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Case No. 2319-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK SLOAN and JACK SLOAN,	)	
	)	
Petitioners,	)	
	)	
v.	)	C.A. No. 2319-VCS
	)	
LOUIS SEGAL and DELAWARE TRUST COMPANY,	)	
	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

Date Submitted: February 19, 2009
Date Decided: April 24, 2009

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STRINE, Vice Chancellor.

I. Introduction

This is a dispute over the distribution of the assets of a trust created by Martin Sloan shortly before his death in 1989 (the "Martin Sloan Trust"). The parties are Martin Sloan's three stepsons: petitioner Frank Sloan, petitioner Jack Sloan, and respondent Louis Segal. Frank, Jack, and Louis are brothers and the sons of Patricia Sloan, Martin Sloan's wife. Under the terms of the Martin Sloan Trust, Patricia had a power of appointment over the distribution of the Trust among her children after death (the "Power of Appointment"). If Patricia did not exercise the Power of Appointment, the Trust was to be split evenly between Frank and Jack, the two sons whom Martin helped raise, and none was to go to Louis, who had lived with Frank, Jack, and Louis' father, Sidney Segal, who was Patricia's first husband, after his parents separated.

The dispute between Frank, Jack, and Louis is whether Patricia validly executed a codicil dated July 1, 2003 that was drafted by Louis and purports to exercise the Power of Appointment entirely in favor of Louis (the "July 2003 Codicil"). The July 2003 Codicil amended a will Patricia executed on August 28, 2002 (the "August 2002 Will"). At the time of both the August 2002 Will and the July 2003 Codicil, Louis was the only one of Patricia's sons who was involved in her life. In the early 1990s, Frank and Jack had a painful falling out with Patricia. Frank and Jack told Patricia that she needed psychiatric help and that if she did not seek help, they would not help her if she got sick or go to her funeral if she died. From 1992 until her death in 2006, neither Frank nor Jack ever had any contact with his mother. But, in 2003 Patricia was also suffering from mild to

moderate Alzheimer's dementia. When she executed the Codicil, Patricia was living in the locked wing of an assisted living facility near Louis' home in Florida.

Based on these circumstances, Frank and Jack contend that Patricia lacked testamentary capacity and was under the undue influence of Louis when she executed the Codicil, making it an invalid exercise of the Power of Appointment. Frank and Jack further contend that the August 2002 Will, which the parties agree was validly executed, does not exercise the Power of Appointment, so the Martin Sloan Trust should be distributed to Frank and Jack under the default terms of the Trust.

Louis responds that Patricia's condition was not so debilitating that she lacked testamentary capacity and that the July 2003 Codicil, far from being the product of undue influence, reflected Patricia's long-held intent to not leave any money to Frank and Jack. Alternatively, Louis argues that, when all of the circumstances are considered, it is clear that Patricia exercised the Power of Appointment in the August 2002 Will in favor of Louis, who otherwise received the bulk of Patricia's estate.

In this post-trial opinion, I find that the assets of the Martin Sloan Trust should be distributed to Louis because the July 2003 Codicil was a validly executed testamentary instrument. First, I conclude that the August 2002 Will does not exercise the Power of Appointment because, under the terms of the Martin Sloan Trust, Patricia was required to make specific reference to the Power of Appointment to exercise it, and she failed to do so in the August 2002 Will. Turning to the July 2003 Codicil, I find that Louis has the burden of proving that Patricia executed the Codicil at a time when she possessed testamentary capacity and was free from undue influence. Louis bears this burden

because Patricia was in a state of weakened intellect due to her dementia, Louis occupied a confidential relationship with her because Louis had been handling all of Patricia's affairs since 2002, and Louis drafted a testamentary instrument that created a substantial benefit for himself. When these factors are present, our law requires that the drafter-beneficiary prove, by a preponderance of the evidence, that the execution of the instrument was valid.[1]

I find that Louis has met this burden. Patricia's medical records and the testimony of her treating physician indicate that the type and severity of dementia that Patricia had on July 1, 2003 did not impair her ability to make decisions about her estate, so she possessed the minimal competence required to have testamentary capacity. And, Louis has proven that there is no result that demonstrates undue influence, a requirement for invalidating a testamentary instrument based on undue influence. Patricia's earlier wills and her discussions with a psychiatrist who evaluated her in August 2002 demonstrate that Patricia never intended to leave Frank and Jack money after their lengthy estrangement. The fact that the August 2002 Will does not exercise the Power of Appointment appears to have been an oversight by Louis, who drafted the Will, or an indication that Louis believed that the Martin Sloan Trust could be liquidated and distributed to Patricia during her life, obviating the need to exercise the Power of Appointment. Patricia executed the Codicil after this court ruled in an earlier proceeding that the Martin Sloan trust could not be liquidated. Thus, the July 2003 Codicil

[1] *In re Will of Melson*, 711 A.2d 783, 788 (Del. 1998).

conformed Patricia's testamentary scheme to her expressed wishes, indicating it was not a product of undue influence.

There is no dispute that the July 2003 Codicil, if valid, designates Louis as the recipient of all of the assets of the Martin Sloan. Accordingly, I dismiss Frank and Jack's petition to direct the trustees of the Martin Sloan Trust to distribute the proceeds of the Trust to them, and I direct the trustees to distribute the proceeds of the Trust to Louis.

II. Factual Background

These are the facts as I find them after trial.

A. The Martin Sloan Trust

The Martin Sloan Trust was created on September 1, 1989, approximately one month before Martin Sloan died on October 9, 1989. Martin Sloan was the husband of Patricia Sloan and the stepfather of Patricia's three children from her previous marriage to Sidney Segal: respondent Louis Segal and petitioners Frank and Jack Sloan.[2]

The Martin Sloan Trust was created through a "Trust Agreement" that granted Patricia a power of appointment over the distribution of the Trust assets after her death:

> All of the principal then remaining shall be distributed to or for the benefit of any or all of the issue of Settlor's said wife then surviving (even to the exclusion of any one or more of any such surviving issue), whether outright or in trust, in such proportions and amounts, and in such lawful interests or estates, as Settlor's said wife designates in her Last Will by specific reference to this power of appointment.[3]

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[2] Frank and Jack, who stayed with their mother after she separated from Sidney Segal, took their stepfather's last name. Louis, who left his mother's house to live with his father when he was a teenager, did not change his name. Tr. at 19-21.
[3] JX-1 ("Martin Sloan Trust Agreement") § I.B.2(c)(ii)(A).

If Patricia did not exercise her Power of Appointment, the Trust assets would be distributed to Frank and Jack:

> To the extent that Settlor's said wife fails to effectively exercise the power of appointment described in the preceding paragraph, the balance of such unappointed property shall be distributed by Trustee as follows:
>
> (1) One-half (1/2) thereof to Settlor's step-son, FRANK SLOAN, if he is then living; otherwise, to his then living issue, such issue to take per stirpes.
>
> (2) One-half (1/2) thereof to Settlor's step-son, JACK K. SLOAN, if he is then living; otherwise, to his then living issue, such issue to take per stirpes.[4]

Thus, in the absence of an effective exercise of the Power of Appointment, Louis was to receive no part of the Martin Sloan Trust.

The exclusion of Louis from the Martin Sloan Trust Agreement was likely intentional and reflected the reigning alliances in the Sloan-Segal family at the time. After his parents' divorce, Louis had had little contact with his mother and brothers, and in fact cut ties with Frank and Jack in 1969, when he learned that they had taken Martin Sloan's last name, and did not speak to them again until the mid-1980s.[5]

B. Patricia's Testamentary Scheme Before 2002

As with the terms of the Martin Sloan Trust, Patricia's testamentary scheme, which evolved through a spurt of will making in the early 1990s and another spurt in the early 2000s, was a product of the contentious Sloan-Segal family dynamics. Patricia's relationships with her sons changed dramatically after Martin's death. In early 1990, Frank and Jack estranged themselves from Patricia through a letter demanding that she

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[4] Martin Sloan Trust Agreement § I.B.2(c)(ii)(B).
[5] Tr. at 21.

seek psychiatric help before they would continue a relationship with her.[6] This letter leveled a number of harsh accusations against Patricia, including that she had been "pathologically cheap" to her children, had a "sick and negative attitude" toward her children, and was suffering from a "personality disorder" that caused her to "distort[] reality to conform to how [she] pretend[ed] to see [her]self in the world."[7] After Patricia refused to seek help for these alleged problems, Frank and Jack had no further contact with Patricia for the rest of her life, other than a letter written by Frank with Jack's approval in 1992 making abundantly clear the hard feelings Frank and Jack felt toward Patricia, including the statement "[i]f you get ill or are institutionalized don't bother to call, I won't feel at all sorry for you. And when you finally die neither Jack nor I will go to your funeral."[8]

Meanwhile, Louis, who had originally joined in Frank and Jack's 1990 letter to Patricia, reconnected with his mother in 1991. This angered Frank and Jack, who felt Louis "wanted to be the only one in the will."[9] Frank and Jack again ceased contact with Louis, and the animosity Frank and Jack bear toward Louis has been evident throughout these proceedings. By contrast, during the period when the rift between Louis and his brothers grew, Louis became a regular part of his mother's life. This new relationship included phone calls and twice-yearly visits — at Christmas and Patricia's birthday —

[6] JX-15 (letter from Frank Sloan and Jack Sloan to Patricia Sloan dated Feb. 19, 1990).
[7] JX-15.
[8] RX-9 (letter from Frank Sloan to Patricia Sloan dated May 11, 1992).
[9] Tr. at 285.

for several weeks at a time at either Louis' home in Florida or Patricia's home in Delaware.

These changing affections are evident in the various testamentary documents Patricia executed in the early 1990s. Patricia bequeathed the assets at her disposal through two sets of documents. Patricia disposed of the assets held in her own trust (the "Patricia Sloan Trust") through a "Declaration of Trust" and its later amendments, and Patricia disposed of her tangible personal property, real property, and, importantly, the assets over which she had a power of appointment[10] through her wills.

Under Patricia's will of January 25, 1991 (the "1991 Will") and Declaration of Trust of the same date, each of her sons was to receive equal $25,000 shares from both Martin and Patricia's trust assets. Martin's remaining assets were to be held in trust for his and Patricia's grandchildren, who at the time were Frank's two children.[11] Patricia's remaining assets were to go to a charitable fund.

In November 1991, Patricia executed amendments to both her 1991 Will and the Patricia Sloan Trust which eliminated Frank and Jack's inheritance from both Martin and Patricia's assets entirely. At the same time, Patricia substantially increased Louis' share, leaving him $500,000 in trust from the Martin Sloan Trust and placing another $500,000 in trust for him from the Patricia Sloan Trust. Again, the remainders of both the Martin Sloan and Patricia Sloan Trusts were to go to the grandchildren and charity,

[10] In addition to the Power of Appointment over the Martin Sloan Trust, Patricia had a power of appointment over an irrevocable life insurance trust created by Martin Sloan. This life insurance trust is not at issue in this action.

[11] Jack also has two children, both born after Jack's estrangement from Patricia began. Jack never told Patricia that she had more grandchildren. Tr. at 283.

respectively.[12] Patricia next modified the terms of the Patricia Sloan Trust in May 1993 to make $200,000 of Louis's inheritance an outright gift, but did not otherwise alter the amount of the money Louis was to receive or change the fact that Frank and Jack were to receive nothing. After that amendment, Patricia did not change her testamentary scheme again for nearly a decade, nor were there any major changes in her relationships with Frank, Jack, and Louis during that time.

Patricia revisited her estate planning in September 2001. This appears to have been prompted by Louis' pseudo-marriage to Deborah Peduto, who had two children from a previous marriage. Louis and Peduto exchanged private vows, which Patricia flew to Florida to witness, on September 4, 2001. Louis and Peduto did not legalize their marriage in order to retain Peduto's alimony payments.[13] On September 26, 2001, Patricia amended the Patricia Sloan Trust to change Louis' inheritance under it from a regular trust — under which the trustee was directed to make liberal distributions to Louis and which granted Louis a power of appointment — to a charitable remainder unitrust with Louis as the income beneficiary.[14] This change suggests that, at least initially, Patricia wanted to limit the amount of property that might ultimately flow to Peduto and her children.

[12] In describing this course of testamentary exercises, I need and therefore do not dilate on whether any of them were proper under the various Trusts as written.

[13] Tr. at 36.

[14] A charitable remainder unitrust is an estate planning vehicle that pays a donee a fixed percentage of the trust's value for a certain period of time, and then gives the remaining property to charity.

But, Patricia did not alter her earlier exercise of the Power of Appointment over the Martin Sloan Trust in favor of Louis. And, she took the opportunity to make it clear that she had disinherited Frank and Jack by amending the definition of "issue" in her will to exclude Frank and Jack. Thus, her will defined "issue" as follows: "'Issue' of a person means all the lineal descendants of that person of all generations (excluding, however, for all purposes herein, FRANK SLOAN and all of his issue, and JACK K. SLOAN and all of his issue)."[15] Given this reality, Frank and Jack's argument that Louis lost some favor with Patricia in 2001 because of his pseudo-marriage to Peduto does not rationally suggest in any way that Patricia was any more disposed to giving Frank or Jack any inheritance. At most, it suggests that Patricia, at the time, wished to limit Louis to being an income beneficiary of the Patricia Sloan Trust and to deny Peduto any claim through a possible will executed by Louis to the principal of that Trust.

C. Patricia's Declining Mental Health

Patricia spent the 1990s and early 2000s living by herself in the Park Plaza condominium building in Wilmington, Delaware. In the later years of this time period, Patricia showed signs of aging and mental impairment. Staff members of Park Plaza noticed that Patricia began to forget what time or what day she had plans, and began to spend hours sitting in the lobby of the building waiting for appointments that were either much later in the day or were nonexistent. George Sturgis, a Park Plaza security guard testified that Patricia had become noticeably less alert and more forgetful in the five years

[15] JX-3 (First Codicil of Patricia R. Sloan dated September 26, 2001).

he knew her from 1997 to 2002.[16] Daniel Talmo, Park Plaza's manager testified that Patricia showed "some diminished capacity."[17] Talmo was not concerned by this loss of capacity because it seemed consistent with Patricia's advancing age, but Talmo was concerned that during this time Patricia began asking other Park Plaza residents to drive her places, which made some of the other residents uncomfortable and posed a possible safety issue to Patricia. Talmo also recalled that Louis was worried that Patricia was not properly caring for her health, and that at some point a social worker visited Patricia to assess her health situation.[18] These events led Talmo to write a letter to Louis indicating that, although Patricia was welcome to stay at Park Plaza, she might be better off in an assisted living facility that could provide her with more support.

As Patricia's ability to care for herself declined, Louis took control of her legal and financial affairs. In 2002, Louis made at least four trips to Delaware from his home in Florida to help his mother sort out her financial and estate planning matters, and ultimately to move her to Florida. As part of this process, Patricia gave Louis extensive authority over her property by granting Louis a broad power of attorney on May 16, 2002 and by adding Louis as an authorized user to her personal checking account in July 2002. Also around this time, Louis retired and began living off of Patricia's money.[19] Louis' explanation for Patricia's decision to support him was that Patricia wanted Louis to

[16] Tr. at 15.
[17] Tr. at 198.
[18] Tr. at 201.
[19] Tr. at 54, 112-13. It is not clear from the record what Louis did before he retired. On his application for a limited guardianship of Patricia's property, discussed below, he listed that he had been self-employed since 1995, and before that he worked at a chiropractic office for nine years. PX-3 at 5. "Self-employed" seems to have been a euphemism Louis used for not having a job.

"handle things for her . . . so she wanted to support [him] so that [he] wouldn't have to work and [he] would have more time to be with her and take care of her affairs."[20] Nothing in the record suggests that this was not the case, and, indeed, it appears Louis spent a substantial portion of his time in 2002 in Delaware managing Patricia's affairs.

That said, I do not doubt that Louis relished the financial wherewithal his mother's support gave him and Peduto. Louis seems to have desired to live a life of leisure with his nuclear family's needs funded by his mother and the proceeds of Peduto's divorce. Put simply, although I do not accept Frank and Jack's contention that Louis had no feelings for his mother and was motivated only by a desire to benefit from her resources, I have no doubt that Louis hoped his mother would aid him monetarily and leave him the wealth at her disposal. In this desire to receive the wealth that Patricia had the power to dispose of, Louis is identical, of course, to Frank and Jack themselves. One this point, I credit the testimony of Louis, Frank, and Jack's cousin, Maxine LaPlace, that a factor in the rift between Patricia and Frank and Jack was that Frank and Jack were angry about how small an inheritance — $100,000 each — they had received from Martin Sloan.[21]

One of Louis' first priorities as Patricia's financial manager was to attempt to remove the trustees of the Martin Sloan Trust. Patricia had at one point been the trustee,

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[20] Tr. at 54.

[21] Tr. at 250. Talmo credibly testified that Patricia had told him the same thing, namely that Frank and Jack were no longer speaking to her because they were angry about their inheritance from Martin Sloan. Tr. at 204. That said, I do not mean to suggest that Frank and Jack were or are motivated to any greater extent than Louis himself by a concern for personal finances. This case surfaces a painful family history, and the record contains evidence suggesting that Frank and Jack's estrangement from their mother was also based on heartfelt and important non-financial reasons. Indeed, in 1990 Louis himself told his mother that Frank and Jack's letter was one he largely agreed with. JX- 17. It is regrettable that this hurtful family dynamic continues through this ongoing rift among the brothers.

but had resigned in favor of David Craig and Louis Sloan, Patricia's brother-in-law. On May 17, 2002, Louis wrote a letter on behalf of Patricia revoking her resignation. The trust administrator did not accept the revocation, so Louis next wrote to the trustees, David Craig and Louis Sloan, asking them to move all of the assets in the Martin Sloan Trust to the Patricia Sloan Trust. After they refused, Louis filed suit in this court on October 15, 2002 seeking the records of the Martin Sloan Trust and disbursement of the Trust's funds to himself (the "Chancery Trust Action"). The intent of these actions was to consolidate Patricia's financial holdings and, no doubt, make them easier for Louis to access to use both for Patricia's benefit and to support himself. Louis was not candid and did not tell this court that he was already using Patricia's funds to pay his own bills. Rather, Louis initially appeared on behalf of himself and Patricia in the Chancery Trust Action, and presented himself as solely concerned with Patricia's best interests.[22]

Louis likewise immersed himself in Patricia's legal affairs, instead of relying on counsel, with regard to Patricia's testamentary documents. According to Louis, Patricia felt the documents amending the Patricia Sloan Trust that her attorney had prepared and that she had executed in September 2001, creating the charitable remainder unitrust, did not reflect her wishes, and she asked Louis to draw up new documents.[23] Louis then drafted a fifth amendment to the Patricia Sloan Trust (the "Fifth Trust Amendment"), which Patricia executed on April 12, 2002.[24] Under the Fifth Amendment, Louis remained the income beneficiary of a charitable remainder unitrust, but the Amendment

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[22] Louis was later ordered to obtain counsel on behalf of Patricia.
[23] Tr. at 41, 146-47.
[24] *Id.*; JX-10.

suggests Patricia's view of Peduto had softened because Louis's income benefits were directed to Peduto and her children, rather than charity, in the event Louis predeceased Patricia.

During this time, Louis recognized that he needed to document Patricia's capacity to sign testamentary instruments. On May 14, 2002, Louis brought Patricia to meet with a psychologist, Dr. Jay Weisberg, to assess her mental competence and to ascertain how she wanted to dispose of her property. Weisberg met with Patricia alone and determined that Patricia exhibited mild memory impairment, but that she was "oriented and competent to make decisions about her estate."[25] In response to Dr. Weisberg's questions, Patricia explained that she did not want to distribute any of her estate to Frank or Jack because of their acrimonious falling out, and that she did not want to leave anything to her grandchildren[26] because none of them had maintained a relationship with her. Patricia told Dr. Weisberg that she felt Louis was preoccupied with her will, but that she nevertheless wanted to leave everything in her estate to him, other than relatively modest gifts made to her niece, Terri Ferguson, and her housekeeper, Albertha King. According to Dr. Weisberg, Patricia understood that Louis' interest in her will was self-serving, but nevertheless felt that Louis "was really the only relative she had a close relationship with and thereby felt she should leave all of her possessions to him."[27]

* * *

[25] JX-20.

[26] When she spoke to Dr. Weisberg, Patricia only mentioned Frank's children. It is unclear from the record whether Patricia ever learned that Jack also had children. Jack did not tell her.

[27] JX-20; Weisberg Dep. at 7.

I pause here to summarize the state of Patricia's testamentary dispositions in mid-2002. Patricia had at her disposal the assets of the Patricia Sloan Trust, which was to include the residual contents of her estate on her death, and the assets of the Martin Sloan Trust, over which she could exercise the Power of Appointment. After 1991, Patricia did not leave gifts to Frank and Jack from either of these sources, and Frank and Jack were to receive nothing upon Patricia's death. Louis, by contrast, was to receive the bulk of the assets at Patricia's disposal, including $500,000 from the Martin Sloan Trust and the income benefits from a charitable remainder unitrust created from the Patricia Sloan Trust. These dispositions were consistent with Patricia's conversation with Dr. Weisberg indicating that she did not want to leave Frank and Jack "a nickel" and that she felt Louis, her only close family member at the time, should be her primary beneficiary.[28]

D. Patricia Executes The August 2002 Will

By early August 2002, it was apparent that it was no longer practical for Patricia to live by herself due to her declining mental and physical health and need for more constant care, and Louis made preparations for Patricia to move to Florida. The original plan was that Patricia would live with Louis and Peduto in their Florida home and attend an adult daycare program at a nearby assisted living facility called Courtyard Gardens. Accordingly, Louis brought Patricia to see her longtime physician in Delaware, Dr. Robert Altschuler, on August 8, 2002 to fill out a health assessment form required by

[28] JX-20.

Courtyard Gardens. Dr. Altschuler diagnosed Patricia with "moderate dementia."[29] In deposition testimony, Dr. Altschuler explained that this diagnosis was based on episodes of confusion that Patricia had experienced.[30]

Later in the month, Louis, concerned that Patricia's decision to disinherit Jack and Frank, as reflected in her testamentary documents after November 1991, might not be honored in probate, drafted the August 2002 Will, which Patricia executed on August 28, 2002. The August 2002 Will specifically acknowledged Patricia's intent to disinherit Frank, Jack, and their children:

> I give no part of my estate to either of my sons, Frank Sloan and Jack K. Sloan, or to their Issue. This is because of the fact that they have voluntarily removed themselves from my life and have made no effort to contact me in any way, since 1991, leaving only my son, Louis Segal, to care for me and to correct my financial problems caused by other people.[31]

The August 2002 Will also named Louis as the executor and sole beneficiary of the estate. But, unlike all of Patricia's earlier wills that are in the record, the August 2002 Will did not contain a specific reference to the Power of Appointment. Louis did not offer an explanation of why the Power of Appointment was not referenced in the August 2002 Will, but it appears to have either been an oversight or based on the erroneous assumption that the Martin Sloan Trust would soon be liquidated and distributed to Patricia.

[29] The form states both that Patricia was diagnosed with dementia and that her cognitive status was "moderate dementia." JX-21.
[30] Altschuler Dep. at 14.
[31] JX-4.

On the day Patricia executed the August 2002 Will, Louis brought her back to Dr. Weisberg for another evaluation. Dr. Weisberg diagnosed Patricia with "mild dementia" during the visit, but nevertheless found her competent to sign a will. And, when Dr. Weisberg reviewed the August 2002 Will with Patricia, he found that she was "in agreement with the stipulations of the will" and that she wanted to disinherit Frank and Jack and leave the bulk of her estate to Louis, consistent with the intent she had earlier expressed to Dr. Weisberg in May.[32] In his deposition testimony, Dr. Weisberg's recollection of Patricia was that she was "a very decisive woman, somebody who knew what she wanted" and that he was struck by how resolute she was in her wishes.[33]

E. Patricia Executes The October 2002 Will And Moves Into Courtyard Gardens

Patricia moved to Florida on August 31, 2002.[34] As had been planned, Patricia moved into Louis and Peduto's home and attended the day program at Courtyard Gardens. But, early in Patricia's stay, Louis was alarmed by an incident where Patricia wandered out of the house and had to be retrieved from a nearby restaurant by the police.[35] This prompted Louis to make arrangements in late September for Patricia to move to Courtyard Gardens full time. The Courtyard Gardens staff assigned Patricia to reside in the Azalea Wing, a secure wing of the facility designed for patients with dementia or other problems that might cause them to wander off.[36]

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[32] JX-20.
[33] Weisberg Dep. at 5-7.
[34] Tr. at 83-84.
[35] Tr. at 159-61.
[36] Tr. at 103-04.

Louis placed a deposit on a room in Courtyard Gardens on September 26, and Patricia moved into the Azalea Wing on October 23. As a patient in the Azalea Wing, Patricia had access to her private room, common areas, and a walled-off garden area.[37] Azalea Wing staff members also accompanied Patricia to the general areas of Courtyard Gardens so that she could participate in activities like bingo and ice cream socials.[38] In addition, Patricia went out to dinner twice a week with either Louis and Peduto or a caretaker hired by Louis, and joined Louis, Peduto, and Peduto's family for holidays and get-togethers.[39]

On October 18, in between the time Louis made the deposit on a Courtyard Gardens room and the time Patricia moved in, Patricia executed a new will drafted by Louis (the "October 2002 Will"). The October 2002 Will was identical to the August 2002 Will, except it changed Patricia's residence from Delaware to Florida.[40] Louis did not, however, bring Patricia to a psychiatrist or other doctor to evaluate her competence at the time the October 2002 Will was executed.

E. Patricia's Health While In Courtyard Gardens

While in Florida, Patricia received medical care from Dr. Lori Lynn Dowie, a primary care physician who made house calls to the residents of Courtyard Gardens, and from a visiting nurse service hired by Louis. When Dr. Dowie first saw Patricia on October 1, 2002 for an intake visit, Dr. Dowie diagnosed Patricia with "moderate

[37] Tr. at 106-07.
[38] Tr. at 162.
[39] Tr. at 210-11.
[40] RX-4.

dementia,"[41] a more severe level of dementia than the "mild dementia" Dr. Weisberg had diagnosed her with in August.

After the intake visit, Dr. Dowie saw Patricia about once a month for checkups. Patricia's diagnosis during these checkups ranged from mild to moderate dementia, and Dr. Dowie also found her to have mild depression.[42] As Dr. Dowie explained in her deposition, the severity of a patient's dementia is measured on a standard scale based on how many questions a patient can answer correctly. In some cases, a patient answering one less question correctly than the last time she was checked may move her from mild to moderate. As a result, it was not surprising to Dr. Dowie that Patricia fluctuated between mild and moderate dementia.[43]

In addition, Dr. Dowie's records indicate that Patricia was consistently cooperative when Dr. Dowie visited, and Dr. Dowie testified that she believed Patricia was "very happy" and that "I think that my ability to assess her happiness, and the fact that she was well cared for, and that she was physically taken care of was my job, and I think she was very well taken care of."[44] Dr. Dowie weakly reconciled this testimony with the

[41] JX-22 at R01388.
[42] *See* JX-22 at R01408 (November 5, 2002: "moderate dementia — stable"); JX-22 at R01485 (March 4, 2003: "mild depression and dementia"); JX-22 at R01489 (April 1, 2003: "mild depression and dementia → stable"); JX-22 at R01496 (May 7, 2003: "mild dementia"). Dowie explained the "stable" notation as follows: "It just means, by gross examination, at that point she had not been exhibiting any signs of decline. Her depression had not been worsening, her dementia had not been worsening." Dowie Dep. at 20.
[43] Dowie Dep. at 20-21.
[44] Dowie Dep. at 24.

diagnosis of depression she had given Patricia as follows: "You can have a mild degree of underlying depression but still be happy in — with your life and in your care."[45]

Dr. Dowie testified that the reason that Patricia was assigned to the Azalea Wing, as opposed to the general residential area, was "[b]ecause memory impairment patients occasionally do have issues with sundowning and other problems where they do get more confused at some times, so they need to have supervision and lockdown at night, especially when they have sundowning."[46] According to Dr. Dowie, this condition did not render Patricia less cognizant of who she was or who her family was.[47]

The only other medical record of Patricia's mental health during this time is a home care assessment performed by Patricia's visiting nurse service on February 24, 2003. The nurse performing that assessment noted that "[p]atient had limited ability to follow instructions in reference [to her healthcare needs] due to degenerating mental status."[48] But, the form also indicates that Patricia's healthcare plan involved seventeen medications to treat her various physical ailments, suggesting her needs were very complicated and that she would have required assistance with proper medication intake with even a low level of mental impairment.

F. The July 2003 Codicil

While Patricia was in Courtyard Gardens, Louis continued to handle all of her affairs. Patricia did not have a telephone in Courtyard Gardens, and all of her mail was

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[45] Dowie Dep. at 28.
[46] Dowie Dep. at 23. Sundowning is a phenomenon common in Alzheimer's dementia patients in which they become disoriented by environmental changes. Dowie Dep. at 44.
[47] Dowie Dep. at 24.
[48] JX-22 at R01482.

sent to Louis' house or held for Louis to pick up at Courtyard Gardens.[49] Louis paid all of Patricia's bills and wrote all of her checks, as he had been doing since July 2002.[50] In March 2003, Louis obtained a limited voluntary guardianship from a Florida probate court over Patricia's property in order to press the claims in the Chancery Trust Action over the assets of the Martin Sloan Trust on Patricia's behalf. In both the Chancery Trust Action in Delaware and the guardianship proceedings in Florida, Louis failed to inform the relevant court that Patricia was living in a secured facility for dementia patients. This lack of forthrightness damages Louis' credibility with this court, which I discuss in more detail in my analysis of Louis' claims below.

In any event, during the proceedings in the Chancery Trust Action, Louis learned that his plans to liquidate the Martin Sloan Trust and consolidate Patricia's finances would not come to pass. Specifically, the court informed the parties in a May 27, 2003 conference that the assets of the Martin Sloan Trust could not be transferred to the Patricia Sloan Trust.[51] Perhaps realizing that this development meant that Patricia had not disposed of the assets of the Martin Sloan Trust in either her August or October 2002 Wills, Louis drafted the July 2003 Codicil to the October 2002 Will to address the problem.[52] Under the July 2003 Codicil, Patricia distributed "all of the principal of the

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[49] Tr. at 103-04; 108-09.
[50] Tr. at 49.
[51] Tr. at 119-20.
[52] Louis testified that "the sole purpose of that codicil was to deal with the Martin Sloan Trust" and the Power of Appointment. Tr. at 121.

[Martin Sloan Trust], outright and free of trust, that is then remaining at the time of [her] death, to [her] oldest son, Louis Segal."[53]

As with the October 2002 Will, Louis did not take any special steps to ensure that the validity of the July 2003 Codicil could not be questioned. But, by coincidence, July 1 was one of the days that Dr. Dowie came to Courtyard Gardens to check on Patricia. Patricia's condition on July 1 was no different than it had been during Dr. Dowie's previous checkups, and Dr. Dowie indicated on her records that Patricia had "mild dementia of Alzhem type" and was oriented to time and person, but not to place.[54] Dr. Dowie testified that on July 1, Patricia "would have [had] the ability to make a decision on her own care and her own properties."[55] Dr. Dowie's recollection of Patricia for the entire time Dr. Dowie knew her, from October 2002 until 2004 when Dr. Dowie stopped making visits to Courtyard Gardens, was that "she always understood what she did and did not want,"[56] an observation similar to Dr. Weisberg's comment that Patricia was "very sure of what she wanted."[57]

Patricia did not execute any testamentary instruments after the July 2003 Codicil. Patricia's health problems became more serious after she fractured her hip in early 2004, and she died on July 1, 2006. Frank and Jack learned that Patricia was living in Courtyard Gardens in 2004, when a friend alerted Frank that Patricia had sold her condo in Delaware, prompting Frank and Jack to hire a private investigator because they were

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[53] RX-5.
[54] JX-22 at R01502.
[55] Dowie Dep. at 26.
[56] Dowie Dep. at 27.
[57] Weisberg Dep. at 7.

shocked that Patricia would have left her home in Delaware.[58] After learning of Patricia's whereabouts from the investigator, Frank and Jack made no attempt to visit or even contact Patricia, but they did investigate and obtain copies of the October 2002 Will, the July 2003 Codicil, and the Martin Sloan Trust Agreement.[59] After reviewing these documents, Frank and Jack realized they might be the beneficiaries of the Martin Sloan Trust, depending on the validity of the July 2003 Codicil.[60]

Frank and Jack did not alert Louis or Patricia to this state of affairs while Patricia was still alive and might have been capable of reaffirming the Codicil in a structured setting with neutral witnesses. Instead, they waited until after Patricia died to press their claims. Neither attended Patricia's funeral.

III. Procedural History

After Patricia's death, Louis did not probate her October 2002 Will, as modified by the July 2003 Codicil, on the advice of an attorney that probate is unnecessary where the executor and sole beneficiary are the same person. Thus, no court has ruled on the validity of the October 2002 Will or the July 2003 Codicil.

Frank and Jack brought their complaint in this court on August 6, 2006 (the "Complaint"). Their succinct, two-page Complaint asks this court to declare that they are entitled to the proceeds of the Martin Sloan Trust on the basis that the July 2003 Codicil purporting to exercise the Power of Appointment in favor of Louis was executed while Patricia lacked testamentary capacity or was under the undue influence of Louis.

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[58] Tr. at 287-88, 298.
[59] Tr. at 288-90; 300-301.
[60] Tr. at 301.

Louis answered the Complaint and the parties began discovery. One year into the proceedings, Louis brought a motion to dismiss for lack of personal jurisdiction and improper venue. The court denied the motion on the basis that it was untimely and lacked merit.[61]

IV. Legal Analysis

The parties agree that Patricia was competent and free from undue influence when she executed the August 2002 Will. In other words, Frank and Jack concede that, despite the episodes of confusion and weakening mental health that Patricia exhibited in her later years in Delaware, she still had testamentary capacity and was able to exercise her own judgment shortly before she moved to Florida and to Courtyard Gardens.

Given this concession, there are two issues before the court: 1) whether the uncontested August 2002 Will exercises the Power of Appointment in favor of Louis; and, if not, 2) whether the July 2003 Codicil was validly executed. Frank and Jack contend that the August 2002 Will does not exercise the Power of Appointment because the Will does not specifically reference the Power of Appointment, while Louis argues that the Will need not specifically reference the Power of Appointment because the circumstances surrounding the Will's execution indicate that Patricia intended to exercise the Power of Appointment in favor of Louis.

With regard to the July 2003 Codicil, Frank and Jack contend that Patricia both lacked testamentary capacity due to her dementia and that Louis took advantage of Patricia's mentally weakened state to unduly influence her into executing the July 2003

[61] *See Sloan v. Segal* ("*Sloan I*"), 2008 WL 81513 (Del. Ch. Jan. 3, 2008).

Codicil. Moreover, Frank and Jack argue that Louis bears the burden of proving that Patricia had testamentary capacity and was free from undue influence when she executed the July 2003 Codicil because she was suffering from a weakened intellect at the time. Louis' response is that Patricia's intellect was not weakened, so Frank and Jack bear the burden of proving the July 2003 Codicil is invalid, and that Frank and Jack cannot meet this burden because Patricia's condition in July 2003 was the same as it had been in August 2002, meaning Patricia was possessed equal competence and freedom from undue influence when she executed the July 2003 Codicil as she had when she executed the August 2002 Will.

I turn to these arguments now.

A. Does The August 2002 Will Exercise The Power Of Appointment?

Louis argues that the August 2002 Will represents an effective exercise of the Power of Appointment, and therefore the court's inquiry can end here. Frank and Jack disagree.

Under Delaware law, "the intention to execute the power [of appointment] must be apparent and clear, so that the transaction is not susceptible of any other interpretation."[62] This intention may be demonstrated in a number of ways, including a showing that under "all of the circumstances surrounding the making of the will, an intention to exercise the power is apparent and clear, notwithstanding the absence of any reference to the power or

[62] *Carlisle v. Del. Trust Co.*, 99 A.2d 764, 767 (Del. 1953) (quoting *Blagge v. Miles,* 3 F. Cas. 559, 566 (C.C.D. Mass. 1841) (No. 1,479)).

to the property that is the subject of it."[63] Louis argues that it is clear from all of the circumstances surrounding the August 2002 Will, including Patricia's earlier wills and her conversations with Dr. Weisberg, that Patricia intended to exercise the Power of Appointment in favor of Louis.

But, a donor may specify greater formalities for the execution of a power of appointment than are required by the law.[64] The purpose of this is to allow donors to impose additional ways of assuring that their donees intended to exercise the power of appointment.[65] Here, Martin Sloan required that Patricia exercise the Power of Appointment "by specific reference to this power of appointment."[66] The August 2002 Will makes no specific reference to the Power of Appointment. Thus, Patricia did not comply with the requisite formalities for exercising the Power of Appointment in the August 2002 Will, and as a result did not exercise the Power of Appointment. I therefore turn to the claims regarding the validity of the July 2003 Codicil, starting with the question of what body of law governs this inquiry.[67]

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[63] *Id.* at 768.

[64] RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 18.2 (1986) ("The formal requisites of an appointment are satisfied if the appointment complies with the formalities required by law . . . *and with any additional formalities the donor specifies*. . . . [A]n appointment is ineffective if the appointment does not comply with the formal requisites of an appointment." (emphasis added)).

[65] *See id.* § 18.2 cmt. a.

[66] Martin Sloan Trust Agreement § I.B.2(c)(ii)(A).

[67] Frank and Jack argue in their post-trial briefing that the October 2002 Will was invalid because it was the product of undue influence. But, whether or not the October 2002 Will was valid does not alter this outcome of this decision. A validly executed codicil generally republishes an earlier will, and this republication cures any infirmity in the execution of the earlier will. *See* 79 AM. JUR. 2D *Wills* § 608 (2008) ("A will that was invalid as originally executed, for want of testamentary capacity, or because of fraud or undue influence, is republished and validated by the execution of a codicil by the testator at a time when he or she

B. Choice Of Law

The situs of the Martin Sloan Trust is Delaware.[68] Patricia executed the July 2003 Codicil as a resident of Florida. As I noted in my earlier opinion in this case, Delaware law has not addressed the question of what law governs the determination of a donee's capacity where the state whose law governs the trust is not the state whose law governs the testamentary instrument that exercises the power of appointment.[69] But, this situation is addressed in the Restatement (Second) Conflict of Laws, which Delaware generally follows[70]:

> An appointment made in the exercise of a power created under a trust to appoint interests in movables is valid . . . if made . . .

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had testamentary capacity and was not subject to fraud or undue influence."); C. T. Drechsler, Annotation, *Codicil as Validating Will or Codicil Which Was Invalid or Inoperative at Time of its Purported Execution*, 21 A.L.R. 2D 821 (1952) ("All the authorities agree that a will which was invalid as originally executed because of fraud or undue influence is republished and validated by the execution of a codicil thereto by the testator at a time when he was not subject to fraud or undue influence."). Thus, if I find the July 2003 Codicil was validly executed, the October 2002 Will is also valid, regardless of the circumstances of its execution. And, if I were to find the July 2003 Codicil was invalidly executed, the October 2002 Will would not help Louis' case because its operative provisions are identical to those of the August 2002 Will, which I find does not exercise the Power of Appointment, as explained above. And, in any event, it does not appear that the analysis of the validity of the October 2002 Will would be materially different than that of the July 2003 Codicil. For these reasons, I focus my analysis on the July 2003 Codicil and do not dilate further on the October 2002 Will.

[68] The Martin Sloan Trust Agreement contains the following provision:

> The State of Delaware is hereby designated as the situs of the Trusts herein created, and all questions pertaining to the validity and construction of this Trust Agreement or the administration of the Trusts hereunder shall be determined in accordance with the laws of Delaware, regardless of the jurisdiction in which the Trusts may at any time be administered.

Martin Sloan Trust Agreement § XII.

[69] *Sloan I*, 2008 WL 81513, at *7 n.31.

[70] *See Juran v. Bron*, 2000 WL 1521478, at *10 (Del. Ch. Oct. 6, 2000) ("Where the law of two different states may apply to an action, Delaware courts apply the Restatement (Second) Conflicts of Laws to determine which state law applies."); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *2 (Del. Ch. Sept. 23, 1999).

> (b) as to questions of formalities and of the capacity of the donee, in accordance with either the law which determines the validity of the trust or the law applicable to the disposition by the donee of his own property.[71]

Under this rule, the exercise of the Power of Appointment was valid if the July 2003 Codicil was valid under either the law of Delaware or the law of Florida.

The parties have primarily argued their cases under Delaware law. With respect to the issues involved in this case, there does not appear to be a substantial difference between Delaware and Florida law. Indeed, this case turns on widely accepted principles of American trust and estate law. As a result, the outcome of this case would be the same whether one examines the July 2003 Codicil under Delaware or Florida law.[72]

C. Burden Of Proof

A party challenging a duly executed will must usually overcome the presumption that such a will is valid.[73] Thus, the challenger generally bears the burden of proving that a testator was either legally incapable of executing a will or that the will was the product of undue influence.[74] These burdens shift, however, under factual situations that lack

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[71] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 274 (1971) (citations omitted).

[72] *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 2752914, at *26 n.113 (Del. Ch. Apr. 2, 2007) (where choice of law decision is immaterial to outcome of case, the court need not decide which law applies).

[73] *In re Will of Melson*, 711 A.2d 783, 786 (Del. 1998); *see also In re Ziy's Estate*, 223 So.2d 42, 43 (Fla. 1969) ("The general rule, in the absence of any evidence to the contrary, is that a testator is presumed to be sane and to have sufficient mental capacity to make a will." (quotations omitted)); *In re Perez' Estate*, 206 So.2d 58, 59-60 (Fla. Dist. Ct. App. 1968) ("The burden of establishing the lack of testamentary capacity is on the will contestant. . . . [T]he burden of establishing undue influence is upon the party who alleges it . . . .").

[74] *Melson*, 711 A.2d at 786; *Norton v. Norton*, 672 A.2d 53, 55 (Del. 1996); *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).

"implicit ethical safeguards."[75] Under the standard established in *Melson*, the burden of proof shifts to the proponent of the will where the party challenging the will demonstrates by clear and convincing evidence that: 1) the will was executed by a testator who was "of weakened intellect"; 2) the will was drafted by a person in a confidential relationship with the testator; and 3) the drafter received a substantial benefit under the will.[76] "If that showing is made, the burden shifts to the proponent of the will to prove by a preponderance of the evidence that the testator or testatrix possessed the requisite testamentary capacity and to show the absence of undue influence."[77] I find that there is clear and convincing evidence that each of the three *Melson* factors existed here.

1. Weakened Intellect

Although a precise standard for "weakened intellect" has not been articulated in our law, it has been recognized that the party challenging a will need not demonstrate an

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[75] *Melson*, 711 A.2d at 787; *see also In re Will of Szewzcyk*, 2001 WL 456448, at *3 (Del. Ch. Apr. 26, 2001).

[76] *Melson*, 711 A.2d at 788. Similarly, Florida law imposes a presumption of undue influence "when a person who is the primary beneficiary of a will (1) had a confidential relationship with the testator, (2) actively procured the bequest, and (3) the first two requirements existed at the time the subject actions occurred." *In re Estate of Stetzko*, 714 So.2d 1087, 1090 (Fla. Dist. Ct. App. 1998) (citing *In re Carpenter's Estate*, 253 So.2d 697 (Fla. 1971)). The parties have not briefed, nor is it readily apparent, under what circumstances Florida law shifts the burden of proving testamentary capacity to the proponent of the will. If anything, Florida law seems to limit this burden shifting to cases where the testator has been deemed legally incompetent. *See Ziy's Estate*, 223 So.2d at 43 ("An adjudication of insanity or incompetency, however, raises a question of testamentary incapacity and the burden of proof then shifts to the proponent of the will." (quotations omitted)); *Raimi v. Furlong*, 702 So.2d 1273, 1286 (Fla. Dist. Ct. App. 1997) ("[T]he presumption of testamentary capacity is so strong in Florida that it allows for a demented or insane person to execute a valid will during a 'lucid interval.'"). Because I find that Louis has met his burden of proving testamentary capacity under Delaware law, which is less protective of the presumption of testator capacity, he has also met his burden under Florida law.

[77] *Melson*, 711 A.2d at 788.

advanced degree of debilitation.[78] Instead, "[t]he Court need only find that such 'weakened intellect' existed, taking into account factors such as a sudden change in the testator's living habits and emotional disposition."[79] Importantly, the court need not find that someone lacked testamentary capacity to find that she was suffering from a weakened intellect.[80]

By July 2003, Patricia was suffering from mild to moderate dementia and had been experiencing periods of confusion for several years, going back at least a few years before her departure from Delaware in 2002. Patricia had been assigned to the secure Azalea Wing of Courtyard Gardens because she required greater supervision and assistance than even the normal areas of the assisted living facility provided. And, Patricia had ceased managing any of her financial affairs. She no longer paid any bills, received any mail, or made her own telephone calls. Instead, Louis dealt with all of these matters on Patricia's behalf. Based on this evidence, I find that Patricia had a weakened intellect in July 2003.

2. Confidential Relationship

"A confidential relationship exists where 'circumstances make it certain the parties do not deal on equal terms but on one side there is an overmastering influence or on the

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[78] *In re Will of Wiltbank*, 2005 WL 2810725, at *5 (Del. Ch. Oct. 18, 2005); *Szewzcyk*, 2001 WL 456448, at *4.

[79] *Wiltbank*, 2005 WL 2810725, at *5; *see also In re Estate of Hafer*, 2000 WL 1721129, at *3 (Del. Ch. Oct. 25, 2000) ("Hafer may not have been as weakened as the testatrix in *Reed,* who suffered from a severely weakened physical and mental condition, but *Melson* does not require such a severe degree of 'weakened intellect' as was present in *Reed. Melson* merely requires a finding that a 'weakened intellect' exists.").

[80] *Wiltbank*, 2005 WL 2810725, at **5-7 (finding that a testator had a weakened intellect but possessed testamentary capacity).

other weakness, dependence or trust, justifiably reposed.'"[81] This court has often found that a confidential relationship existed where, as here, an adult child was taking care of an aging or infirm parent.[82] In those cases, the court took into consideration whether the testators' relationships with their non-caretaker children were strained and whether the caretaking children were acting with power of attorney for their parents. These circumstances lend themselves to the creation of a confidential relationship because the parent must rely on a trusted child for physical, emotional, or decisional support.[83]

In this case, Patricia entrusted Louis with a great deal of power over her. Louis had a broad power of attorney as well as a limited guardianship over her property, and Louis managed all of Patricia's affairs, including paying bills, selling her Delaware condo, and pursuing her legal claims over the Martin Sloan Trust. And, part of the reason that Patricia's reliance on Louis was so complete was because she was isolated from the rest of her family. Patricia had not spoken to Frank or Jack in over a decade, and she had no other remaining close family relationships.[84] Moreover, without her own private telephone, Patricia had little contact with anyone outside of Courtyard Gardens

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[81] *Id.* at *6 (quoting *Szewzcyk*, 2001 WL 456448, at *5).

[82] *See Tucker v. Lawrie*, 2007 WL 2372616, at *7 (Del. Ch. Aug. 17, 2007), *aff'd*, 956 A.2d 642 (Del. 2008); *Wiltbank*, 2005 WL 2810725, at *6; *Faraone v. Kenyon*, 2004 WL 550745, at *9 (Del. Ch. Mar. 15, 2004); *Szewzcyk*, 2001 WL 456448, at *5.

[83] *See Mitchell v. Reynolds*, 2009 WL 132881, at *9 (Del. Ch. Jan. 6, 2009) ("This Court has frequently looked to the transferor's extensive or exclusive reliance on another for physical, emotional, or decisional support, a query informed by the transferor's disposition and mental and physical capabilities, as well as the existence of any additional support network.").

[84] Louis called his cousin, Maxine LaPlace, as a witness at trial. LaPlace and Patricia had enjoyed a close relationship while LaPlace was living in Delaware, but that relationship tapered off when LaPlace moved to New Mexico in 2000. Tr. at 246-49.

other than Louis, Peduto, and the caretakers they hired. Thus, the trust and responsibility that Patricia lodged with Louis placed him in a confidential relationship with her.

3. Substantial Benefit

Louis argues that he did not receive a substantial benefit under the July 2003 Codicil because the Codicil merely effectuated Patricia's intent, as evidenced by the wills she executed before 2002. This argument addresses the wrong question. Whether or not Patricia intended for Louis to have the assets of the Martin Sloan Trust goes to the issue of whether she was unduly influenced. But, for purposes of this initial analysis of who bears the burden of proving testamentary capacity and lack of undue influence, the question is whether the July 2003 Codicil conferred a substantial benefit on Louis. Before the Codicil was executed, Louis was to receive no part of the Martin Sloan Trust because Patricia did not effectively exercise her Power of Appointment in the August and October 2002 Wills, as discussed above. Under the July 2003 Codicil, Louis stands to receive all of the Martin Sloan Trust. That is a substantial benefit.

* * *

In sum, Frank and Jack have sufficiently demonstrated that Patricia was suffering from a weakened intellect because of her dementia, that Louis' handling of her legal and financial affairs placed Louis in a confidential relationship with Patricia, and that Louis received a substantial benefit under the July 2003 Codicil. Accordingly, the burden shifts to Louis to prove that Patricia possessed testamentary capacity and was free from undue influence when she executed the July 2003 Codicil.

D. Testamentary Capacity

To possess testamentary capacity, a testator need only have a modest level of competence.[85] The testator must be capable of exercising thought, reflection, and judgment and possess sufficient memory and understanding to comprehend the nature of the will and how she is disposing of her property.[86] In other words, a testator must know she is "disposing of her estate by will, and to whom."[87] Testamentary capacity is measured at the time the will is executed.[88] Because Louis bears the burden of proving testamentary capacity, he must show that when Patricia executed the July 2003 Codicil she understood that she was disposing of her property and who was receiving the property.

Louis has provided very little evidence of the specific circumstances surrounding Patricia's execution of the July 2003 Codicil. He testified only that he drafted the Codicil, brought it to Courtyard Gardens, and was present when Patricia signed it there on July 1, 2003.[89] Louis rests his case on the argument that Patricia maintained testamentary capacity from the time Dr. Weisberg saw her in August 2002 until at least 2004, when she fractured her hip.

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[85] *West*, 522 A.2d at 1263; *In re Estate of Justison*, 2005 WL 217035, at *7 (Del. Ch. Jan 21, 2005).

[86] *West*, 522 A.2d at 1263. Similarly, under Florida law, a testator has testamentary capacity if she has "the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed." *Raimi*, 702 So.2d at 1286.

[87] *West*, 522 A.2d at 1263.

[88] *Justison*, 2005 WL 217035, at *7; *In re Langmeier*, 466 A.2d 386, 389 (Del. Ch. 1983).

[89] Tr. at 121-22.

In evaluating Louis' contention that Patricia was of sound mind for all of 2003, I give the most weight to the medical records offered into evidence and to the deposition testimony of Dr. Dowie, who is a disinterested witness and who, as Patricia's treating physician, was in the best position to assess Patricia's medical condition. I give little weight to Louis' testimony because he has a strong interest in the outcome of this case and because he concealed Patricia's condition and his use of her resources from this court during the Chancery Trust Action, which weakens his credibility. I also approach the testimony of Louis' medical expert, Dr. Carol Tavani, with some hesitation because Dr. Tavani offered a number of opinions about Patricia's state of mind that were based on what Louis, her client, told her and that were far afield from the question of whether Patricia was competent to sign a will.[90] As such, I limit my use of Dr. Tavani's testimony solely to the portion that was grounded in the professional medical records in evidence and Dr. Tavani's application of her expertise in neurology and psychiatry to those records.

At the outset, I note that the fact that Patricia was experiencing Alzheimer's dementia to some degree does not dictate a finding that she lacked testamentary capacity.[91] As noted above, the required competence to execute a testamentary

[90] For example, Louis' counsel asked Dr. Tavani to opine on the nature of Patricia's relationship with her sons and whether her testamentary desires changed between August 2002 and July 2003. Tr. at 312, 339-40. Dr. Tavani did not ground her testimony in any reliable professional methodology. Dr. Tavani simply credited what her client or his lawyer had told her; there was no professional rigor to the testimony.

[91] *See Justison*, 2005 WL 217035, at *9 (finding a testator suffering from memory impairment was competent); *Raimi*, 702 So.2d at 1286 (finding challengers to a will had failed to adduce adequate evidence that a testator suffering "severe dementia" lacked capacity).

instrument is minimal.[92] Indeed, when Dr. Weisberg saw Patricia in August 2002, he found her both to have mild dementia and to be competent to sign a will. The day Patricia executed the Codicil, she exhibited mild dementia, the same level she had shown at Dr. Weisberg's office. In between the execution of the August 2002 Will — when Frank and Jack concede that Patricia was competent and free from undue influence despite her onset of dementia — and the execution of the July 2003 Codicil, Patricia did not exhibit any signs of sharp decline. Dr. Dowie's notes indicate that Patricia's condition was stable, and it was Dr. Dowie's opinion that Patricia had the ability to make her own decisions about her property on July 1, 2003, consistent with Dr. Dowie's assessment that Patricia "always understood what she did and did not want" and that she knew how to express her wishes.[93] That finding — that Patricia was clear about her desires and strong enough to demand that they be met — was consistent with Dr. Weisberg's earlier findings in August 2002.

Dr. Tavani testified that if there had been an event suggesting Patricia's condition had worsened, it would have been noted in her medical records, and Dr. Tavani did not find such a notation in her review of the records. Dr. Tavani further testified that Alzheimer's dementia "is characterized by a very slow, progressive decline, which sometimes even has plateaus in it," and it would have been inconsistent with Patricia's diagnosis to have a sudden drop-off in mental ability after Dr. Weisberg saw her.[94]

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[92] *West*, 522 A.2d at 1263; *Justison*, 2005 WL 217035, at *7.
[93] Dowie Dep. at 27.
[94] Tr. at 328.

Based on this evidence, I conclude that it is more probable than not that Patricia had testamentary capacity on July 1, 2003. Patricia's medical records and the testimony of Dr. Dowie and Dr. Tavani all support the conclusion that Patricia's mental abilities on July 1, 2003 were not materially different from her mental abilities on August 28, 2002, when she executed the uncontested August 2002 Will. Louis has thus provided sufficient evidence that Patricia's level of mental impairment when she executed the July 2003 codicil was mild enough that it would not have interfered with her ability to make decisions about her estate.

E. Undue Influence

Having found that Patricia possessed testamentary capacity when she executed the July 2003 Codicil, I now turn to Frank and Jack's contention that the Codicil was the product of undue influence. For a beneficiary's influence over a testator to be undue, it "must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own."[95] The essential elements of undue influence are: 1) a susceptible testator; 2) the opportunity to exert influence; 3) a disposition to do so for an improper purpose; 4) the actual exertion of such influence; and 5) a result demonstrating its effect.[96]

As discussed above, Louis has the burden of showing by a preponderance of the evidence that Patricia was not under undue influence when she executed the July 2003

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[95] *West*, 522 A.2d at 1263 (quoting *Langmeier*, 466 A.2d at 403).
[96] *Norton,* 672 A.2d at 55.

Codicil. Louis has failed to rebut the majority of the elements of undue influence. As a person with a weakened intellect, Patricia was a susceptible testator.[97] Louis had ample opportunity to influence Patricia during his frequent visits to Courtyard Gardens and by drafting the Codicil himself. And, Louis had a motive to exert improper influence because he was retired and living off of Patricia's largesse, so his continued ability to support himself was dependent on his inheritance from her.

Importantly, however, Louis has demonstrated that he most likely did not influence Patricia and that there is no result suggesting undue influence. Our Supreme Court has made clear that the existence of the opportunity to exert undue influence and a motive to do so is not enough to invalidate a will; there must also be actual exertion of improper influence and a result demonstrating its effect.[98] This requirement reflects our law's hesitation to invalidate a will where doing so might frustrate the testator's intent.[99]

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[97] *See Tucker*, 2007 WL 2372616, at *8 ("The Tuckers have shown [that] Violet was suffering from a weakened intellect, so they also have shown that Violet was susceptible to undue influence."); *Wiltbank*, 2005 WL 2810725, at *8 (finding a testator was susceptible because he had a weakened intellect); *Hafer*, 2000 WL 1721129, at *3 (upholding mater's report considering susceptibility and weakened intellect to be "akin"); *see also* EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS ("WILL CONTESTS") § 7:4 (2d ed. 1999) ("[I]f the victim was . . . senile . . .or under some other form of physical or mental impairment, the courts will carefully examine the actions of any alleged influencer on the ground that the victim was susceptible to undue influence." (citations omitted)); *id.* ("[T]he degree of impairment necessary to find susceptibility to influence is much less than that required to find lack of testamentary capacity.").

[98] *West*, 522 A.2d at 1265 ("[T]he Vice Chancellor's conclusion, that opportunity and motive to influence a susceptible testatrix necessarily establishes the actual exertion of improper influence and a result demonstrating its effect, does not comport with Delaware law.").

[99] *Id.* ("The law disfavors invalidating a will absent strong evidence mandating such drastic action. This is especially so where, as here, two equally plausible reasons exist for the late change in beneficiaries.").

I find it improbable that Louis would have had to exert *any* influence *at all* in order to get Patricia to sign the July 2003 Codicil. If he had simply told her that the August 2002 Will had failed to exercise the Power of Appointment, meaning Frank and Jack would inherit the Martin Sloan Trust, but that if she signed the July 2003 Codicil, the Martin Sloan Trust would go to Louis, along with the rest of the assets at Patricia's disposal, I have no doubt that Patricia would have willingly signed — nay, demanded to sign — the Codicil. There is ample evidence that Patricia's testamentary intent for over a decade was to leave nothing to Frank or Jack, either from her estate or through the Power of Appointment. Soon after their estrangement in the early 1990s, Patricia changed her will to remove Frank and Jack from her exercise of the Power of Appointment and as beneficiaries of the Patricia Sloan Trust. And, Patricia told Dr. Weisberg in the later half of 2002 that she did not want Frank and Jack to have anything because she was still hurt by their falling out. Frank and Jack themselves testified that they did not expect to be included in Patricia's will.[100]

In essence, Frank and Jack admit that if Patricia knew what she was doing, she would have cut them out of her testamentary dispositions. And there is, in my view, no plausible explanation for why Patricia would have included Frank and Jack in her testamentary dispositions given the emotionally charged way their relationship ended and the fact that Frank or Jack never tried to contact Patricia once during the last fourteen years of her life. As a result, the fact that the July 2003 Codicil eliminates Frank and Jack's gift under the Martin Sloan Trust Agreement does not reflect undue influence.

[100] Tr. at 290-91, 301.

Rather, it most likely reflects Patricia's own genuine desire to make sure that all of the wealth at her testamentary disposal — including the assets of the Martin Sloan Trust — went to Louis and not to Frank or Jack.[101]

Because I find no indication of actual exertion of improper influence or a result reflecting undue influence, I decline to invalidate the July 2003 Codicil. Louis may have had the motive and opportunity to exert influence over Patricia at a time when she was susceptible to such influence, but that is not sufficient reason to invalidate a testamentary document that comports with the wishes Patricia expressed for disposing of her property at a time when it is undisputed that she possessed testamentary capacity and was free from undue influence.[102]

F. The Equitable Claims

Frank and Jack raise a slew of criminal accusations against Louis in their trial briefs, ranging from elder abuse to tax evasion and money laundering. These claims are far beyond both the scope of the Complaint in this action and this court's subject matter jurisdiction, and they are irrelevant to the question of whether Patricia validly exercised

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[101] Under Florida law, to overcome the presumption of undue influence created by Louis' role in actively procuring the July 2003 Codicil, Louis must "come forward with a reasonable explanation of his . . . active role in the preparation of the decedent's will." *Raimi*, 702 So.2d at 1287; *Estate of Brock*, 692 So.2d 907, 912 (Fla. Dist. Ct. App. 1996). Here, the reasonable explanation is that Louis was helping Patricia effect her established intention to exercise the Power of Appointment in favor of Louis and not in favor of Frank or Jack. *See Raimi*, 702 So.2d at 1288 ("Manny's explanation that he merely facilitated the decedent's independent decision to change her will after her dispute with Estelle was reasonable under these circumstances.").

[102] *West*, 522 A.2d at 1265 ("Establishing the opportunity and motive for influencing an allegedly susceptible testatrix is simply insufficient to invalidate a will under Delaware law."); *see also* WILL CONTESTS § 7:7 ("[T]he courts refuse to find that the victim was subject to undue influence because the new dispositive scheme was either identical to the victim's prior plans, or nearly so.").

the Power of Appointment. Accordingly, I do not consider them.[103] I also reject Frank and Jack's contention that Louis' conduct amounts to unclean hands because he moved Patricia to Florida against her will, took advantage of his access to her bank accounts to live off of her money, and misled both this court during the Chancery Trust Action and the Florida probate court during the limited guardianship proceedings about Patricia's state of health and financial support of Louis.[104]

For starters, Frank and Jack have not proven that Patricia went to Florida against her will. Although there is some evidence that Patricia (as would be natural) did not relish leaving her long-time home in Delaware,[105] Dr. Dowie's testimony and medical records indicate that Patricia was cooperative and relatively happy once she settled into Courtyard Gardens. The record is also clear that Patricia needed some type of assisted

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[103] I also note that these far-ranging charges were not leveled during Patricia's lifetime, but instead only during this litigation. Neither Frank nor Jack took any steps to ensure that his mother was well-provided for and content. To the extent they learned before her death that Patricia was living in Courtyard Gardens, one must assume that they regarded it as a quality institution. Certainly, they never took steps to remove her to anywhere else. Although there is evidence that Louis used Patricia's resources to meet his own needs, there is no evidence that suggests that he did so at the cost of depriving his mother of quality care or other needs or desires that could be met by monetary purchase.

[104] *See Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998) ("The unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case. The Court invokes the doctrine when faced with a litigant whose acts threaten to tarnish the Court's good name.").

[105] George Sturgis, a Park Plaza security guard, testified that Patricia told him she did not want to go to Florida. Tr. at 15. It is normal for people to not want to take a necessary but undesirable course of action that they know is in their best interest, and I take this as evidence that Patricia was reluctant to leave her home of several decades even though it was no longer practical for her to stay there. Patricia's recognition of her changing needs is reflected in her Fifth and Sixth Amendments to the Patricia Sloan Trust, both drafted by Louis. The Fifth Amendment, executed April 12, 2002, states, "[i]t is Trustor's intention and demand that under no circumstances will she be placed in any type of nursing home or assisted living facility." JX-10. The Sixth Amendment, executed August 28, 2002, the day Patricia was examined by Dr. Weisberg, deletes "assisted living facility" from this provision, suggesting Patricia had accepted that she could no longer live independently. JX-11.

living facility and that Courtyard Gardens was a nice facility that provided quality care and a positive social environment. In the four years that Patricia lived there, Louis visited Patricia frequently, took an active role in managing her medical care, and regularly included her in family life. The only reliable evidence of record is that Patricia lived out her years in Florida with dignity, good care, and the emotional support of a flawed but caring son and his family. In sum, Frank and Jack have not demonstrated why Patricia would not have shared her money with the one family member who was providing care and support to her and who was to be the recipient of the bulk of her estate in any event.

As to the claim that Louis misled this court and the Florida probate court, I agree with Frank and Jack that Louis' conduct lacked candor and damages Louis credibility. I have accordingly discounted Louis' testimony heavily in my factual findings. But, I do not agree that Louis' conduct is so repugnant that the court must automatically deny him the benefits of the July 2003 Codicil. And, doing so would unnecessarily thwart Patricia's testamentary intent to exercise the Power of Appointment in favor of Louis and not Frank or Jack.

For these reasons, I reject Frank and Jack's equitable claims.

G. Attorneys' Fees

Louis has requested that Frank and Jack be ordered to pay his attorneys' fees. This court recently summarized the requirements for shifting attorneys' fees as follows:

> Generally, Delaware follows the American Rule and litigants must pay their own attorneys' fees and costs. As an equitable exception to the American Rule, however, this Court may grant attorneys' fees if it finds

> that a party brought litigation in bad faith or acted in bad faith during the course of the litigation. Still, this Court does not lightly award attorneys' fees under this exception, and has limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons.[106]

Louis argues that Frank and Jack acted in bad faith by bringing the Complaint when they knew, based on Patricia's earlier testamentary documents and on their historical relationship with her, that Patricia wanted to leave the money in the Martin Sloan Trust to Louis. In essence, Louis argues that it was bad faith for Frank and Jack to attempt to exploit the technical mistake Louis made by failing to make specific reference to the Power of Appointment in the August 2002 Will. But, Frank and Jack had a right to insist that if they were deprived of their bequest under the default provisions of the Martin Sloan Trust, it was done in compliance with the requirements set forth in our law and by Martin Sloan. Here, the August 2002 Will failed to comply with the formalities required for exercising the Power of Appointment set forth by Martin Sloan, and the July 2003 Codicil was executed under circumstances that give rise to a presumption under our law that it was not a valid testamentary instrument. It was therefore not in bad faith for Frank and Jack to petition this court to enforce the default provisions of the Martin Sloan Trust.

Louis has also requested that the attorneys' fees of Delaware Trust Company, one of the trustees of the Martin Sloan Trust, be shifted to Frank and Jack. I deny this request for the same reasons stated above.

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[106] *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199, at *24 (Del. Ch. Aug. 20, 2008) (citations omitted).

V. Conclusion

For the foregoing reasons, I dismiss Frank and Jack Sloan's petition to have the assets of the Martin Sloan Trust distributed to them, and I direct the trustees of the Martin Sloan Trust, respondents Louis Segal and Delaware Trust Company, to distribute the assets of the Martin Sloan Trust to Louis Segal. Each side shall bear its own costs. IT IS SO ORDERED.