THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
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December 29, 2011

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Case Name: **Estate of Norine Lucie Betjemann**
Case Number: **319-2009-ET-00711**

Enclosed please find the order of the court dated 12/28/11.

Suzanne R. Doyle
Clerk of Court

C: Philip Waystack, ESQ; Kathryn M Kiernan, ESQ; Stephane A Duckett; Robert A Wells, ESQ; Arianne Betjemann; Juliette Betjemann

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

7TH CIRCUIT COURT
PROBATE DIVISION

CHRISTOPHER H. BETJEMANN, JR.

V.

NORINNE L. BETJEMANN and STEPHANE A. DUCKETT,
EXECUTORS U/W/O OF NORINE L. BETJEMANN

319-2009-ET-0711

DECREE ON RE-EXAMINATION OF WILL PROBATE AND IMPOSITION OF CONSTRUCTIVE TRUST

In this matter Christopher H. Betjemann, Jr. (Christopher), the oldest son of Norine L Betjemann (the decedent) asks for re-examination of the admission into probate and invalidation of her will on assertions that the decedent lacked testamentary capacity and that it was the product of the undue influence of Norinne L. Betjemann (Norinne) and Stephane Duckett (Stephane), a daughter and son-in-law of the decedent.[1] Under the will as previously admitted, Norinne and Stephane were named as executors and made primary legatees of the estate. Christopher also requests that the court impose a constructive trust on findings that they committed fraud, breached fiduciary duty and wrongfully converted the decedent's assets to their own use. Under a previous order (doc. 53) the issues were bifurcated, with those related to the will challenge tried first given the prospect that validation of the will may render the equity issues supporting imposition of a constructive trust moot. The will proof is **confirmed** consistent with the findings, rulings and orders within.

[1] Initially he asked that the will be proved in solemn form also, but he withdrew that request on the record at the hearing.

I. Facts

The decedent was married to Christopher H. Betjemann, Sr. (Christopher, Sr.). Together they had four children — Christopher, Jr., born December 12, 1943; Robert Betjemann, born October 14, 1945 (Robert); Peter Betjemann, born December 14, 1947 (Peter); and Norinne, born April 29, 1959.

Christopher, Sr. and the decedent were residing in Maryland in 1991 at the time of Christopher, Sr.'s death. In 1992, the decedent moved to a condominium unit in Wakefield, Rhode Island to be closer to family members in New England. Her four children lived in disparate locations. Christopher, a physician, then lived with his wife Barbara in Stewartstown, New Hampshire but had impending plans to soon relocate to Rhode Island. Robert had a difficult relationship with the family and was often absent for long periods of time. Peter had moved to France in 1966 or 1967 and also had little to no meaningful involvement with the family. Norinne lived in London, England, with husband Stephane.

In 1994, approximately two years after the decedent moved to Rhode Island, Christopher and Barbara departed northern New Hampshire for property Barbara had inherited from her parents in South Kingston, on the Rhode Island coast. The decedent then, in turn, left her condo and settled onto their property, staying for a time in their home and later in a separate nearby cottage on the property. She paid rent of $500 a month for the cottage, about half the going market rental value. Christopher and Barbara lent her advice, provided companionship, assisted her with medical appointments and furnished other helpful services.

Before too long, the decedent began exhibiting some fragility in her health. She endured hip replacement surgery; fell in a hospital parking lot where she was working as a volunteer; had a couple of minor car accidents; and was observed by Christopher and Barbara on another occasion driving for several miles on a flat tire without being aware. Christopher testified that his mother had also experienced at least one transient

ischemic attack (TIA – a temporary, mini-stroke), and manifested abbreviated episodes of intermittent confusion at that time.

Eventually Christopher and Barbara convinced the reluctant decedent that she should stop driving. She thereafter opted to live in an assisted living facility. In May 1998, she moved to Langdon Place in Dover, New Hampshire, where she assumed an independent apartment and by that facility was afforded some transportation, her meals, and other assistive services. There she lived in relative close proximity to a granddaughter, Julia Dundorf, Christopher and Barbara's daughter, who lived in the neighboring town of Barrington. Also living in New Hampshire was at least one of decedent's sisters, and a niece, Barbara Reid, with whom she visited regularly.

After moving to Dover, the decedent in December 1998 executed a will. In it she named Christopher to serve as executor, with Julia Dundorf as contingent fiduciary in the event Christopher was unable or for other reason to not serve. She directed that her assets be divided into four equal parts with one part each distributable to Christopher, Peter and Norinne, and the remaining part distributable: one-half to Robert; one-quarter to his son, Robert Gustav; and one-quarter to his daughter, Eva Betjemann Lansford. Petitioner's Exhibit 2.

In April of 1999, Christopher and Barbara returned from Rhode Island to New Hampshire, settling in Barrington near daughter Julia. They and Julia kept in regular contact with the decedent, provided transportation and rendered other assistance for her as needed or requested. Nonetheless, the family relationship seems to have been uneven. In April 2002, Christopher and Barbara corresponded complaining to Norinne: "Judging from her behavior our only real utility or importance to mother seems to be our jumping when she calls (and that is essentially the only time she calls)." In the same email they also expressed frustration that they had been excluded from a family gathering of the decedent, sister Norinne, brother-in-law Stephane, cousin Barbara Reid, and an aunt, stating that "[i]t would be difficult to even appear to be a 'loving family' (as described by mother in her talking about Marjorie and Barbara) without the opportunity to have joined into such a get together." Respondent's Exhibit H.

In contrast, Norinne testified that she talked on the telephone with her mother twice a week about such matters as world news, the goings-on at Langdon Place, and other events of everyday life in general. Norinne felt that her mother listened to and was very supportive of her. In 1995, the decedent began making annual visits to England, usually for and over the December holidays. Christopher, from both his perspective as a physician and her son, had informed her that because of health concerns she should not travel to England. He testified that his mother repeatedly disregarded his advice about not traveling. On her part, Norinne came to stay with her mother for approximately a week each August, around the time of her mother's birthday. On two or more occasions, Stephane accompanied her.

In December 2002, the decedent executed a new will. Under this iteration, Norinne was nominated executor, and Stephane contingent executor. All of her assets were made distributable to her four children equally, eliminating the further division of Robert's fourth share contained in the earlier will but adding a provision for deducting from Christopher's share of the estate any money he then owed her.[2] She further specifically referenced a loan she had made to granddaughter Julia Dundorf, with an instruction that it be included amongst the assets of her estate. No provision was made for Robert's two children in this will version. Petitioner's Exhibit 3.

In December 2004, the decedent was scheduled to have exploratory surgery after her physicians became concerned that an unidentified mass detected might be cancerous. Norinne came from England for about a week to be with her mother at the time of the surgery. Christopher had been in contact with his mother's physicians about

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2. Several years prior to the 2002 will the decedent loaned approximately $400,000 to Christopher and Barbara so they could complete renovations on their farm in Stewartstown before its sale while, contemporaneously, they began renovations on Barbara's property in Rhode Island. They and the decedent had contemplated that the initial loan would be repaid when the New Hampshire property was sold, but the sale took longer and resulted in receipt of a lesser sum than had been anticipated. At the time of the decedent's death, $175,000 remained due on the loan that they had been repaying, by agreement, on an interest-only basis pending payment of all outstanding principal on or before February 1, 2019. Respondent's Exhibit TT. Christopher and Barbara both testified that they had offered to repay the full amount of the loan, but that the decedent preferred that they continue paying her the interest only payments monthly.

the surgery so that he might be assured it was needed and appropriate, and be better positioned to explain the procedures to his mother. He had not been told that Norinne would be in New Hampshire for the surgery until three weeks prior to her arrival. Respondent's Exhibit K. Nor was he informed that their brother, Robert, had visited their mother and Norine prior to the surgery. On December 21, 2004, the day after the surgery, there was an altercation in the hospital between Christopher, his mother and Norinne. He voiced upset that he had not been informed of Robert's visit. He testified that he may have raised his voice to his mother and Norinne. However Norinne described what was experienced as Christopher "going ballistic" in the course of a very animated and "violent reaction" to not having been informed that involved his shouting, while slicing his arms through the air, that veered into other topics such as accusations of "offences" he felt she had committed, how he was doing all he could to keep his mother alive while she was doing all she could to kill her, her treatment of him as being like her treatment of their father and related themes The medical records indicate that the decedent reported that Christopher was "unkind", controlling, and yelled at her, and that she did not want any further contact with him. Respondent's Exhibit RRR, Tab 36. Christopher testified that in his pique he informed his mother that he would no longer be acting as her emergency contact person and that he would no longer act as her power of attorney healthcare agent. While she remained in the hospital for an additional nine days, Christopher did not during that time again visit or contact her. Thereafter she named niece Barbara Reid her healthcare agent. It was Ms. Reid who drove her home from the hospital after discharge. Following the hospital incident the relationship between Christopher and his mother became further strained. Contact between them continued, but on a less frequent basis than before. Christopher testified that though he recalled visiting with her at her apartment in February 2005; he did not recall or write in his diary any other dates of visits over the ensuing two years.

In December 2006, the decedent moved to England. She was unaccompanied on the trip and had managed to pack and get herself to the airport without the assistance of family. On the day she was leaving she contacted two family members, niece Barbara Reid and granddaughter Eva Betjemann, to inform them that she

intended to remain in England permanently. She did not contact Christopher. She moved to Peterhouse, an assisted living facility located approximately 70 miles from Norinne and Stephane's principal home and nearer their weekend/beach home. After she moved to England, she and Norinne spoke on the telephone almost daily and usually visited at least weekly. Norinne and Stephane provided companionship, transportation and rendered advice to the decedent when called upon.

Christopher was shocked and hurt by his mother's move to England without informing him or other family members. He did not contact his mother by telephone or through visits over the remaining approximate three years of her life. He and Barbara did however testify that they do recall sending her occasional cards and letters, including a long letter describing their visit to the town where Christopher grew up. Likewise, their daughter Julia was very upset that her grandmother moved to England without even a goodbye to her or her children with whom Julia felt the decedent had been close. But for sending her a Christmas card, Julia also conceded that she did not telephone, visit or otherwise engage her grandmother once she had moved to England.

That Norinne had a very close relationship with her mother throughout her life was testified to by herself and confirmed by Barbara Reid, who also offered that the decedent was always excited and happy to talk about Norinne, and her visits were "a real source of conversation." The decedent's correspondence with her daughter and son-in-law likewise evidence affection between them. For example, in August 2002, the decedent wrote: "A short note of thanks for the many, many lovely thoughtful things (both you & Stephane) have done for me and given me. Love, Mom." Respondent's Exhibit I. In other correspondence she wrote: "As you already know – Stephane is fantastic! ... I am so proud of you and Stephane ... Love & Kisses Mom." Respondent's Exhibit E.

After her move to England, the decedent sent occasional correspondence to Christopher. The communication was typically brief and somewhat more business-like, commonly related to repayment of the loan she had made to him. Respondent's Exhibits N & P. In others she was not averse to sticking a jab. Respondent's Exhibit V

("Thanks for your card. I'm very happy here. It is wonderful to be so close to people who care about me."). Correspondence was sent to and received from other family members as well, including Eva Betjemann, Barbara Reid, and friends. Respondent's Exhibits R, S, T & U..

For most of the time she lived in the United States, and for some of time while in England, the decedent handled her own finances. She was capable of arithmetic calculations (though with occasional errors), and prepared the 2005 tax information form required by her accountant. Respondent's Exhibits LL & GG. She managed and maintained her own bank accounts. Respondent's Exhibits OO, PP & QQ.

Through at least October 2007, the decedent's medical records are replete with notations that she was oriented to person, place and time; and that she was mentally capable, able to administer her own medication and to meaningfully consent to medical procedures. See e.g. Exhibit RRR, Tabs 3, 5, 8, 26, 39, 42, 47, 57, 68, 77, 79, 80, 81, 82, 83 & 84. Her primary care physician in the United States, Allison Sollee, M.D., testified that up to her last contact in about November 2006, she did not have concerns about her ability to make medical decisions or to consent to procedures. Dr. Sollee stated that good medical practice requires that a provider document when there is a concern about a patient's capacity.

There are several later notations in the medical record that the decedent was confused. A Conquest Hospital form, dated April 28, 2009, states "...short term [*sic*] memory loss – confusion for nearly past 2 yrs acc: to daughter (who spoke to A&C Dr) – no recent ↑ confusion." Petitioner's Exhibit 30, Tab 13, p.19. In a report dated November 8, 2007, it states: "[E]arlier today was confused & found wondering [*sic*] around RH ... very pleasant but confused lady esp. to time & place." Petitioner's Exhibit 30, Tab 13, p. 11. See also Exhibit 30, Tab 13, p 15 ("Please note that the patient is a poor/confused historian." 07 March 2008).

Christopher and Norinne both testified that their mother had provided them with gifts throughout her life. The gifts, however, were exceedingly unequal. She gave

Norinne some $351,000 in gifts, Respondent's Exhibit RR, but Christopher only some $40,000. Respondent's Exhibit UUU. Additionally, as early as 2004, the decedent had made Norinne a joint tenant on three bank accounts totaling over $91,000. Respondent's Exhibit EE. She at no point made Christopher a joint tenant on any of her accounts.

Nine months after her move to England the decedent met with a solicitor and executed the will now under challenge, naming Norinne and Stephane executors. It provides one thousand British pounds to each of her three sons. The remainder of her estate is given to Norinne. Had Norinne predeceased her, the remainder would have gone to Stephane, or to Barbara Reid if Stephane had also predeceased. The same day, she executed a power of attorney naming Norinne and Stephane agents. They had not previously participated in the management of her finances. Nor had they had any involvement making medical decisions for her. The solicitor, Cara Sheppard, testified by stipulated video deposition. She stated that in the first meeting with the decedent, Norinne and Stephane were in the room, but did not participate in the conversation. Norinne chose the solicitor and contacted the solicitor's office to schedule the initial meeting at her mother's request. Her mother asked that she and Stephane attend the meeting, which they did with the solicitor's permission. The decedent informed the solicitor of her wish to prefer her daughter with her testamentary largesse over her sons, and explained why. So far as the record indicates, apart from their presence, Norinne and Stephane did not otherwise participate. On learning of this, Norinne became somewhat emotional by her own description and that of the solicitor. She testified that she and so far as she knew, her husband, had had no prior discussions concerning, or awareness of, her mother's change in post-mortem estate plans. After drafting the will Solicitor Sheppard forwarded it will to the decedent for review. At the decedent's request, confirmed by a note accompanying its return in her own hand informing the solicitor, she had Norinne notate corrections in the spellings of their respective first and middle names, as well as the designation of appointed executors and trustees from the partners of the law firm to Norinne and Stephane. The second meeting, which was for execution of the will, was scheduled by the decedent

herself and conducted at her home. Neither Norinne nor Stephane were present. According to the solicitor, at that meeting the decedent was able to recall her intended dispositional scheme and why she chose to provide so little of her estate to her sons. Petitioner's Exhibit 19, Tab 7, p. 28 & Respondent's Exhibit XXX, p. 28. She also provided a letter to Solicitor Sheppard that explained her reasons for nearly excluding Christopher, Robert, and Peter from inheriting from her estate. Petitioner's Exhibit 16 ("Letter of Reasons").

The decedent remained in England until her death on September 30, 2009. Her assets were primarily in United States bank accounts. Her will was submitted for probate and domiciliary administration in this court without objection. This action ensued.

II. Law

A. Testamentary Capacity

The standard for establishing testamentary capacity is that the testator, at the time of making a will:

> must have been able to understand the nature of the act she was doing, to recollect the property she wished to dispose of and understand its general nature, to bear in mind those who were then her nearest relatives as such, and to make an election upon whom and how she would bestow the property by her will; that she must have had the ability, the mental power or capacity to do this.

In re Estate of Washburn, 141 N.H. 658, 661 (1997) (citation omitted). In New Hampshire the burden of proving testamentary capacity in will contests remains on the proponent of the will throughout the proceeding. Ross v Carlino 119 N.H. 128, 129-130 (1979). The proponent must persuade the court by a preponderance of the evidence that the testator possessed requisite mental capacity. Washburn, 141 N.H. at 663.

Christopher argues that his mother lacked testamentary capacity based on (1) her exhibited confusion and the problematic incidents earlier referenced while she lived in Rhode Island; (2) Eva Betjemann's testimony that during a telephone call in March

2008, the testator did not recall Eva's husband and daughter; and (3) the notations in the medical record referencing confusion or memory deficits.

The decedent's testamentary capacity is to be evaluated and determined as of the time of the execution of her will in September 2007. Hardy v Merrill 56 N.H. 227, 243 (1875) ("The question of testamentary capacity is in strictness limited to a very brief period of time – the few minutes occupied by the attestation of the will."). Her confusion while in Rhode Island predated the signing of her will by some 10 years and was described as intermittent, not of an enduring dimension, and related to a TIA — in name and by definition a temporary and transient condition. Similarly, Eva Betjemann's reference to the telephone conversation six months after the will was signed is not of compelling weight given its stretch from the will's execution. Under cross-examination, she acknowledged that her grandmother recognized and conversed with her otherwise normally. She further stated that the decedent had never appeared to her confused at any time prior to her move to England in December 2006.

Those medical records not remote in time to the will signing must be taken into account in determining the decedent's testamentary capacity at its execution. In a medical record dated November 8, 2007, two months after Mrs. Betjemann signed the will, it was noted that she "...was confused and found wondering [*sic*]." Petitioner's Exhibit 30, Tab 13, p. 11. That medical record further indicates that on that date she was suffering from a urinary tract infection, was dizzy and nauseous — conditions that Norinne suggests furnish reasonable and plausible explanation for the reported confusion and wandering. Christopher himself testified that from his practice as a physician he did not find it uncommon for an elderly person with a urinary tract infection to exhibit confusion or disorientation. In relation to the earlier cited April 4, 2009 report in the medical records referencing that she had told the "A&C Dr." that her mother had "short term memory loss – confusion for nearly 2 yrs...." In a deposition, part of which was read into the record, Norinne offered clarification that what she had stated was that her mother had had a period of confusion over the past two years – i.e. when she had the urinary tract infection – not that she had confusion for the past two years. The court notes that the medical record appears to indicate that the comment was made by

Norinne to a doctor, who then related the information to the person writing the report — lending a measure of greater probability or prospect that there may have been a miscommunication or misunderstanding. There is substantial medical evidence, including a report dated August 31, 2007, very close to the date of the will signing, stating that the decedent had "full mental capacity." Petitioner's Exhibit 30, Tab 13, p.10.

Other evidence was introduced showing that the decedent knew her family members. She wrote notes to her son and signed them "Mom". She also corresponded with other family members and was able to identify her children for Solicitor Sheppard. She understood the nature and value of her property – her bank statements went to her address at Peterhouse, she wrote checks herself, and she corresponded with her son about his mortgage payments to her. Further, Solicitor Sheppard testified through deposition that she understood she was making a will and chose the dispositional scheme for her property it sets out. The Letter of Reasons lends additional support to the proposition that she knew her family and acted with deliberation before deciding how her property should would pass after her death.

B. Undue Influence

Under New Hampshire law, to invalidate a will on the basis of undue influence,

> there must be evidence sufficient to permit the inference that the testator was misled or coerced into making the will as it was made; it must appear that the influence charged amounts "to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion."

Bartlett v. McKay, 80 N.H. 574, 574-575 (1923) (citation omitted). "Whether [it] exists Is a question of fact to be determined based upon the surrounding facts and circumstances." In re Estate of Cass, 143 N.H. 57, 61 (1998) (citations omitted). In making the determination the court must draw upon and consider "all circumstances surrounding [the] disposition, including the relationship between the parties, the physical and mental condition of the [testator], the reasonableness and nature of the disposition,

and the personalities of the parties. Id. Though the existence of a confidential relationship between the testator and benefitted legatee does not alone give rise to a presumption of undue influence, it is a factor to be considered in making the ultimate determination. See Patten v. Cilley, 67 N.H. 520, 528-29 (1893).

Christopher presented testimony of an expert, Dr. Eric Mart, a psychologist, to support his claim that the will was the product of undue influence foisted upon the decedent by Norinne and/or Stephane. Dr. Mart, relying on a 1992 article in the American Journal of Psychiatry[3], reviewed seven indicia of possible undue influence. Those factors are:

1. The accused party played an active role in procuring the will.
2. The accused party was in a confidential or fiduciary relationship with the testator.
3. The accused party unduly profited from the provisions of the will.
4. The presence of unnatural provisions in the will.
5. Provisions inconsistent with prior or subsequent expressions of the testator's wishes.
6. A relationship between the testator and the beneficiary that created an opportunity to control the testamentary act.
7. A mental or physical condition of the testator that facilitates subversion of the testator's free will.

Norinne was actively involved in procuring the will so far as, at her mother's request, she sought out the name of the solicitor and scheduled the initial meeting. Though she and Stephane were present in the office when the decedent met with the solicitor to discuss her will, the court is persuaded by the testimony of Solicitor Sheppard that they did not actively participate in explaining or establishing the terms of the will. They indeed were in a confidential relationship with the decedent, but that alone will not invalidate a will on grounds of undue influence. Only if they exerted influence resulting in their undue profit under will provisions that the decedent would not have made but for it, may the will be set aside. If the decedent had testamentary

[3] Spar and Garb, Assessing Competency to Make a Will, American Journal of Psychiatry 149:2 (1992).

capacity and was not subject to undue influence, then she was free to choose whom to benefit consistent with her testamentary intentions.

In her 2007 will, the decedent changed the dispositional scheme from what it had been in the preceding will by providing very little of her estate assets to her three sons. However, she had also previously changed dispositional provisions of other prior wills, if less drastically. The 1998 will provided for unequal treatment of her four children in affording Robert's children beneficial gifting. The 2002 will divided her assets equally among the four children, but specifically stated that Christopher's indebtedness to her, if any, was to be deducted from his share. Beyond that, there was a disparate pattern of property transfers and gifting that foreshadows the testamentary disposition of the decedent's last will. She had provided substantial gifts to Norinne and had transferred or created bank accounts in joint name with her prior to making the 2007 will. There were significantly fewer gifts to Chrisopher, and there were no joint bank accounts created with him.

That Norinne shared a close relationship with her mother could well have created an opportunity to control the testamentary act. By all accounts she was viewed as "the favorite child", perhaps enhanced by being the only female. She was the child at the time living closest to the decedent. She also rendered advice, afforded transportation to appointments, and was from the evidence seemingly the child the decedent felt was most solicitous in offering other support and assistance as needed. The court has heard and well considered Christopher's assertion and belief that his mother had been isolated, was subjected to the undue influence of Norinne and Stephane and suffered from compromised cognition at the time of her execution of her will. The testimony of the administering solicitor and much of the medical record indicates otherwise. It is satisfied that though the decedent had experienced some physical fragility, periodic lapses of memory and abbreviated bouts of confusion, the record before it does not carry Christopher's burden over the legal threshold of proof needed to invalidate the 2007 will on grounds of a lack of testamentary capacity or the exertion of undue influence present at its execution. While Christopher may well harbor belief or have cause to feel otherwise, it is the decedent's mindset that counts. If the field may have

been cleared, tilled and otherwise prepared for the exertion of undue influence, as Christopher claims, his proof does not established that it was exerted or brought to bear in overcoming the free volition and judgment of his mother in making the 2007 will. See Albee v Osgood, 79 N.H. 89, 89 (1918) ("A testator may properly receive the advice and opinions of others, and, though influenced thereby, there is no undue influence, if he is not controlled to the extent of yielding his own judgment or will.") See also Cowan v Cowan 90 N.H. 198, 201 (1939) ("The right of a person to make a will unreasonable, impractical and unfair in its terms and provisions in not doubtful.").

There are other indications that suggest that the decedent was not unduly influenced. Barbara Reid characterized her as private, determined and strong-willed. That she was a person able and willing to disregard the advice or urgings of others is reflected in her rejection of Christopher's recommendations that she not travel to England over health concerns, regardless of his background as a physician and that they were offered when, based on her extant designation of him as agent in her healthcare power of attorney. Her sense of independence and self-reliance is shown by her arrangement of transportation and travel alone to England annually and, eventually, permanently. Notably, during a deposition, when Christopher was asked whether he was able to easily influence his mother, he replied: "You have got to be kidding. No." And in answer to a question posed during the hearing, he acknowledged that she "had a lot of moxie".

Christopher posits that the reason the decedent moved to England without informing him and other family members in advance was because she was under the influence of Norinne to not do so. But a more plausible explanation based on the history of interrelationships and past occurrences is that she did not want to provoke debate or disapproval and cause upset by giving advance notice. If nothing else, that Christopher had consistently discouraged her from traveling there would have given her reason to anticipate his opposition. Were that not enough, it is also a fact and likely, that, as state earlier, the cooling of his relationship with his mother following the December 2004 hospital altercation also played a part.

The decedent well may have had her reasons for conferring different dispositional benefit among her four children in her will. She had been estranged from Peter and Robert, or at least had a rather distant and disconnected relationship with them, for many years or decades. Her relationship with Christopher became increasingly strained, especially after the hospital incident. By his choice, he was no longer her emergency medical contact and no longer held position as her healthcare power of attorney. He testified that he has since come to regret his behavior at the hospital, and that sometime after March 2007, he apologized to his sister. Respondent's Exhibit Q. After his mother's move to England, he could still have maintained regular contact. He could have contacted her by telephone. He could easily have obtained her phone number from his sister or by looking up Peterhouse on the internet. He chose not to do so. His contact with her between December 2004 and her move to England in December 2006 was of a diminished magnitude, and from December 2006 to her death on September 30, 2009, it was minimal.

So far a Dr. Mart's testimony and opinion is concerned on the matter of undue influence, the court can but only state that it was unconvincing and unpersuasive.

III. Conclusion

Norinne and Stephane have sustained their burden of proving by preponderance of the evidence that the decedent had testamentary capacity and acted freely and voluntarily in executing the 2007 will drafted by her solicitor at her direction. The court further finds that the 2007 will was not the product of undue influence perpetrated by them or either of them. Similar to the case of Bartlett v McKay, 80 N.H. 574 (1923),

> [t]he provisions of [the decedent's] will are not unreasonable. [She] had the right to prefer one of the children. That she was induced to do so by superior affection for or more intimate association with that one, or even by her suggestion or request, does not affect the will in the absence of evidence of fraud or imposition or coercion so strong as to substitute the daughter's will for the mother's. There is no evidence of fraud or imposition and no substantial evidence that the daughter's influence was wrongfully exercised to produce the will.

Id. at 576-77

Given this ruling, the court finds it is unnecessary to hear and decide the Christopher's remaining equitable claims in support of the imposition of a constructive trust. Those claims are presumably moot so far as , even if Christopher could prove that Norinne or Stephane engaged in fraud or conversion, Norinne is the residuary legatee of all estate assets but for the legacies to her brothers and, as such, is the only person who would be aggrieve or might have cause to complain over her wrongful gain. Accordingly, the petition for equitable relief is respectfully **dismissed**.

As the court is satisfied that it has sufficiently set out the facts and applicable law essential to support its rulings on appeal, the parties' respective requests for findings of fact and rulings of law are granted so far as consistent with the narrative facts, rulings and law set out in this decree.. Any of their requests that are inconsistent, either expressly or by necessary implication, are denied or determined otherwise to be unnecessary. See Crown Paper Co. v. City of Berlin, 142 N.H. 563, 571 (1997).

SO ORDERED.

12·28·11
Date

Gary R. Cassavechia, Judge