Hue also was distrustful of the validity of the Will because the majority of the Estate went to

Cedric D'Hue, who drafted the Will, and family ancestral lands had been bequeathed to a non-family member, Marva Coulson. Mr. D'Hue mentioned that his father had a prior, unexecuted Will drafted by the McCormick Firm. Mr. D'Hue stated that he did not understand why his father would not again contact the McCormick Firm to draft an updated version of the Will rather than rely on a family member.<sup>3</sup>

Mr. D'Hue also testified that he did not believe his father had the capacity to draft or execute a Will based on his father's mental state on April 8, 2020. Mr. D'Hue averred that while his father had retained his long-term memory, Decedent himself had explained to his son during their final meeting that his short-term memory had declined due to various rounds of chemotherapy. Mr. D'Hue averred that the truth of this statement was evident when speaking with Decedent during his final days; Decedent's response time was significantly delayed, and he would sometimes get stuck repeating the same thought. Mr. D'Hue added that his father did not speak much at all during their final meeting, but rather listened to his family reminisce.

#### E. Charles Hanley

Petitioners then rested their case. Respondent first called Charles William Hanley, III ("Mr. Hanley") to testify. Mr. Hanley submitted an Oath of Non-Subscribing Witness to the Court.<sup>4</sup> Mr. Hanley introduced himself as a licensed practical nurse who has worked at UPMC in Williamsport for the last seventeen years. Mr. Hanley testified that he had worked as a nurse for Decedent, an ENT specialist, for about seven years. Mr. Hanley testified that he was familiar with Decedent's signature. He averred that the signature on Decedent's Will was consistent with Decedent's signature through his work experience. Mr. Hanley elaborated that while the signature on the Will was less composed than Decedent's typical signature, Decedent's signature would often become messier by the end of a workday. Mr. Hanley further testified that Decedent had remained in practice until January or February of 2020 when he was visibly deteriorating from cancer. Mr. Hanley stated that he observed

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<sup>3</sup> This earlier Will, drafted in 2012, was entered as Proponent's Exhibit 4.

<sup>4</sup> Charles Hanley's Oath of Non-Subscribing Witness was entered as Proponent's Exhibit 2.

Decedent experiencing tremors during his last months at work, resulting in an increasingly shaky signature.

Mr. Hanley testified that he had visited Decedent some three or four times after Decedent returned from hospice care on April 8, 2020. Mr. Hanley recalled visiting Decedent in the late afternoon or early evening of April 11, 2020. At that visit, Mr. Hanley averred that he found Decedent tired but coherent, capable of engaging in a substantive conversation. Decedent and Mr. Hanley had chatted for a while, with Decedent asking about how UPMC had implemented COVID-19 protocols. Decedent had also sought updates on how certain UPMC staff members and Mr. Hanley's son were doing. Mr. Hanley and Decedent prayed together before Mr. Hanley left. Mr. Hanley stated that April 12, 2020 was the last time he had visited Decedent. However, at that time Decedent had been asleep and unresponsive.

When questioned as to his perception of Decedent and Ms. Coulson's relationship, Mr. Hanley testified that he knew that Decedent and Ms. Coulson had been off and on together for several years before finally reuniting in 2016. Mr. Hanley testified that he saw the relationship as being romantic but also practical. He stated that Ms. Coulson had helped Decedent in arranging the construction of cabins in Jamaica. He described her as a caregiver, providing that Ms. Coulson had cleaned Decedent's house, prepared his meals, and accompanied him on his trips to Little Rock, Arkansas. Mr. Hanley testified that he had never had any conversations with Ms. Coulson regarding Decedent's Will, but stated that he would not be surprised if she had been provided for. When asked about Decedent's relationship with Ms. Gibbs, Mr. Hanley testified that Decedent had told him that Ms. Gibbs was his niece, and that he planned to marry her so she could get a green card to the United States and start a better life.

#### F. Taylor Kozak

Respondent then called Taylor Kozak ("Ms. Kozak") as a witness. Ms. Kozak also provided an Oath of Non-Subscribing Witness.<sup>5</sup> Ms. Kozak identified herself as a

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<sup>5</sup> Taylor Kozak's Oath of Non-Subscribing Witness was entered as Proponent's Exhibit 3.

licensed practical nurse who had worked with Decedent for two years at the ENT division before moving to pediatrics. Ms. Kozak stated that during the time she had worked with Decedent they had become very close. She stated that she was familiar with Decedent's signature from observing him sign papers at work. She affirmed that the signature on the Will was consistent with Decedent's signature. Specifically, Ms. Kozak elaborated that in January and February of 2020, right before Decedent retired, his declining health had resulted in his signature becoming shaken and distorted.

Mr. Kozak testified that she had visited the Decedent a few times in his final days. She provided that she had visited around noon on April 11, 2020, and spoke to Decedent for about an hour. Ms. Kozak described Decedent as being feeble, but in a cognizant state. Decedent had greeted Ms. Kozak as "giggles," his old nickname for her, and had offered her rum punch. Ms. Kozak testified that she and Decedent had largely talked about how great it had been to work together. Ms. Kozak added that Decedent had seemed slightly upset that she had not come to visit earlier. Ms. Kozak testified that she had also gone to visit Decedent on April 13, 2020, but at that point, Decedent was unresponsive.

When asked whether she knew Marva Coulson, Ms. Kozak testified that she knew of her as Decedent's girlfriend, but did not know her personally. Upon further questioning, Ms. Kozak stated she would not have been surprised if the Decedent had provided for Ms. Coulson in his Will.

#### G. Cedric D'Hue is recalled

Respondent Cedric D'Hue was recalled to elaborate on the drafting of Decedent's Will. Dr. D'Hue first clarified that he had not spoken to anyone else about the specific contents of the Will prior to his father's death. He provided any time he and Decedent began discussing the Will, Marva Coulson, if present, would excuse herself from the room. Dr. D'Hue next testified that he was aware that his brother Ainsworth D'Hue and his father had a troubled relationship, which at times had even become violent. As to Janette D'Hue, Dr. D'Hue averred that in the process of finalizing terms, Decedent had mentioned that he had provided for his daughter

throughout her life, and felt no obligation to leave her more than the thirty thousand bequeathed in the Will. Dr. D'Hue corrected himself on certain details provided in his initial testimony, clarifying that he had completed and shown a draft of the Will to his father on the morning of August 9, 2020, before leaving to catch a plane. Dr. D'Hue further explained that Decedent at that time had stated that he wanted the title "Dr." added to his and Cedric D'Hue's names. After Dr. D'Hue arrived home in Indiana, he made the changes and emailed the updated document to his father.

On cross-examination, when questioned about his relationship with Ainsworth D'Hue, Dr. D'Hue explained that he had not grown up in the same home with his brother, but had spent summers with him. When questioned with respect to his source of knowledge of Ainsworth D'Hue's strained relationship with Decedent, Dr. D'Hue testified that both his father and Mr. D'Hue had told him details of confrontations. Dr. D'Hue also recalled conversations with Decedent where Decedent had complained that Ainsworth D'Hue's children only contacted him when they wanted something. When asked why his father felt that he had sufficiently provided for Janette D'Hue, Dr. D'Hue averred that he did not know, as he had not pressed his father on the matter. When asked about the bequest of land to Marva Coulson, Dr. D'Hue testified that Ms. Coulson had served as Decedent's primary caretaker for years without pay. Dr. D'Hue also believed Decedent felt guilty about his "false marriage" to Ms. Gibbs and wanted to compensate Ms. Coulson in some manner.

When asked why he believed he had been granted the bulk of Decedent's Estate, Dr. D'Hue theorized that it was because he had never asked his father to financially support him. Dr. D'Hue elaborated that his father had not supported him through college because Dr. D'Hue had decided to study out-of-state, rather than in state as his father wanted. Dr. D'Hue said that there had been tension in his relationship with his father for that reason, and also because his father had not initially approved of who Dr. D'Hue chose to marry. Dr. D'Hue testified that his father had since become proud of Dr. D'Hue's achievements, and theorized that perhaps his father felt that he was making things right with him by making a generous bequest.

When asked why Decedent had not contacted the McCormick Firm to draft a revised Will, Dr. D'Hue testified that as the original draft Will dated from 2012, he was unsure whether Decedent still had a client relationship with the McCormick Firm. Dr. D'Hue acknowledged the fact that as the primary beneficiary under the Will it was not ideal that he was also the Will's drafter. However, Dr. D'Hue averred that under the exigent circumstance of Decedent's quickly declining health both he and Decedent recognized there would be no time to retain an attorney.

On redirect, Dr. D'Hue was questioned further concerning the assets of the Estate. Dr. D'Hue provided that he had been designated the beneficiary on Decedent's IRA and life insurance plan. Dr. D'Hue averred that he did not know when Decedent made these designations. Dr. D'Hue also identified a UPMC cash and savings plan without a designated beneficiary, which was therefore subject to a three-way split among the siblings. Dr. D'Hue stated that he had been named the joint tenant on two of Decedent's properties in Jamaica in 2018.

#### H. Marva Coulson

Respondent called Marva Antoinette Coulson to testify. Ms. Coulson identified herself as a resident of Laurel Hill, Florida, and stated that she had been Decedent's girlfriend. Ms. Coulson elaborated that she and Decedent had been in a relationship from 1998 through 2001, after which they separated. She testified that she and Decedent had gotten back together in 2014. In late 2016 or early 2017, at Decedent's request, Ms. Coulson left her residence in Orlando, Florida, to live with Decedent in Williamsport. Ms. Coulson stated at the time she had moved in with Decedent, his cancer had been in remission, but soon became active again in late 2017. She stated that once the cancer had recurred, Decedent had not gone a day without suffering. Ms. Coulson quickly assumed a caretaker role, cleaning Decedent's house, preparing his meals, doing laundry, and serving as a sympathetic ear whenever Decedent felt unwell.

Ms. Coulson testified that Decedent's symptoms worsened in 2019, which is when he began planning his retirement. She stated that Decedent suffered from

tiredness, a lack of concentration, and neuropathy in his fingers. Decedent could not regulate his temperature and would become too hot or cold. Ms. Coulson testified that despite this, Decedent remained of sound mind and until the night before his death, was able to engage in substantive discussions and make plans.

Ms. Coulson testified that on April 11, 2020 she had printed out the final draft version of the Will emailed by Cedric D'Hue and provided the document for Decedent's review. Once Decedent expressed his approval of the Will, it was put aside with several other documents that Decedent intended to execute in the presence of a notary. Among these documents was a Power of Attorney naming Cedric D'Hue as Decedent's agent. Upon her arrival, Ms. Byham, the notary, gathered with Ms. Coulson and Ms. Gibbs in Decedent's room to witness Decedent's signing of documents. Ms. Coulson maintained that although Ms. Gibbs had signed various documents at the time, Ms. Gibbs specifically knew when she was signing the witness page of the Will because Decedent had made sure to tell her beforehand what she was doing. Ms. Coulson testified that while she had given Decedent the pen and had placed the Will on a book and held it up to Decedent's face for him to sign, she had not directed his hand in making the signature. Ms. Coulson averred that Decedent had been of sound mind at the time he signed his Will.

Ms. Coulson provided that while she had never discussed a beneficiary designation with Decedent, at various times Decedent had assured her that she would be provided for at the time of his death. When questioned on cross whether she had discussed Decedent's Estate with any of Decedent's children, Ms. Coulson testified that Janette D'Hue had asked her at various times about Decedent's plans regarding the disposition of properties in Saint Margaret's Bay, Jamaica, where Decedent was constructing cottages. Ms. Coulson averred that she had mentioned Ms. D'Hue's interest in the property to Decedent. Decedent had responded that Ms. Coulson should not allow Ms. D'Hue to take advantage of her as a source of information.

Ms. Coulson testified that she had been confronted by Ainsworth D'Hue, who accused her of manipulating his father into putting her name on the Saint Margaret's

Bay properties. Ms. Coulson told Mr. D'Hue that it was none of his business, although she testified in Court that because she had helped prepare the paperwork for the properties she knew that her name was not on the titles. Ms. Coulson testified that Decedent had told her that he planned to disinherit Ainsworth D'Hue. Ms. Coulson maintained that she had urged Decedent to bequeath Ainsworth D'Hue the Silverado truck, as Mr. D'Hue had already borrowed the truck and had it in his possession.

I. Ajay Kumar

Respondent next called Ajay Kumar, MD ("Dr. Kumar") as a witness. Dr. Kumar introduced himself as a board-certified oncology and hematology specialist who has practiced at UPMC Susquehanna's cancer center for the past two-and-a-half years. Dr. Kumar testified that he assumed Decedent's cancer treatment from another colleague in early 2019. Dr. Kumar provided that he had last seen Decedent on March 6, 2020 at the cancer center, after which UPMC arranged to transfer Decedent to hospice care in Little Rock, Arkansas. Dr. Kumar testified that Decedent had progressed through all treatment modalities by the end of his stay in Little Rock. Determining that the cancer had significantly metastasized and that Decedent was too weak to undergo further treatment, he was put on end of life palliative care. Dr. Kumar explained that palliative care is designed to manage symptoms, such as pain, so to allow patients to "die with dignity." To that end, Decedent had been released back to his home with a hospice care worker so he could spend his last days with family.

Dr. Kumar testified that while in home care, Decedent had been prescribed oral morphine and a fentanyl patch, which when applied to skin provides a constant, low-level release of pain medication. Dr. Kumar testified that the pain medications Decedent was receiving could have side effects such as drowsiness, reduced concentration, impairment of short-term memory, breathing difficulties, and constipation. When asked on cross whether the medications Decedent had been prescribed could impact his comprehension, Dr. Kumar opined that it was unlikely given the relatively low dose that Decedent had been taking.

#### J. Ruth Shelton

Respondent's final witness was Ruth Shelton ("Ms. Shelton"). Ms. Shelton introduced herself as a middle school principal in Canada and a friend to Decedent. Ms. Shelton testified that she has known Decedent for fifty-nine years and was a relative by marriage; specifically, Ms. Shelton's mother-in-law is Decedent's sister. Ms. Shelton testified that Decedent had called her on the morning of Friday, April 10, 2020. Ms. Shelton said that Decedent had told her that the treatment had not been successful. While Decedent had previously had a hopeful tone in discussing his illness, he now seemed tired and resigned. Ms. Shelton theorized that Decedent had called to say goodbye. She and Decedent talked about Ms. Shelton's older brother, who had been a close friend and attended school with Decedent. Ms. Shelton apologized to Decedent that neither she nor her older brother were in a position to travel and visit him at that time. Ms. Shelton testified that after the call ended, she telephoned all of Decedent's nieces and nephews on the mother-in-law's side of the family to tell them that, if possible, they should try to visit Decedent while they still had the opportunity to do so.

With that, the testimonial part of the evidentiary hearing concluded. The Court ordered the filing of supplemental briefing. On June 23, 2021, the Court received Petitioners' Brief in Support of Petition for Appeal from Probate. On July 6, 2021, the Court received Respondent's Brief in Opposition to Petitioners' Brief in Support of Petition for Appeal from Probate.

#### ***Analysis***

Petitioners raise two issues on appeal: lack of testamentary capacity and undue influence. As to lack of capacity, Petitioners assert that due to the side effect of heavy medication, Petitioner lacked the capacity to understand or appreciate that he was making and executing a Will. The lack of capacity claim has a fraud element as well, as Petitioners aver that in guiding Decedent's hand in his weakened state, Marva Coulson effectively forged his signature.

## I. Lack of Testamentary Capacity

"The burden of proof as to testamentary capacity initially rests with the proponent of a will. However, a presumption of testamentary capacity arises upon proof of execution by two subscribing witnesses."<sup>6</sup> The burden of proof then shifts to the Will contestants to demonstrate incapacity by clear and compelling evidence.<sup>7</sup> "Capacity is presumed because sound mind is a normal condition."<sup>8</sup> Old age, sickness, distress or debility of body neither prove nor raise a presumption of incapacity.<sup>9</sup>

One of the subscribing witnesses to the Will, Angella Gibbs, has testified to Decedent's lack of testamentary capacity at the time he signed his Will. While this is certainly evidence supportive of Petitioners' claim of lack of capacity, this does not in itself negate the self-proving aspect of the Will. The Pennsylvania Supreme Court's determination in the 1965 case *In re Brantlinger's Estate* clarified that there is no obligation that the subscribing witnesses to a will make any representation as to testamentary capacity in order for the will to be proven. Rather, challenges to the will "must overcome, by clear, strong, and compelling evidence. . .the presumption of testamentary capacity which arose when the execution of the will was proved by the required two witnesses."<sup>10</sup> In support of its decision, the *Brantlinger* Court cited to a case from one hundred years prior, *Rees v. Stillé*, which has significant factual similarity to the foregoing matter. In *Rees*, one subscribing witness to a codicil testified to both the fact of execution and the testator's mental capacity. The second witness testified that the testator was comatose at the time of execution, his hand guided by another to make his signature. The *Rees* Court held that while the second subscribing witness had called into question the testator's mental capacity at the time of executing the codicil, an issue that would need to be presented to the factfinder, the

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<sup>6</sup> *In re Hastings' Est.*, 387 A.2d 865, 867 (Pa. 1978) (citations omitted); see also 20 Pa.C.S. § 3132.1 for the requirements of a self-proving will.

<sup>7</sup> *Id.*

<sup>8</sup> *In re Est. of Mabel Adams*, No. OC2000-67, 2001 WL 35928089 (O.C. Craw. Cty. Nov. 14, 2001) (citing *In re Allison's Est.*, 59 A. 318 (Pa. 1904)).

<sup>9</sup> *Id.* (citing *Est. of Hastings*, 387 A.2d at 868).

<sup>10</sup> *In re Brantlinger's Est.*, 210 A.2d 246, 250 (Pa. 1965).

signatures of two subscribing witnesses were *prima facie* proof of the execution of the codicil. Therefore, the burden of challenging the admission of the codicil to probate would fall on the contestant.<sup>11</sup>

Further, this Commonwealth has recognized that a guided hand signature may constitute a valid execution of a will when the testator is of sound mind and wishes to sign the will, but lacks physical ability, and so calls on the assistance of another.<sup>12</sup> Therefore, even accepting as true *arguendo* Ms. Gibbs' averment that she saw Ms. Coulson guide Decedent's hand in signing the Will, this does not *per se* contravene Decedent's valid execution of the Will; Ms. Gibbs' testimony rather calls into question Decedent's state of mind and intentions at the time of execution.

Ms. Gibbs also testified that she did know she was witnessing the execution of Decedent's Will when signing the Oath of Subscribing Witness. Even accepting this as true *arguendo*, this is not *per se* relevant to whether the Will is self-proving. The necessity of two subscribing witnesses is for proof of the execution of a paper. It is unnecessary for the witnesses to know that they have specifically witnessed the execution of a will in order for the will to be self-proving.<sup>13</sup>

The Court thereby finds that the burden falls upon Petitioners to show by clear and compelling evidence that Decedent lacked testamentary capacity at the time the Will was executed. The Courts have defined testamentary capacity in the following

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<sup>11</sup> See *id.* (citing *Rees v. Stillé*, 38 Pa. 138 (1861)).

<sup>12</sup> *Brehony v. Brehony*, 137 A. 260, 261 (Pa. 1927) ("Where testator's mental conception is entirely clear and he desires to sign the will, but his physical powers unassisted will not permit it, and such assistance is called in, the incident of assistance becomes immaterial so long as there is a conscious wish of the testator that his hand should make the signature."); see also *In re Milleman's Est.*, 203 A.2d 202, 209 (Pa. 1964) ("If one having testamentary capacity, is unable from palsy or other cause to steady his hand so as to make to his will the signature required by law, another person may hold his hand and aid him in so doing; and it is not necessary to prove any express request from the testator for such assistance. The act is his own with the assistance of another, and not the act of another under authority from him."); *In re Staico*, 143 A.3d 983 (Pa. Super. 2016) (holding that when testator executed will with assistance of his girlfriend, who guided testator's hand because he had difficulty pressing down the pen, this satisfied the requirement that the will be signed by the testator).

<sup>13</sup> *Brantlinger's Est.*, 210 A.2d at 251 (citing *In re Lillibridge's Est.*, 69 A. 1121 (Pa. 1908)) ("We have uniformly held that the necessity for two subscribing witnesses relates only to the formal execution of the paper; and we have just as uniformly held that where the instrument is in terms a will, it is wholly immaterial that the witnesses did not know that the paper was a will, or were without knowledge that it

manner:

Testamentary capacity exists when the testator has intelligent 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. Neither old age, nor its infirmities, including untidy habits, 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 determining testamentary capacity, a greater degree of proof of mental incapacity is required than would be necessary to show the inability to conduct one's business affairs. Finally, testamentary capacity is to be ascertained as of the date of execution of the contested document.<sup>14</sup>

While capacity is determined by the testator's state of mind at the time of executing the will, "evidence of incapacity for a reasonable time before and after the making of a will is admissible as an indication of lack of capacity on the day the will is executed."<sup>15</sup>

There was ample testimony that Decedent was sufficiently alert to engage in substantive conversations from April 8, 2020, through April 11, 2020. While Decedent was variously described as "unresponsive" the morning of Wednesday, April 8, 2020, Decedent had just traveled to Williamsport from hospice care in Little Rock, Arkansas, and would reasonably have been tired. Decedent's three children all testified to having spoken with Decedent in the late afternoon or evening of April 8, and on the morning of April 9. While the children's' description of Decedent's acuity at this time vary to a degree, their testimony is consistent that Decedent recognized his children, spoke with them, and listened while his children reminisced and prayed for him.

Further, Cedric D'Hue testified that he and his father had discussed the terms of Decedent's Will late on the night of April 8 and into the early morning of April 9, and that his father asked him to make revisions to the Will on the morning of April 9. Petitioners have questioned Cedric D'Hue's credibility due to drafting a Will by which

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had ever been read to the testator. It is quite as immaterial here that they signed as witnesses without having been specifically requested to do so by the testator.").

<sup>14</sup> *Staico*, 143 A.3d at 989 (quoting *In re Est. of Smaling*, 80 A.3d 485, 494 (Pa. Super. 2013)).

he is the primary beneficiary. However, the Court finds Cedric D'Hue credible, based both upon its assessment of Dr. D'Hue's comportment at trial, and upon uncontested testimony that Dr. D'Hue had been also named the sole beneficiary of Decedent's IRA and life insurance plan, and a joint tenant on two of Decedent's Jamaica properties. Decedent had also designated Cedric D'Hue as an eighty-five percent beneficiary in his unexecuted 2012 Will. The evidence of record strongly suggests that Decedent had long intended Cedric D'Hue to be the primary beneficiary of his Estate.

The Court ruled at trial that Janette D'Hue's testimony regarding the text messages she received from Marva Coulson and the telephone conversations she had with Marva Coulson and her cousin regarding Decedent's deteriorating health on April 10-12 was inadmissible hearsay. Conversely, the Court considered the direct testimony from Ruth Shelton, who engaged in a telephone conversation with Decedent on April 10, and Charles Hanley and Taylor Kozak, who visited Decedent in person on April 11. These three witnesses all testified that Decedent had been able to engage in substantive conversations on April 10 and 11. Based upon their demeanor and apparent lack of interest in the outcome of this matter, the Court finds the testimony of all of three witnesses to be credible.

The Court also credits the testimony of Mr. Hanley and Ms. Kozak that the signature on the Will resembled Decedent's signature as it appeared in the final months of his life, i.e., an unsteady version of his typical signature caused by tremors and weakness. The Court finds the testimony of Janette D'Hue that the signature did not resemble her father's less probative. Ms. D'Hue testified to having received letters from her father in college, presumably decades ago and during a time when Decedent was not suffering from late-stage cancer.

Dr. Kumar, Decedent's treating physician, opined that Decedent's medication regime was unlikely to have affected his cognitive abilities to the extent that it would impair his overall comprehension. While the Court puts limited weight on this

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<sup>15</sup> *In re Hastings' Est.*, 387 A.2d at 867 (citations omitted).

testimony, as it was not offered in the nature of an expert opinion, and because Dr. Kumar did not see Decedent in the month leading up to his death, Petitioners failed to present evidence that Decedent was likely suffering from significant cognitive impairment due to his medication. Ainsworth D'Hue, based upon his visit with Decedent on April 8 and 9, described his father's short-term memory as deteriorated, his response time delayed, and spoke of him occasionally repeating phrases. However, these behaviors, if taken as true, are insufficient to prove a lack of testamentary capacity.

Petitioners' case, therefore, rests in very large part on the testimony of Angella Gibbs. As a non-beneficiary of Decedent's Estate under intestacy, Ms. Gibbs has no immediate interest in the outcome of this case. However, Ms. Gibbs' testimony suggested an understandable antipathy toward Ms. Coulson due to Ms. Coulson's romantic relationship with the Decedent during the time Ms. Gibbs and Decedent were married. Additionally, Ms. Gibbs lives (or lived at time of trial) with Janette D'Hue. These facts could predispose Ms. Gibbs to support Petitioners. Nonetheless, of the two witnesses who testified as to Decedent's demeanor at the time he signed the Will, the Court finds the testimony of Angella Gibbs to be more credible than that of Marva Coulson. This is in part because Ms. Coulson is a beneficiary under the Will, and will not inherit through intestacy, and so has a direct interest in upholding the Will, but also because Ms. Gibbs' comportment and demeanor while she testified made her, in the Court's opinion, more believable.

Nonetheless, Ms. Gibbs' testimony suffers from being inconsistent with that of other credible witnesses. Ms. Gibbs testified that Decedent was fully catatonic by April 10 and 11, and that no one visited him on those dates. This testimony is inconsistent with the representations of Ms. Shelton, Mr. Hanley, and Ms. Kozak. As previously stated, the Court finds these witnesses credible and disinterested. Further, Ms. Gibbs' testimony that Decedent was unresponsive at the time that he signed the Will is not only contradicted by the testimony of Ms. Coulson, but by Ms. Byham's notarization of the Will as validly executed.

Petitioners have of course challenged the validity of the Will's notarization as well. Ms. Gibbs testified that Ms. Byham was not present for the execution of the Will, and in fact did not see the Decedent at all on April 11, but rather pre-notarized the Will before it had been signed. Importantly, Respondent withdrew Ms. Byham's Affidavit, which affirmed that she appropriately witnessed and notarized the execution of the Will. On the other hand, Ms. Coulson testified that Ms. Byham was in the room when Decedent executed the Will, and properly notarized the self-proving clause and affidavit of subscribing witnesses once those pages had been signed in her presence. The absence of Ms. Byham from the evidentiary hearing is troubling, as her testimony would clearly be crucial regarding the regularity of the execution of the Will. As there is no Affidavit to consider, the question arises whether the Court may draw an adverse inference against either Petitioners or Respondent for failing to call Ms. Byham as a witness. In the Civil and Criminal context, the general rule is that the factfinder may draw an adverse inference when a party fails to call a witness or present evidence uniquely within his or her control. This rule only applies when the witness or evidence is not equally available to both parties.<sup>16</sup> Analogues to this rule have been applied in the Orphans' Court.<sup>17</sup>

Finding that Ms. Byham would have been equally available to either party, the Court cannot draw an adverse inference from her absence. However, to the extent that Petitioners bear the burden of proof, the Court finds their failure to bolster Ms. Gibbs' versions of events on April 11, 2020 with other potentially probative evidence is fatal to their claim. Pursuant to the foregoing, the Court holds that Petitioners have failed to demonstrate by clear, strong, and compelling evidence that Decedent lacked

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<sup>16</sup> See *Kovach v. Solomon*, 732 A.2d 1, 8 (Pa. Super. 1999).

<sup>17</sup> See e.g., *In re Fink's Est.*, 21 A.2d 883, 890 (Pa. 1941) (finding that claimants seeking to prove by preponderance of the evidence their relatedness to the decedent, and thus their status to inherit under the laws of intestacy, had weakened their argument by failing to call as a witness one of the claimant's aunt, as the aunt had unique knowledge of important facts to the case); *Life Ins. Co. of N. Am. v. O'Brien and Piskorski*, 3 Phila. Co. Rptr. 529 (O.C. Phila. Cty. Feb. 13, 1980) (holding, when claimant challenged the legitimacy of a change of beneficiaries form, that the failure of the proponent of the form to call two subscribing witnesses, when the two witnesses were friends of proponent and had been called to proponent's home at her request to witness decedent's execution of the form, would be construed against the proponent).

testamentary capacity at the time of the execution of his Will.

## II. Undue Influence

The Court next considers Petitioners' allegations that Cedric D'Hue and Marva Coulson exercised undue influence and overrode Decedent's decision-making authority in drafting or executing the Will. To make a *prima facie* case for undue influence, Petitioners must demonstrate by clear and convincing evidence: "(1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the will; and (3) the proponent receives a substantial benefit from the will in question."<sup>18</sup> If Petitioners can satisfy each prong of this test, then the burden shifts to Respondent to demonstrate by clear and convincing evidence a lack of undue influence.<sup>19</sup>

In the undue influence analysis, when considering whether the testator had a weakened intellect, the standard of evidence is less than that needed to prove a lack of testamentary incapacity.<sup>20</sup> "Although our cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation."<sup>21</sup> As to the second factor, a court will find a confidential relationship "when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed[.]"<sup>22</sup> "It will weigh heavily against the proponent on the issue of undue influence when the proponent was either the scrivener of the will or present at the dictation of the will."<sup>23</sup> "Because undue influence has been described as subtle, intangible, yet recognizable by human experience, it

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<sup>18</sup> *Est. of Fabian*, 222 A.3d 1143, 1150 (Pa. Super. 2019) (quoting *In re Estate of Smaling*, 80 A.3d at 493).

<sup>19</sup> *Id.*

<sup>20</sup> *In re Est. of Smaling*, 80 A.3d at 498 (citing *In re Est. of Clark*, 334 A.2d 628, 634 (Pa. 1975)).

<sup>21</sup> *Id.* (quoting *In re Est. of Fritts*, 906 A.2d 601, 607 (Pa. Super. 2006)).

<sup>22</sup> *Owens v. Mazzei*, 847 A.2d 700, 709 (Pa. Super. 2004) (quoting *Frowen v. Blank*, 425 A.2d 412, 416–17 (Pa. 1981)).

<sup>23</sup> *In re Est. of Schumacher*, 133 A.3d 45, 54 n.4 (Pa. Super. 2016) (quoting *Burns v. Kabboul*, 595 A.2d 1153, 1163 (Pa. Super. 1991)).

may be shown by circumstantial evidence. . . . Nevertheless, opportunity, suspicion and conjecture do not create or amount to proof of either a confidential relationship or undue influence and cannot carry the cause.”<sup>24</sup>

As to the first factor, a weakened intellect, there is some evidence that Decedent had a diminished capacity on April 8 and 9, the date that Dr. D’Hue assisted Decedent in drafting the Will. To be precise, there was testimony by Ainsworth D’Hue that Decedent’s short-term memory was deteriorated, that his thought processes were delayed, and that he would sometimes repeat thoughts. Cedric D’Hue testified to the contrary that Decedent was tired but fully cognizant when drafting the Will over the night of April 8-9. Dr. D’Hue had also testified that Decedent had effectively finalized the terms of his Will in February of 2020, when there is no allegation that Decedent was suffering from memory problems. Therefore, there is conflicting testimony as to the state of testator’s intellect at the time he drafted the Will, and in both instances testimony derives from interested parties.

As to the second factor, a confidential relationship, the Court notes that while a parent-child relationship does not alone establish a confidential relationship, it may be considered as a factor.<sup>25</sup> The Court finds, however, that there is little evidence otherwise that Dr. D’Hue exercised an “overmastering influence” over Decedent. Dr. D’Hue lives in Indiana and had apparently limited contact with Decedent in the months leading up to Decedent’s death. Additionally, there are no allegations that Decedent’s intellect was at all impaired when Dr. D’Hue alleges he first met with Decedent to discuss the terms of his Will in February of 2020. To the contrary, the fact that Decedent continued working as a physician until approximately January or February of 2020 suggests that Decedent remained of sound mind at that time. Further, as discussed *supra*, Decedent, prior to drafting and executing the Will, had named Dr. D’Hue as his primary beneficiary in the unexecuted 2012 Will, had made Dr. D’Hue the sole beneficiary of his IRA and life insurance, and had named Dr. D’Hue as the co-owner of two Jamaica properties. As there is no evidence that Decedent was suffering

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<sup>24</sup> *In re Est. of Luongo*, 823 A.2d 942, 964 (Pa. Super. 2003) (citations omitted).

from a weakened intellect prior to April 8, 2020, these prior designations strongly suggest that Decedent had identified of his own accord Dr. D'Hue as his primary beneficiary.

Considering the third factor, a substantial benefit, it is undisputed that Dr. D'Hue was the drafter of a Will by which he is the primary beneficiary. However, the father-son relationship between Decedent and Dr. D'Hue construes in Dr. D'Hue's favor on this factor, as kinship alone would be a sufficient basis for Dr. D'Hue to be named a beneficiary.<sup>26</sup> Taken together, the Court finds that Petitioners have failed to demonstrate by clear and convincing evidence that Dr. D'Hue exercised undue influence over Decedent in the drafting of the Will.<sup>27</sup>

The Court next considers Petitioners' claim that Marva Coulson exercised an undue influence on Decedent at the time he drafted and executed his Will. As to the first factor, a weakened intellect, there is contradictory testimony as to Decedent's mental state during April 8-11. Ms. Gibbs testified that Decedent was effectively catatonic by April 10. Ms. Shelton, Mr. Hanley, and Ms. Kozak testified to the contrary, that they spoke on the telephone or visited with Decedent on April 10 and 11 and found him alert and able to carry on a substantive conversation. As previously noted, the Court finds all of these witnesses credible in demeanor, but also finds in weighing the conflicting testimony that greater weight should be afforded to Ms. Shelton, Mr. Hanley, and Ms. Kozak, as they are clearly disinterested witnesses.

As to the second factor, a confidential relationship, there is evidence of Ms. Coulson's involvement in day-to-day activities with Decedent, including testimony that she cooked for him, cleaned the house, traveled with him to Little Rock for hospice care, and even helped Decedent undertake certain property transactions in Jamaica. However, merely performing a caretaker role for the Decedent is insufficient to prove a

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<sup>25</sup> *In re Est. of Schumacher*, 133 A.3d at 54 (citation omitted).

<sup>26</sup> See *In re Est. of Stout*, 746 A.2d 645, 649 (Pa. Super. 2000) (quoting *In re Est. of Simpson*, 595 A.2d 94, 98 (Pa. Super. 1991)) ("[W]here there is a blood relationship between the testator and the beneficiaries of her estate, '[t]hat fact alone forms a sufficient, independent basis' for the bequest.").

<sup>27</sup> See *In re Est. of Heske*, 647 A.2d 243, 244 (Pa. Super. 1994) (quotation omitted) ("Clear and convincing evidence is the highest burden in our civil law and requires that the fact finder be able to come to clear conviction, without hesitancy, of the truth of the precise facts in issue.").

confidential relationship.<sup>28</sup> Decedent appears to have remained financially and professionally independent through the final months of his life, not suggestive of an overmaster influence. Further, while there was testimony from Ainsworth D'Hue and Janette D'Hue suggesting that Ms. Coulson limited their access to Decedent following their visit on April 8-9, the Court finds the record insufficient to demonstrate that Ms. Coulson made concerted efforts to isolate Decedent from his children, colleagues, or extended family. Finally, and most significantly, no evidence was presented suggesting that Ms. Coulson was involved in helping to draft Decedent's Will. In fact, Dr. D'Hue testified that Ms. Coulson would step out of the room when he discussed the Will with his father.

As to the final factor, Ms. Coulson clearly benefits under the Will, and would receive nothing through intestacy. However, considering the three factors jointly, the Court finds that Petitioners have failed to demonstrate beyond mere suspicion or conjecture a confidential relationship as would enable them to create a *prima facie* case for undue influence.

### **DECREE**

AND NOW, for the reasons set forth in the foregoing Opinion, the appeal from probate of the Will of Joel Oliver D'Hue by Petitioners Ainsworth Wayne D'Hue and Janette Evone D'Hue is hereby DISMISSED.

IT IS SO DECREED this 15<sup>th</sup> day of September 2021.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp

cc: Andrea Pulizzi, Esq.  
Christopher Kenyon, Esq.  
Gary Weber, Esq. / Lycoming Reporter

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<sup>28</sup> See e.g., *In re Koltowich's Est.*, 457 A.2d 1302 (Pa. Super. 1983) (holding that evidence that beneficiary and proponent of the will visited the decedent regularly, took the decedent for rides, bought the decedent food, and did other personal tasks for decedent was insufficient to prove a confidential relationship).