THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

ROBERT W. BARKER

v.

REBECCA RULE, JOHN RULE, AND ADRIENNE RULE

318-2016-EQ-00967

ESTATE OF JEAN L. BARKER

318-2015-ET-01617

FINAL DECREE

Presently before the Court is a *Verified Petition to Invalidate Trust and For Other Equitable Relief* ("*Verified Petition*"), see Index #1,[1] filed by Petitioner Robert W. Barker ("Bob" or "Rob")[2] challenging the validity of the Jean L. Barker Revocable Trust (the "2012 Trust") dated September 12, 2012 executed by his mother, Jean L. Barker ("Jean"), and certain transfers of property into that Trust. See *Verified Petition*, Exh. B. (Index #1); see generally RSA 564-B:4-406(a). The *Verified Petition* asserts two claims: (1) that the 2012 Trust is invalid because Jean lacked the capacity to create it, see id.

[1] These consolidated matters include the Estate of Jean L. Barker, No. 318-2015-ET-01617. That matter was transferred to the Trust Docket to facilitate retrieval of Jean Barker's medical records. See Estate Index ##5, 7. A *Petition for Estate Administration* for this limited purpose was granted by the Court. See Estate Index ##3, 6, 7. Except as otherwise indicated, all index numbers referenced in this Final Order pertain to the equity case, No. 318-2016-EQ-00967.

[2] The Court does not intend to imply any disrespect by using first names or family names, however, given that many parties and/or witnesses share common last names, it, for purposes of clarity, will use their first names or family names.

¶¶ 62-69; see generally RSA 564-B:4-402(a)(1); and (2) it is the product of undue influence, fraud, or duress. *Verified Petition* ¶¶ 71-83; see generally RSA 564-B:4-406(a). Bob asserts that if the 2012 Trust is invalid due to Jean's lack of capacity or because it was a result of undue influence, then any asset transfers to it should be declared void as well. See *Verified Petition* ¶¶ 69, 82; see generally, RSA 564-B:10-1001(9). The Trustee and beneficiary of the 2012 Trust, Respondent Rebecca Rule ("Becky"),[3] denies that the trust is invalid, see *Amended Answer* (Index #10), asserting: (1) that Jean possessed the requisite capacity to execute the 2012 Trust; (2) its formation was not the device of undue influence; and (3) Jean had competent counsel provide advice and assist in its drafting and execution. Id. at 12, ¶1. Both parties seek reimbursement of attorney's fees from the other. See *Verified Petition* at 13, Prayer E (Index #1); *Amended Answer* at 13, Prayer F (Index #10); see generally, RSA 564-B:10-1004.

A four-day trial on the merits of these claims was held on September 12-14 and 28, 2016. See Scheduling Order dated January 26, 2016 (Index #17). After consideration of testimony and evidence presented during the trial, at which both parties were well-represented by competent counsel, the *Verified Petition,* see Index #1, is **GRANTED IN PART** for the reasons set forth infra. The Court finds that the 2012 Trust is invalid as Becky had a confidential relationship with Jean and she has not carried her burden of demonstrating a lack of undue influence. As a consequence, therefore, the Court, need not rule on Bob's asserted claim that Jean lacked the requisite capacity to establish it. The Court **ORDERS** Becky to return and/or replace all assets transferred to

[3] The *Verified Petition* also listed John Rule and Adrienne Rule as respondents. See id. at 2. Just prior to trial, however, Robert filed a voluntary non-suit without prejudice as to them. See Index #34.

the 2012 Trust to the Estate of Jean Barker **within 30 days** of the date of the Clerk's Notice of Decision in remittance of this Final Decree or the foregoing order attains the status of a final judgment, pending which she stands **RESTRAINED AND ENJOINED** from selling, transferring, expending, encumbering, hypothecating, distributing, concealing, or otherwise, in any manner whatsoever, disposing of those assets, absent further contrary order of the Court. See RSA 564-B:10-1001(9), (10). The Court **DEFERS**, however, any award of attorney's fees pending further briefing and such hearing as it may deem necessary. See RSA 564-B:10-1004; Shelton v. Tamposi, 164 N.H. 490, 502 (2013)(interpreting RSA 564-B:10-1004).[4] It pauses to observe, however, that since the Court's ruling invalidating the 2012 Trust is premised on the failure to carry her burden to prove an absence of undue influence, at present, and before further illumination by the parties, it is inclined to exercise its discretion to follow the American Rule that each party bear its own fees and costs. The parties are **DIRECTED** to submit to the Court, **within thirty (30) days** of the date of this Order, submissions addressing entitlement to fees, along with any relevant attorney invoices,[5] for its consideration.

I. Facts

At trial, both parties testified and presented expert, as well as lay, witness testimony. The Court enters the findings of facts that follow. In so doing, it pauses to interject that a court's evaluation of any matter involving an allegation of undue

[4] The Court observes that an appeal of multiple orders issued by the Trust Docket concerning the appropriate attorney's fee award(s) pursuant to RSA 564-B:10-1004 after a trust has been invalidated due to undue influence is currently pending at the New Hampshire Supreme Court. See In re Alice Stedman 1989 Trust 2013 Restatement, No. 2017-0288 (N.H. August 31, 2017)(order accepting and consolidating appeals).

[5] The Court will allow the parties, as an initial matter, to submit their invoices under seal to the Court.

influence foisted on, or the lack of capacity of, a settlor often tasks it with sorting through sometimes inconsistent documentary and testimonial evidence necessitating earnest and careful assessments of the credibility of witnesses — some of whom enter the courtroom having a personal stake in the outcome of the case. In the course of the trial, it became apparent to the Court that in this matter, that whatever clarity that evidence of Jean's mental health and state of mind at the time of execution of the 2012 Trust might have offered has been somewhat obscured by her increasing, and seemingly inexorable if not deliberate, withdrawal and seclusion from the outside world in her later years. During the approximate two year period(s) before and after the 2012 Trust was executed, she failed to attend medical appointments, despite her long-time physician's: (1) diagnosis of early dementia; (2) notations of hallucinations/delusions[6]; (3) endeavor to see her on a regular basis; and (4) his expressed concern that she was living alone. Key witnesses lack certain credibility,[7] and even Jean's entries in her daily diary omit note of events important to this inquiry, but, in her mind, and for whatever reason, not worthy of record.

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[6] Except when referenced otherwise as either within a quote from an exhibit admitted into the record, throughout this Final Order the Court will refer to Jean's experienced psychoses as "hallucinations/delusions" without distinguishing one from the other as the reported occurrences at times were seemingly in the nature of one, the other, or perhaps both. Further, any specificity would not otherwise advance or require any meaningful change in the Court's rulings.

[7] The Court did not find Attorney Fox's testimony credible given her nearly complete dependence on, and direction from, Becky and failure to meet with Jean at all when drafting an earlier executed power of attorney. Similarly, it notes that she did not meet with Jean until the 2012 Trust was nearly a *fait accompli* and, even then, spent very little time meeting or counselling alone with her. She never requested medical records, but instead relied on Becky's recitation of her mother's mental health. Finally, it is discomforted that Attorney Fox, without initially consulting with Jean, suggested to Becky that Jean's substantial liquid assets be invested/managed by the attorney's husband.

The Court also did not find Becky's testimony credible on the issue of her mother's mental state, finding it self-serving and contrary to other evidence. For example, she denied that her mother had delusions/hallucinations, claiming that she felt her mother was simply in a "dream state." Medical records indicate otherwise, see infra. Becky also claimed that these delusions/hallucinations ended after Jean recovered from the grief of losing her husband. Again, medical records and testimony from other relatives and friends indicate otherwise.

A. Barker Family History

The Court begins with the Barker family. Jean and Lewis ("Bud") Barker were married for many years and parented Becky and Bob. They raised their family in Boscawen, and for most of their lives had a close relationship with both children. Bob testified that his father was his "best friend" and that for many years, Bud, Bob, and Jean enjoyed hunting, fishing, canoeing, and searching for abandoned bottles together. Bob briefly took a job in Vermont, but returned to live near his parents after his brother, Steve, died in 1985. Becky likewise was close to her parents, and visited often to converse and play board games. Her parents were proud of her accomplishments as a published writer and professional storyteller. Until Bud's death in February 2011, Bob, who lived nearby, generally visited with his parents multiple times a week and Becky generally telephoned and/or visited twice per week.[8]

In approximately 2000, Bob took over the care of "Uncle Herb" – Jean's brother-in-law – who had been suffering for quite some time with memory impairment. From approximately 1995-2000, Bud had been bringing "Uncle Herb" meals twice a day. As Bud faced his own health challenges, Bob took over the care of "Uncle Herb" and became successor agent on a power of attorney. Bob was named executor of "Uncle Herb's" estate when he died. Bob was not a distributee or legatee of any estate property.

[8] It is undisputed that Becky became estranged from her parents for a time in 2010. Testimony over the cause and exact length of the estrangement varied and remains unclear to the Court. In terms of its duration it ranged from a few months to over a year. Notably, her parents did not alter their estate plans during this estrangement.

As set forth infra, Bob was estranged from his mother in the latter years of her life. Her long-held estate plan was altered, however, approximately ten-to-eleven months after the initial argument between Jean and Bob, and five months after a final attempt to fully reconcile failed. See infra. For the vast majority of Becky and Bob's life, however, Jean and Bud enjoyed regular contact with their children.

Although close as children, Becky and Bob gradually drew apart as high school teenagers and became increasing distant and estranged in later adulthood. Credible witness testimony was presented that Becky, a writer with a college and post-graduate education, would belittle Bob, a factory worker and manual laborer, for his lack of education and rudimentary verbal skills. Becky and Michelle Barker, Bob's wife, were not close,[9] and, after Michelle told Becky's husband, John, in 2014 that the Rules were not to call Bob anymore, all contact between the siblings ceased. Bob learned of his mother's later hospitalization, move from the family home to the Rule's residence, and eventual death, from cousins.

There was undisputed testimony that the final years of Bud's life were difficult for the family. As set forth more fully infra, Jean began to suffer from hallucinations/ delusions that items in her home would go missing, doors or windows were opened, or that people had entered or were attempting to break into the house. She became progressively unwilling to leave her home and could no longer drive. As Bud struggled with cancer, he was in pain and became increasingly sad. In the summer of 2010, Becky went to Bob's house very upset following a visit with their parents. She testified that she observed that her parents had brought loaded guns into the living area and was concerned that they might harm themselves or others. Bob testified that he disagreed with her and they had an argument. The gun incident was seemingly resolved without harm to anyone. Bud passed away on February 3, 2011. See Verified at Petition at 2, ¶2; Amended Answer admission at 1, ¶2 (Index #10).

[9] According to testimony at trial, Michelle also felt belittled by Becky for her relative lack of education.

Shortly after Bud's death, both Bob and Becky increased their visits to their parents' home. Bob, who lived closer, would visit five-to-seven days per week. Becky, who lived farther away, gradually came to visit some two-to-three times per week. Jean became dependent on both of them for assistance with various house-related chores, running errands, buying groceries, paying bills, providing transportation to doctor's appointments, and the like. On one visit, Jean showed them her Will, executed in June 1990, see P's Exh. 1, that directed family assets, other than a "camp in Danbury" bequeathed to Bud's sister, id. Article Third, to be split equally between Becky and Bob. Id. Article Fourth.

At least by September 2011, and continuing through December 2013, Jean kept a daily diary of certain occurrences and her activities. See Exhs.14; L-Q. The Court has reviewed the diaries and observes that the entries mostly concern contemporaneous recording of everyday matters of Jean's increasingly sheltered life at her home. Her documentary focus is largely-to-mostly repetitive – she discusses her meals, contact with her friend and neighbor Jinx, puttering around the house or yard, and her obsession with Boston sports teams and their games on television.[10] Notably, as discussed more fully infra, certain important life events were not chronicled, including meetings with the drafting attorney Judy Fox, and the execution of the 2012 Trust. The death of her best friend Jinx itself garners only a brief mention.

B. Medical History & Mental Health

Although Jean remained physically able to reside in her home until February of

[10] Although it was argued at trial that the diaries show that Jean was engaged with politics and/or current events in a substantive way, review of the entries did not reveal sophisticated discourse or analysis, but mainly contemporaneous record of the occurrence of certain events in a similar fashion to, but with less apparent devotion and detail, Red Sox box scores.

2014, she did so only with significant family support. Food shopping was regularly done by others, and Becky and her family, and until 2011 Bob and his family, brought her meals. Further, as already indicated, more taxing chores were completed by family, and Jean was assisted by Becky in keeping current paying her bills.

Medical records and witness testimony indicate, however, that her mental health was in decline and of concern to her medical providers. Medical records in January 2010 indicate that she was reporting difficulty with memory; however, a mini mental status exam resulted in a score within the normal range of cognitive function. P's Exh. 21 (JB 395). It also noted that Jean was "certainly taxed and/or stressed by her husband's illness." Id. By May 13, 2011, however, Jean had reported that "[s]he feels people are constantly in the house, particularly at night. They do not come when anybody else is there because they can see the cars in the driveway . . . They do not steal anything. They are sometimes under the bed. They are sometimes in her safe." Id. (JB-454).[11] In June 2011, Dr. Niegisch assessed Jean as suffering from "[d]eclining cognitive function" and "[h]allucinations, likely on the basis of early dementia." Id. (JB-449).[12] Jean reported that she did not like taking a certain medication as it "made her too tired, and she wanted to be awake so she could see the people that she constantly finds in her room." Id. Dr. Niegisch made note that Jean "continues to carry these hallucinations as valid, and remembers them well," id., including a report that when she "got out of the shower, she thought people had been pricking her in the arm . . . ." Id.

[11] Jean's physician, Dr. Niegisch, recorded that the hallucinations/delusions had "been going on now 3 years according to daughter, Becky." Id.

[12] At that meeting, Jean was administered another mini-mental status exam and purportedly scored three points lower than a prior exam in 2010. The results of that exam, however, are ambiguous as it appears that there may have been a mistake in scoring. See id. (JB 703). The Court gives limited weight to that exam. However, her physician also notes that she was "borderline dementia, *commensurate with her MRI findings of vascular disease.*" Id. (Emphasis added.) As such, the Court finds that by June 6, 2011, Jean's mental health was in decline.

While Dr. Niegisch endeavored to remain in contact and/or see Jean on a frequent basis to monitor her medical status, she did not attend another appointment until over two years later, see id. (JB 585), after Becky initiated contact with Dr. Niegisch's office on February 7, 2014, reporting that Jean had been calling the local police complaining about intruders. Id. (JB 590). When she later reported that Jean refused to go to the emergency room as advised by Dr. Niegisch, he scheduled an office appointment to see her for later that same day. Id. After he examined her, Dr. Niegisch wrote:

> [Jean is] [h]ere with concerns regarding hallucinations and delusions. . . . [Jean] has been basically struggling with this for years. . . . More recently has had the police at the house a number of times for issues of concerns [sic] regarding the neighbors stimulating her weather scanner. . . .Jean is no longer really able to care for herself. Guns are now out of the house. She is not cooking. She does not go out at all. . . . Apparently the curtains are always closed in the house because she is afraid of the neighbors watching her. She constantly feels like she is being watched. She feels like the crooks have her house wired and she is being monitored.

Id. (585). On the other hand, he further commented that Jean has gained weight "which is delightful." Id. He concluded, however, that she suffers from dementia with "underlying hallucinations, delusions," id., but states that given that "[t]he family is devout on trying to keep Jean in her home[,] . . . I think we can safely try and make her comfortable at home at this time." Id. This was consistent with observations in his deposition, where he further stated that Jean was a "minimalist in wanting to limit her care and contact with the healthcare opportunities that were available to her." Niegisch Deposition at 47. He further stated that he found her to be "independent" and that it was "reasonable" to describe her as "stubborn."

Not only do Jean's medical records indicate that she suffered from delusions and/or hallucinations, but the Court finds that they, her diary entries, and witness testimony, suggest that she suffered from these issues from at least 2010, and possibly 2008, through 2014.[13] In a number of diary entries, she records her hallucinations/delusions. As an example, on September 22, 2011, she writes that after she went to bed:

> Noise outside. [D]id not get up – dumb me. Someone or 2 [sic] got inside. Must be desperate to find something – they did yesterday when they got inside garage - Tell Beck cannot find Manchester cards now—and others - Sure it's not them they wanted. These showed up, I left them out here. . . .What is it? They or he was in here yesterday AM. I heard someone say early are you awake. Very low whisper really. Thought I was dreaming. Never moved and went back to sleep a while untill [sic] I had to go to Bathroom. Didn't think anything any more about it. Just wanted to prove to me tonight they could get in anytime and I was to know about it. Just games!

P's Exh. 14 – JB-12; see e.g. id. JB-6 ("Suspect pranks!"); JB-7 ("another prank"); JB-8 (had a visitor or 2); JB-10-11 (visitors/noises); JB-15 (lost items returning); JB-16 (noises);JB 18-21 (missing items, bugs); JB 23 (bugs, items in strange places, missing items); JB 25-26 (noises, bugs, visitors); JB-30. Although Becky asserted that diary notations that reference her delusions ceased on October 29, 2011, the Court observes that as late as October 15, 2012, Jean writes: "Beck[y] got garage open – no key could we find. Vanished I guess. expect to find! When they return it. MAYBE." Id. JB 118.

[13] The Court adds that it does not adjudge Becky's testimony concerning these delusions/hallucinations persuasive. She asserted at trial that her mother only suffered from an extended dream state, and was not delusional/hallucinating. Medical records indicate that Jean held on to those beliefs. P's Exh. 21 (JB 590). Two witnesses, see infra, testified that Jean had phantom fears expressed to them, indicating that she was not in a dream state.

In addition, Sandra Morin, Jean's niece, testified that shortly after Bud died, Jean called her to complain about bugs all over her body. Donald Cross, an old family friend, testified that Jean, in last years of Bud's life became more and more reclusive, and she did not remember Mr. Cross's name. He further testified that in 2010, he went to Jean and Bud's home to shovel snow. He stated that Jean met him at the door and told him that under no circumstances was he to shovel her steps as she wanted to "see his footsteps." Finally, it was unrefuted that prior to moving from her home, Jean disliked her granddaughter's (Becky's daughter) boyfriend, known as "K", because she believed he was a drug dealer/gang member and ran a "chop-shop." She also accused "K" of stealing Bud's cancer medications. None of these allegations were substantiated or were accepted as having any basis in fact by others.

The Court does not find support for much of Becky's testimony concerning Jean's mental health. At first, under direct examination by Petitioner's counsel, she denied that she knew of the dementia diagnosis, despite medical records indicating that Becky was with her mother during an appointment with Dr. Niegisch in June 2011 where he notes that they discussed "treatment" and that "she [Jean] and her daughter prefer no intervention on discussion with me at this time." P's Exh. 21 (JB 449). In a June 22, 2011 email to Attorney Fox, see infra, she states "[Jean's] going downhill fast mentally since my dad died and I fear there's a narrow window here." P's Exh. 19 (F-1). Later at trial, Becky asserted that her mother did not have dementia and seemingly "recovered" during the period during which the 2012 Trust was executed as grief over the loss of Bud subsided. Diary entries, see infra, note hallucinations/delusions continued until at least October 2012. Moreover, the medical report from February 2014 states that this

has been an issue "for years," indicating a continuation of the condition. P's Exh. 21 (JB 590). In addition, as noted supra, Dr. Niegisch, her long time physician, diagnosed Jean with "declining cognitive function [and] [h]allucinations, likely the basis of early dementia." Id. (JB 449). Although he opined in his deposition that the grieving process may affect an individual's overall cognitive health, he also agreed that since he did not treat Jean during the time period that the 2012 Trust was executed, he could not opine whether grief, or the diminution of it, affected her then diagnosed dementia. See Niegisch Depo. At 41-43. Finally, Dr. Mildred H. LaFontaine, the Petitioner's expert physician with a wealth of experience in neurology and treating patients with cognitive impairment, testified credibly[14] that she, in fact, had worked with Dr. Niegisch, and further opined that if he diagnosed "dementia" then it would likely be of a nature that would progress over time. She stated that the disease progression experiences daily "ups and downs," however, the general trajectory of the disease is a downward slope of cognition over time. Certainly, by 2014 Jean was clearly dependent on Becky and her family and was experiencing a lot of difficulty with hallucinations/delusions. Dr. LaFontaine testified plausibly that while functionally able to live in her home with considerable assistance,[15] one can reasonably extrapolate from the medical records that Jean would be experiencing considerable cognitive difficulty in 2012. Important for

[14] The Court notes that the Respondent also offered expert testimony of Dr. Eric Mart concerning Jean's cognitive health. The Court gives less weight to Dr. Mart's testimony than it gives to that of Dr. LaFontaine as: (1) he has never been a treating provider for dementia; and (2) unlike Dr. LaFontaine, he did not practice with Dr. Niegisch, and thus could offer less insight into his diagnoses of Jean. Cf. Fenlon v. Thayer, 127 N.H. 702, 708 (1986)("Whether an expert is a 'hired gun' or one whose opinions have greater foundation of objectivity is an issue to be . . . considered by the [fact-finder]"). The Court observes, however, that he testified that while bereavement can appear to be dementia, so that cognitive impairment can improve as the grief process progresses, in this matter, while he saw some evidence that this may be the case, such speculation is hard to corroborate based on the record.

[15] Although asserting at trial that Jean was mentally sharp, engaged and completely capable of living independently at home when the 2012 Trust was executed, the Court notes that in a June 23, 2011 email to Attorney Fox, see infra, Becky states:" My mother should not be living alone! But she is adamant." P's Exh. 19 (F-5).

the matter before the Court is Dr. LaFontaine's opinion that as a person's world narrows, susceptibility to undue influence increases.

C. June 2011 Power of Attorney

Jean Barker executed a power of attorney on June 22, 2011, naming Becky as agent and her husband, John Rule, as successor agent. P's Exh. 16. Although that document is not challenged in the instant litigation, the Court briefly recounts the circumstances of its making as it yet informs: (1) the question of whether Becky had a confidential relationship with Jean, and; (2) drafting attorney Judy Fox's professional relationship with Becky, including Becky's failure to inform Attorney Fox of Jean's dementia diagnosis. In addition, as to the 2012 Trust, it imparts insight on Attorney Fox's relationship with her putative client, Jean, and her ability to assess Jean's cognitive abilities as of September 12, 2012 since she had never previously met, conversed or otherwise engaged with Jean.[16] When drafting Jean's power of attorney, Attorney Fox neither met nor spoke with Jean. She did not enter into a fee or engagement agreement with Jean and did not receive from her a letter of instruction. It was Becky who initiated the contact and directly engaged her to draft, inter alia, the power of attorney for Jean. All direction concerning the terms of the document was communicated to Attorney Fox by Becky. In a follow-up email dated June 22, 2011, Becky wrote:

> I talked to my mother today. She will sign a power of attorney and sees the need for it . . . but she will not go to your office and does not want anybody coming to the house except family. . . . How can we make this happen? She's

[16] Attorney Fox testified at trial about the drafting of the power of attorney without objection, and emails exchanged in the course of the endeavor were admitted by agreement.

> going downhill fast mentally since my dad died and I fear there is a narrow window here.

P's Exh. 19 (F-1). Later that day, Attorney Fox suggested arranging a meeting with Becky to "discuss things you should be keeping in mind as she declines," and ends the email by stating: "I usually do not do Financial Powers of Attorney without meeting with the client to be sure that she understands the risks involved and really trusts the person she names. However, I'm comfortable here . . ." Id. (F-2) (ellipses in original). In another email, Becky balked at Attorney Fox's suggestion that Bob be named as a successor agent, and suggested John instead, claiming that since Bob was Uncle Herb's agent "my mother insists that he doesn't want to be POA for her. If you think it would be better, I can ask him." Id. F-4. Becky later emailed Attorney Fox that:

> If you think it would be better to have my brother as the default POA, that's ok. Now that I've read the document and see that he has authority only in the event of my disability or incapacity, I'm more comfortable with putting his name on. He has said he wants no part of POA's or being executor after a bad experience dealing with my Uncle Herb's POA and estate . . . . I don't think naming him default POA will be a problem. I'm a little worried that my mother may object, knowing, as she does, Robert's feelings.

Id. (F-9). In fact, it is undisputed that Bob was never informed of the plans to draft the document and only learned of it when Becky was presenting the completed document to Jean at her home and Bob walked in on its occurrence. He did not object at the time, and stayed at the house while Becky drove Jean to the bank to have the document notarized. Becky subsequently emailed Attorney Fox about execution of the document, noting it "[w]ent smoothly and my brother came so he's in the loop," id. (F-10), to which Attorney Fox replied, "Phew!" Id. (F-11).

Importantly, Becky's emails reveal that she was not forthcoming about Dr. Niegisch's dementia diagnosis or Jean's hallucinations/delusions. As mentioned infra, Becky stated that Jean was "slipping," and at trial Attorney Fox admitted that she relied on information from Becky that Jean had not slipped too far to be unable to execute the power of attorney. Attorney Fox asked for and received the name of Jean's primary care physician, see id. (F-3; F-9), but never contacted him. Becky did mention Jean's recent physical health challenges, and selectively wrote that:

> It was all I could do to get [Jean] to see her doctor a few weeks ago when she was having dizzy spells, but by golly she went. Had an MRI. She was sure she had a brain tumor, but no – just a little scarring consistent, the doc said, with her age. Still I'm really worried about her mentally slipping. A lot has to do with my dad dying.

Id. (F-5).

D. Bob's and Jean's Estrangement

Although both Becky and Bob increased their visits to Jean after Bud's death, in the fall of 2011, a dispute arose between Jean and Bob concerning a box of postcards. Jean had a rather large collection of postcards and sometime in September or October 2011 asked Bob to retrieve certain of them from an attic and bring them to her living room. He did so. Later, one night after Bob and Michelle brought her dinner, Jean expressed a belief that certain of the postcards contained in a milk crate were missing and that she believed Bob had taken them. Initially, Bob and Michelle thought she was joking, but after Jean persisted and would not be dissuaded by Bob's denial, they left in anger. Bob did not return to the house for over a week, and when he did return, he testified that Jean continued to accuse him of having the cards and insisted that he return them. Bob testified that he then limited his visits to once a week, although Jean

continued to accuse him of stealing the postcards. Bob and his family did not celebrate Thanksgiving (or Christmas) with Jean in 2011, although they had done so for many earlier years. Notably, at trial no witness posited belief that Bob stole or took any postcards.

In December 2011, Becky called Bob, asking him to return to Jean's for a meeting so that Jean could apologize. When he arrived, Jean continued to accuse him of stealing the postcards. Becky did not intervene, either to correct her mother or to defend Bob. Michelle, in particular took offense, became very angry and departed the home. Bob soon followed and he suspended visits with his mother.

In February 2012, Becky called Bob again, claiming that Jean wanted to apologize and issued a request for another meeting, but without Michelle. Before that meeting occurred, Becky wrote a note[17] and left it on Bob's door stating: "Robert Call your Mother now or further steps will be taken. Beck[.]" See P's Exh. 9. A first attempt at the requested meeting in February 2012 was aborted because when Bob and Michelle arrived at Jean's home, Becky had yet to arrive, and Jean refused to let Michelle into her home. One week later, Bob and Michelle went to Jean's to attempt another meeting at Becky's request. At this time, both Becky and John were waiting with Jean. Once again, Jean accused Bob of stealing the postcards and called Michelle a derisive name. After Michelle jumped to Bob's defense, Becky and John confronted Bob for not visiting Jean. They did not, however, confront or endeavor to persuade Jean that her accusations were not true. Bob and Michelle left without resolution of the conflict. Bob, however, did begin visiting his mother once a month.

[17] Becky claims that her mother dictated the note because she became so upset she was rendered unable to write it herself.

A final attempt to resolve the dispute occurred in April 2012. Becky once again called Bob and asked him to return to Jean's home since she wanted to apologize. Bob attended the meeting without Michelle, and met Jean, Becky, and John at Jean's home. He testified that Jean immediately accused him of stealing the postcards in addition to a family heirloom she called the "Lincoln Papers." Neither Becky nor John defended him. Bob decided to call the police, hoping they could convince his mother that he did not steal the postcards. He then proceeded to sit in his car outside the house for three hours waiting for the police. They never responded, and, after one, or possibly two, unsuccessful attempt by Becky to coax him into Jean's home, Bob left. He testified that he believed that between that meeting and execution of the 2012 Trust in September, he visited, or attempted to visit his mother five-to-eight times. When he did see her, however, he met her on the doorstep or in the driveway and conducted very abbreviated conversation.

Remarkably, although Bob and Becky agree that Jean's accusation was unfounded and that three meetings were held toward resolving the dispute, Jean's diary is relatively silent on the incident. In a September 22, 2011 entry, Jean notes: "Rob came by for a short visit. Stayed for a short time, and left. Still mad and so am I." P's Exh. 14 (JB – 13). She never mentions her belief that Bob stole some postcards. Notably, on September 24th she wrote that she "put [the] cards away got sick of them for now," id. (JB 14), and later on October 11th included postcard albums among a list of things that she believed unspecified people had stolen, including money, photos, and a shark's tooth. Id. (JB 21). On October 16th she noted: "still no card albums that I'm

missing. May turn up, who knows," but again, does not mention Bob in reference to the matter. Id. (JB-23).

Jean's diary entries between September/October 2011 and September 2012, when the 2012 Trust was executed, reveal that she dearly missed her son. The Court, however, does not discern any measure of deep or entrenched antagonism until well after the 2012 Trust was executed. There is also no mention of the three attempts to address and resolve the postcard issue despite universal testimony that the meetings were heated. At first, her entries portray a belief that Bob is not visiting because he is working hard. On November 10th she wrote: "[s]till no ROB Just a repeat of a few years ago when we went to Steenbekes mill to visit him at noon. Only time we saw him way back then. So not surprised that he has not been down." Id. (JB-29). On November 20th she similarly recorded: "[s]till no ROBERT. Not surprised. Hope he had a chance to do some hunting and not work all the time." Id. (JB-31).

Later entries show growing frustration at his absence, a tendency to blame another for his absence, and a genuine longing to see her son. Again, oddly none of these entries mention the postcard dispute. On December 19th, she writes: "[s]till no word from ROBERT guess I am still on his No call & NO SEE LIST. Thanks to you know who!" Id. (JB-33). On New Year's Eve she records: "Haven't heard from ROBERT YET. Miss him & No Visit from Danielle over x mas. Thank goodness I have Jinx and Beck, John & Adi." Id. Of interest is a February 6, 2012 entry in her diary showing frustration at his absence, but also confusion concerning its reason. In that entry, she recites:

> Tried to get hold of ROB tonight . . . Guess he must (ROB) must be ok. Can't imagine why ROB won't talk to me. Guess "ma" is off his

> list. I would think he could call and see what I wanted. I could be sick but he don't care anymore or he is only able to do what wifie [sic] SAYS. They better start or I will do something about it. -- What I don't know . . . .

Id. (JB-47). Two days later she writes about riding to Rob's on Feb. 8th and leaving the note. She wrote: "[w]e heard from M – as soon as she found it." Id. (JB 46-47). On May 26, 2012, Jean reports that Becky saw Rob and "said he was very nice. NO Wifey in tow! Id. (JB-77).

Diary entries during the summer and fall of 2012 are worthy of attention in so far as Jean never discusses an intention or plan to disinherit Bob. This silence is in sharp contrast to emails Becky sent to Attorney Fox, see infra, during the same period that portray Jean as being "adamant" that she wants to disinherit Bob, see P's Exh. 10 (F-21)(August 31, 2012), and expressing that changes are "in her mind, urgent" and "for Ma's peace of mind." Id. (F-22,F-23)(September 4, 2012). In addition, the diary contains no notations of visits from Attorney Fox on September 6th and 12th, see P's Exh. 14 (JB106), while she does document a visit six days later on September 18, 2012, by writing: "Robert came with final check from Herb[']s estate was glad to see him – Long time no see. Beck & John were also very glad to see him." Id. (JB-110).

Jean's entries *well after execution of the 2012 Trust* tend to show a preference for Becky and frustration at Bob. On a day she reports to be the second anniversary of Bud's death,[18] Jean writes: "Sure am lonesome without him and Steve. Thank goodness for John Beck & Adi up here most every day. Haven't seen ROB for quite a spell." Id. (JB – 154). On April 13, 2013, seven months after the new estate plan was

[18] The diary entry is on March 3, 2013, however, Bud died on February 3, 2011 as earlier stated.

executed, Jean, seemingly unaware of it, writes "Beck & John up – called Rob. Big fight as usual. Still won't listen to reason. Have to get a lawyer." Id. (JB 175).

E. Becky Relationship with Jean 2011-2012

The record is clear that after the familial rift between Bob and Jean resulting from the postcard accusations, Becky and her family assumed all duties to support Jean's ability to continue living in the Barker family home. The Rule family brought prepared meals and groceries to Jean, visited her nearly daily, and assisted with chores like bringing in wood for the woodstove and carting items down from the attic to the family room. Jean was unwilling or unable to drive, so the Rules drove Jean when needed. Becky assisted her mother with bill paying. Email records indicate that as Jean and Bob's estrangement continued, Becky became increasingly resentful of him. See, e.g., P's Exh. 10 (F-21)("I resent his abdication of his responsibility . . .").

Moreover, there is no doubt that the Rules maintained a close relationship with Jean. Testimony and Jean's diaries tend to indicate consistent interaction with and visits from them.

F. 2012 Trust Drafting & Execution

In August 2012, Becky contacted Attorney Fox seeking assistance to "help my mother and me to get her affairs in order the way she wants them," presumably to disinherit Bob. See P's Exh. 10 (F-21). In her initial email, Becky reminded the attorney that she had "helped [her] with the POA . . . for my mother, Jean." Although in prior emails associated with the 2011 power of attorney Becky had informed Attorney Fox that Jean was "going downhill fast mentally," see P's Exh. 19 (F-1), in August 2012 she represented to Attorney Fox that her mother had "gotten better mentally," took care of

herself, and has "memory problems (very short term — like where are my keys)." P's Exh. 10 (F-21). In the August 31st email, Becky explained that Bob and Jean had a dispute over postcards, and stated: "I tried to get them to reconcile at one point, and he and his wife came to her house, but the issues remained the same." Id. She then claims: "Ma has become adamant that she doesn't want my brother, his wife, or their daughter . . . to inherit anything. Today I told her that in fact her will leaves half to me, half to him. She wants to change it." Id. She does not, in this document, or ever, inform Attorney Fox of the dementia diagnosis and Attorney Fox never contacted Dr. Niegisch to independently inquire as to Jean's cognitive health.

Attorney Fox's first occasion to meet with Jean was on September 6, 2012. It is deservedly again of note that many, if not most, all the details of the eventual estate plan already had been prearranged through emails between Becky and Attorney Fox before the meeting. On September 4th, Attorney Fox replied to Becky's inquiry that she is, inter alia, "[h]appy to help." Id. (F-22). Later that day, they arrange to meet at Jean's house and Becky states that it is "in [Jean's] mind, urgent." Id. Becky directs that:

> *I'd* like to get the will done as well as all the CDs, IRAs and bank accounts in order. My brother's name is on all of them as well as Ma's and mine. This might be the time to reformat them something that will work better for purposes of probate since all the accounts have to be changed anyway.

Id. (F-22-F-23)(emphasis added). She closed by noting: "There is a lot of money involved, two houses, and a half share of about a hundred acres of family land. More important than that is Ma's peace of mind." Id. (F-23). Later that day, after Becky asks if she needs to prepare any paperwork, Attorney Fox asks her to gather deed, bank and investment account information, along with information on securities and life insurance

policies. Id. Attorney Fox also offers counsel that "[i]t seems to me that a trust will be the most appropriate route. That will mean re-titling all assets." Id.[19] Becky responds with "[s]ounds good." Id. (F-24). In the days that follow before the meeting, Becky gathered detailed asset information for Attorney Fox.[20] Id. (F-24-F-25).

The September 6th meeting between Attorney Fox and Jean first reportedly lasted, according to the attorney, for about two hours. Attorney Fox testified that after meeting with both Becky and Jean for about the first hour, she met alone with Jean for some ten-fifteen minutes. The remainder of the meeting was with both Becky and Jean. As noted supra, Jean made no record of the meeting in her diary, but does mention that "Beck had a tuna sandwich with me at noon." See P's Exh. 14 (JB-106). Attorney Fox further testified that at the September 6th meeting, the "three of us" discussed disinheriting Bob. She testified Jean understood she was disinheriting Bob, knew her children, and knew her assets. She also stated that she apprehended some minor memory loss. She further commented that Jean appeared anxious and under stress, but believed that the cause of that stress was a desire to complete the transaction.[21] Upon questioning by the Court, it became apparent that Attorney Fox's memory of her time spent alone with Jean was limited.

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[19] At trial, Attorney Fox testified that she did not review the existing 1990 Will before suggesting a trust, but relied on Becky's representation that the assets were split equally between Becky and Bob. She also assumed Becky would be trustee before meeting Jean, as she had previously understood from Becky that Bob did not want to be agent on the power of attorney. She did not consult Bob.

[20] In one email Becky informs her that: "I got info together and updated. Ma's assets are quite a lot more than I thought they'd be. I'll have a detailed list tomorrow, but grand totals are $810,942.64 in CDs, Money Market, Roth IRAs and $253,233 in property . . . ." Id. (F-25).

[21] The Court departs to remark that since Attorney Fox did not meet Jean while drafting the 2011 power of attorney, or even during the months that followed, it questions her ability to make a reliable report concerning Jean's mental health as she had no baseline for comparison and relied completely on Becky's representations of her mother's cognitive issues. She admitted that had she known of the hallucinations/delusions and dementia diagnosis, she would have conducted a more searching review in both June 2011 and September 2012. She, however, proceeded as she did trusting that Becky was an accurate reporter.

Before ending the September 6th meeting, it was agreed that they would meet the following week to execute the 2012 Trust and arrange for the asset transfers.[22] Attorney Fox also suggested to Jean that before the next meeting she create a record stating the reasons for the change in her estate plans. A copy of a September 8, 2012 dated handwritten note signed by Jean, apparently in fulfillment of Attorney Fox's suggestion, was entered into evidence. See R's Exh. E. It states:

> This is my decision to leave all my assets wherever they maybe to my daughter Rebecca Rule, as she has stood by me for this last year to make sure I had all that I needed. My son Robert I have not seen for many months. This is my decision to make a trust for Becky.

Id. It is undisputed that the handwriting in the note is Jean's. It was also undisputed at trial that the syntax and form varies significantly from contemporaneous diary entries. See P's Exh. 14. The actual circumstances attendant the drafting of the note are unclear.

After the September 6th meeting, Becky and Attorney Fox communicated about the terms of the 2012 Trust and asset re-titling. Later on the 6th, Becky sent Attorney Fox deed information and went to two banks to get advice on re-titling accounts. P's Exh. 10 (F-26-F-27; F-32-F-33). She later expressed exasperation that one bank requested that Jean accompany her to re-title the account, see id. (F-28), but felt it

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[22] Surprisingly, the 1990 Will leaving the bulk of the estate to both Bob and Becky remained unchanged. Attorney Fox conceded that this circumstance is highly unusual. The Court observes that the formalities to create a trust are less complicated than creating or modifying a will. Compare RSA 564-B:4-401; RSA 564-B:4-402 with RSA 551:2; RSA 551:2-a. The attorney testified that she "probably" drafted one, see P's Exh. 10 (F-40), but Jean did not sign it because of the statutory requirement that the document to be witnessed. She surmised that she did not follow up with a new Will because all Jean's assets had been transferred into or retitled to the 2012 Trust. As a consequence, she offered that she believed a Will to be "redundant," see also id. (F-45-F-46), in apparent disregard of the prospect that any of Jean's assets that may have been inadvertently left out of, or later acquired outside and not placed in, the 2012 Trust would require probate administration and be distributable through the 1990 Will.

could be "arranged." Id. (F-27). Becky reviewed a draft of the 2012 Trust, and promised to "talk to Ma about what she'd like to do percentage[-]wise should I predecease her . . . ." Id. (F-33). She subsequently emailed Attorney Fox that: "Ma wasn't too clear about the percentages re: If I die before her. She didn't want to think about it, I think. I'm thinking 45% John, 45% Adi, 10% to Sheree Miller, Sandra Morin, Candy Adams . . . ." Id. (F-35). Indeed, the 2012 Trust reflects these terms consistent with Becky's email. P's Exh. 3 (Article II(C)). Finally, the Court takes note that after Becky was unable to secure agreement from a long-time bank employee familiar to the Becky and the Barker's to be named as "Accounting Agent," before the scheduled signing, Becky emailed to Attorney Fox: "Is it possible for Ma's trust to be signed and sealed with the Accounting Agent to be named later? I really really want this done this week. And Ma really really does." P's Exh. 10 (F-38).

On September 12, 2012, the 2012 Trust, along with four of five deeds transferring real property to the trust were executed by Jean at her home and notarized by Attorney Fox. See P's Exhs. 3-4.[23] The attorney met at Jean's home again for an estimated two hours according to her testimony. She further testified that she first met with both Jean and Becky, and that this time she was alone with Jean for 5-15 minutes, but only because Becky would temporarily leave the room as needed to retrieve documents for Attorney Fox. Jean's diary entry for September 12th does not mention the meeting. P's exh. 14 (JB-108). The following day, re-titling of Jean's bank and investment accounts, either in the name of the Trust or jointly with Becky, was completed, see generally P's Exh. 7, and Jean comments in her diary that she "[g]ot all

[23] The remaining property in Danbury was transferred the following day. See P's Exh. 4.

of business done today." P's exh. 14 (JB-108). Rebecca emailed Attorney Fox that it [t]ook most of the day but all is done at the banks." P's Exh. 10 (F-45).

The following week, Becky emailed Attorney Fox with concern that Bob had called stating he would be visiting Jean the following day with a final distribution from Uncle Herb's estate. Id. (F-47). She states: "I'm kinda nervous. Just wanted you to know. Advice appreciated. I don't want him to upset Ma. OMG." Id. Attorney Fox replied: "Are you concerned he will somehow learn that changes have been made to the accounts? There is no reason to hide that she created the trust in order to avoid probate and the accounts are now held in the name of the Trust. There is no reason for her to disclose the terms of the trust to him." Id. Bob indeed visited Jean the following day with the final distribution from Uncle Herb's estate. No mention of the new trust was made. Jean's diary entry for that day stated that it "was very good to see him." P's exh. 14 (JB-110). There was again no mention that she had just disinherited him. In her testimony Dr. LaFontaine opined credibly that in her opinion after having reviewed the diary entry, Jean did not remember the trust and this belief was supported by a later entry, see supra, indicating that Jean felt she needed to get a lawyer, see id. (JB-175), despite the fact that by that time the 2012 Trust was in place for just over seven months.

G. Jean's Final Years

Jean Barker died on October 28, 2015. She and Bob never recovered the close relationship they shared for most of his life before the postcard incident. Becky and Bob remain estranged. Becky did not inform Bob that their mother had moved to Becky's after her hallucinations increased and she was frequently calling the police. She also did not inform Bob directly about their mother's hospitalization and a cousin informed

him of her death. Bob was not told of the 2012 Trust until after Jean's death. He testified that he learned of the 2012 closing of a joint account he held with his mother after Jean died in 2015. He convincingly stated that the account was joint because it held approximately $175K from Uncle Herb's estate that his parents told him he was entitled to because he had taken care of Uncle Herb in his final years.

II. Applicable Law

A. Undue Influence

Courts are authorized to invalidate a trust where "its creation was induced by fraud, duress, or undue influence." RSA 564-B:4-406(a). "Undue influence" is defined in New Hampshire as: "the use of such appliances and influences as take away the free will of the [settlor], and substitute another's will for [hers], so that in effect the instrument is not the expression of the wishes of the [settlor] in the disposition of the property, but of the wishes of another." Albee v. Osgood, 79 N.H. 89, 92 (1918)(quotations omitted). An instrument will not be invalidated, however,

> where no fraud or deception is practiced, mere persuasion will not invalidate a [trust] on the ground of undue influence. On the contrary, . . . a [settlor] may properly receive the advice, opinions, and arguments of others, and if, after all such advice, opinions, and arguments, the [settlor] is not controlled by them to the extent of surrendering [her] free agency and yielding [her] own judgment or will, then there is no such undue influence as is required to be proved to avoid the will.

Id. (quotations omitted). The influence exerted must amount "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 [trust] was obtained by this coercion." Bartlett v. McKay, 80 N.H. 574, 574-75 (1923)(quotations omitted). Mere kindness

and/or affection, id., or desire to gratify another, Albee, 79 N.H. at 92, whatever the motives of the influencer, cf. In re Estate of West, 522 A.2d 1256, 1265 (Del. 1987), is not sufficient to support a finding of undue influence. Id. However, "importunity that could not be resisted," Albee, 79 N.H. at 92 (quotations omitted), has been determined to equate to "force or fear" sufficient to support a conclusion that undue influence was exerted upon a settlor. Bartis v. Bartis, 107 N.H. 34, 37 (1966). Consistent with these guideposts, Connecticut courts have explained that "pressure" in the context of undue influence is "[p]ressure, of whatever character, whether acting on the fears or hopes, if so exerted as to overpower volition without convincing the judgment, is a species of constraint under which no [trust] can be made . . . . though no force was either used or threatened." In re Hobbes, 47 A. 678, 680 (Conn. 1900).

Although the established test to prove undue influence appears rigorous, New Hampshire case law recognizes that undue influence, by its nature, is fact dependent. See In re Estate of Cass, 143 N.H. 57, 61 (1998). "Generally, a court considers all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties." Id. (quotations omitted). While a finding of incapacity is not required to conclude that an instrument was the product of undue influence, cf. Gaffney v. Coffey, 81 N.H. 300, 306 (1924), it has been long recognized that "manifestly less influence is required to dominate a weak mind than to control a strong one." Harvey v. Provandie, 83 N.H. 236, 240 (1928); cf. Patten v. Cilley, 67 N.H. 520, 528 (1894)(quality of mind a material fact). The extent of dependency on the influencer is a factor to consider; as "[e]xperience has shown that in

the great majority of cases transactions are not fair and honest in which a person procures a gift from one who is dependent upon him or in some way under his control." Edgerly v. Edgerly, 73 N.H. 407, 408 (1905).

As such, undue influence may be shown where "there is substantial evidence not only of opportunity and ability, but of design and accomplishment." Harvey, 83 N.H. at 240; Loveren v. Eaton, 80 N.H. 62, 64 (1921)(evidence showed opportunity and ability, but not accomplishment); Albee, 79 N.H. at 92 (opportunity does not equate with accomplishment); 36 Am. Jur. Proof of Facts 2d Undue Influence in Execution of Will §2 (elements of undue influence); cf. O'Rourke v. Hunter, 848 N.E.2d 382, 392-93 (Mass. 2006)("Four considerations are usually present in a case of undue influence: that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means." (quotations omitted)).

Determination of whether a trust executed later in life, that is distinct from the disposition in a valid will, is the product of undue influence is in the best of circumstances a challenging task for the Court as the testator's circumstances, health, and intent is rendered uncertain by his or her decease. It also challenges the Court to determine facts and apply the law in a setting clouded by competing possibilities, namely whether an individual's modification of a long held estate plan is motivated by an independent decision to favor one child over another one, or is the product of the undue influence of the benefitted party. On the one hand, courts understand that a settlor has:

> 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.

Bartlett v. McKay, 80 N.H. 574, 576-77 (1923). On the other hand, undue influence, as one court has observed: "may be inferred from the nature of the testamentary provisions accompanied by questionable conditions . . . . When the donor is enfeebled by age or disease, . . . and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny. . . ." Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920). As such, courts recognize that:

> [t]he existence and exercise of such undue influence is not often susceptible of direct proof. It is shown by all the facts and circumstances surrounding the [settlor], the family relations, the will, her condition of mind, and of body as affecting her mind, her condition of health, her dependence upon, and subjection to, the control of the person influencing, and the opportunity of such person to wield such an influence. Such an undue influence may be inferred as a fact from all the facts and circumstances aforesaid, and others of like nature that are in evidence in the case, even if there be no direct and positive proof of the existence and exercise of such an influence.

In re Hobbes, 47 A. at 680 (quotations omitted).

Given this uncertainty and that direct evidence is typically unavailable or not entirely useful, the New Hampshire Supreme Court has recognized that undue influence, or the lack of it, may be demonstrated by circumstantial evidence. See, e.g., Patten v. Cilley, 67 N.H. 520, 528 (1894). Additionally, courts have long been entitled to rely on the testimony of lay witnesses who knew and actually observed the mental capacity of a settlor and her susceptibility to another's influence. See, e.g., Pattee v.

Whitcomb, 72 N.H. 249, 251 (1903); relying on Hardy v. Merrill, 56 N.H. 227, 241, 244, 248 (1875).

The Court now turns to the evidentiary burdens, and "whether [and, if so, when they lie] with the proponent of the will or the allegator of undue influence." Albee, 79 N.H. at 91. In New Hampshire, "the law presumes the absence of undue influence upon proof of the voluntary, formal execution of the will by a competent testator and that, *in the absence of circumstances arousing suspicion*, the proponent of the [trust] is not required to offer express affirmative proof of the absence of undue influence." Id. (emphasis added). This "presumption of fact, which excuses such offers of proof, however, neither extinguishes the original issue nor shifts the burden of proof to the contestant. It simply suspends the requirement of further proof of the voluntary character of the [settlor's] act until it is called in question, if at all, by the submission of substantial evidence of undue influence by the contestant." Gaffney, 81 N.H. at 306-07.

Where a beneficiary is acting in a "fiduciary capacity" or is in a "confidential relationship" with the testator, she has "the burden of proving an absence of undue influence. This [rule is] based upon the inference of undue influence which arises in cases in which the beneficiary of a transfer holds a position of trust and confidence with the party making the transfer." Archer v. Dow, 126 N.H. 24, 28 (1985)(inter vivos transfer); relying on Edgerly, 73 N.H. at 408-09 ("[W]henever it appears that the donor was dependent upon or under the control of the donee, and that the latter took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence." (will contest)); see, e.g., Patten, 67 N.H. at 528-29; In re Estate of Sharis,

990 N.E.2d 98, 102 (Mass. App. Ct. 2013)(grandson with power of attorney had "burden to prove that the will was not the product of his undue influence").

"The basic confidential relationship arises out of the family relationship, where one party is justified in believing that the other party will act in [her] interest." In re Estate of Couture, 166 N.H. at 112 (quotations and brackets omitted). Put another way, it has long been recognized that "[t]he term 'fiduciary or confidential relation' is a comprehensive one and exists wherever influence has been acquired and abused or confidence has been reposed and betrayed." Cornwell v. Cornwell, 116 N.H. 205, 209 (1976)(quotations omitted). A "confidential relationship" is found where "between two persons . . . one has gained the confidence of the other and purports to act or advise with the other's interest in mind. It is particularly likely to exist where there is a family relationship or one of friendship." Id. (quotations, brackets, and ellipses omitted).

It remains unclear in this jurisdiction, however, the nature of the quantum of proof necessary to demonstrate an absence of undue influence. See generally 25 AM. JUR. 2D DURESS AND UNDUE INFLUENCE Weight and Sufficiency of Evidence §42 (noting split in jurisdictions over whether standard is preponderance, clear and convincing, or beyond a reasonable doubt). In this instance, the Court will apply New Hampshire's generally accepted quantum of proof in civil matters, preponderance of the evidence, see also RSA 464-A:26-a,V (burden for testamentary gifts of ward); Estate of Washburn, 141 N.H. 658, 660 (1997)(after presumption of competency rebutted, respondent must prove capacity by a preponderance), to the burden to prove the absence of undue influence where a contestant has demonstrated: (1) a confidential relationship; and (2) a benefit

conferred. Cf. In re Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 2, 6 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016).

In his *Memorandum of Law*, Bob asserts that the Court should hold that Becky must demonstrate a lack of undue influence by clear and convincing evidence. Id. at 3-4 (Index #36). Although the Court continues to hold the belief as expressed in the Webber matter, see Geraldine W. Webber Revocable Living Trust, No. 318-2013-EQ-00694 at 11 (N.H. Cir. Ct. August 20, 2015) available at http://www.courts.state.nh.us/caseinfo/index.htm, that clear and convincing is the better standard, until informed otherwise by the Supreme Court or Legislature, it will apply the preponderance standard. Cf. Hack v. Janes, 878 So.2d 440 (Dist. Ct. App. Fla. 2004); In re Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 6 -7 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016)(noting that this Court applied the preponderance standard).

The Court observes that in at least one state, if the fiduciary or confidential relation is a child of the donor, the burden does not shift as children are viewed as the natural recipients of a parent's bounty. See, e.g., Berkowitz v. Berkowitz, 162 A.2d 709, 711 (Conn. 1960). Becky contends therefore that the burden should not shift to her. See *Respondents' Requests for Findings of Fact and Rulings of Law* ¶126 (Index #38). This exception has not been adopted in New Hampshire, cf. In re: Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 2 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016), and the Court declines to do so at this juncture.

As a matter of remedy, a Court may declare invalid a trust created with the taint of undue influence. RSA 564-B:4-406(a). In addition to the remedial measure of

invalidation of a trust or will procured by undue influence and invalidation of transfers to it, see RSA 564-B:4-406, the Court may also exercise its equitable authority to "void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds." RSA 564-B:10-1001(9). As to the equitable remedy of constructive trust,[24] Justice Cardozo once observed:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not *in good conscience* retain the beneficial interest, equity converts him to a trustee.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §55(a) Constructive Trust (2011)(quotations omitted); see, e.g., Milne v. Burlington Homes, Inc., 117 N.H. 813, 816 (1977). As such, "[a] constructive trust will be imposed whenever necessary to satisfy the demand of justice." In re Estate of Couture, 166 N.H. at 112 (quotations omitted).

"There are no rigid requirements for imposing a constructive trust," id. at 111 (quotations omitted), and as such, "[t]he specific instances in which equity impresses a constructive trust are numberless, as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." Milne, 117 N.H. at 816. The numerous scenarios in which a constructive trust may be imposed include "circumstances which would render it unconscientious for the holder to retain and enjoy the beneficial interest" in property. Id. (quotations and ellipses omitted). A petitioner seeking a constructive trust, however, takes upon himself "a heavy burden of proof, as

[24] The Court notes that a "constructive trust" is sometimes confused with inter vivos or testamentary trusts and not properly recognized as an equitable remedy.

[he] must demonstrate by clear and convincing evidence that a constructive trust is warranted." Salisbury v. Lowe, 140 N.H. 82, 83 (1995)(quotations omitted); but cf. Hopwood,145 N.H. at 209 (where a party seeks to impose a constructive trust on a slayer's inheritance, the standard of proof is by a preponderance).

Although there are no rigid requirements for imposition of the equitable remedy of a constructive trust, before a court imposes it, a petitioner generally must demonstrate "that: (1) a confidential relationship exists between two people; (2) one of them transferred property to the other; and (3) the person receiving the property would be unjustly enriched by retaining it, regardless of whether the person obtained it honestly." In re Estate of McIntosh, 146 N.H. 474, 478–79 (2001); see, e.g., In re Estate of Cass, 143 N.H. at 60. "A person may be unjustly enriched if he or she obtains title to property by fraud, duress, or undue influence, or violates a duty that arises out of a fiduciary relation to another." In re Estate of Cass, 143 N.H. at 60; see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §55(f) Constructive Trust (2011)("Constructive trust is a means to recover specific property from the holder of legal title, when the acquisition of title results in unjust enrichment of the holder").

B. Lack of Capacity

Although as noted supra, analysis of undue influence and testamentary capacity are often closely intertwined, absence of capacity can itself be an independent basis for invalidating a trust as a trust cannot be created if the settlor lacks capacity. See RSA 564-B:4-402(a)(1); see, e.g., Perkins, 39 N.H. at 167. "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." RSA 564-B:6-

602. Accordingly, the standard for establishing testamentary capacity is that the testator at the time of executing a trust:

> 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 [trust]; that she must have had the ability, the mental power or capacity to do this; that if she had, the law regarded her as of sufficient mental capacity to make the will . . . .

In re Estate of Washburn, 141 N.H. at 661 (quotations omitted); cf. Boardman v. Woodman, 47 N.H. 120, 122, 140 (1866) (upholding a jury instruction with this standard) overruled on other grounds by Hardy v. Merrill, 56 N.H. 227, 234-52 (1875). The law also has long recognized that capacity is judged at the time of execution, see Hardy, 56 N.H. at 243 ("The question of testamentary capacity is in strictness limited to a very brief period of time – the few minutes occupied by the [execution of the trust]."), thus, where a settlor "was under delusion, but the will and its provisions were not in any way the offspring or result of the delusion, and were not connected with or influenced by it, then she was of sane mind to make the [trust] . . . ." Boardman, 47 N.H. at 140 (quotations omitted); see, e.g., In re Estate of Washburn, 141 N.H. at 661-62.

Thus, this Court, when determining whether Jean possessed sufficient capacity to execute the 2012 Trust, must inquire: "1) whether [she] possessed testamentary capacity to execute a will; and 2) if [she] had such capacity, whether the [trust] is the offspring of a delusion or was created during a lucid interval." In re Estate of Washburn, 141 N.H. at 662. Courts are permitted to consider lay witness testimony concerning the mental capacity of a testator/settlor and susceptibility to undue influence by those who

knew and actually observed the individual. See, e.g., Pattee, 72 N.H. at 252; relying on Hardy, 56 N.H. at 241, 244, 248.

"In New Hampshire, the burden of proving testamentary capacity in will contests remains on the proponent of the will throughout the proceeding." In re Estate of Washburn, 141 N.H. at 662. However, the document's proponent "may safely rely upon the presumption of the law that all men are sane until some evidence to the contrary is offered." Perkins, 39 N.H. at 170; accord In re Estate of Washburn, 141 N.H. at 662. Thus, a trust's "proponent need not introduce any evidence upon the issue of the testatrix's capacity until [the] contestant first rebuts the presumption by offering evidence of incapacity." In re Estate of Washburn, 141 N.H. at 663. "This burden remains upon [the will/trust proponent] till the close of the trial." Perkins, 39 N.H. at 171. As such, "once the presumption is rebutted, the proponent merely retains the initial burden of proving due execution. The proponent must persuade the trial court, by a preponderance of all the evidence presented, that the [settlor] possessed the requisite capacity to make the [trust]." In re Estate of Washburn, 141 N.H. at 663.

C. Fees

Finally, both parties have requested reimbursement of attorney's fees. Courts may also award "costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." RSA 564-B:10-1004. Pursuant to Probate Division Rule 59, courts may also award reasonable costs and attorney's fees when they find that one party's "frivolous or unreasonable conduct" forces another to file pleading(s) or attend hearing(s). As to an

award of fees to "any party," the New Hampshire Supreme Court has observed that the New Hampshire Trust Code

> provides an exception to the American Rule that generally each party is responsible for his or her own fees. . . . [T]he words 'as justice and equity may require' establish a broad standard, one that certainly reaches beyond bad faith or wrongful conduct. Nevertheless, before an award of fees is made, the trial court must provide a reason, grounded in equity, as to why such an award should be made. We acknowledge at the outset that, when acting in the proper exercise of her official duties, a trustee should not generally be held personally liable under the Uniform Trust Code for attorney's fees incurred by any party. We note, however, that the use of the word 'any' conveys broad authority upon the trial court to award attorney's fees to any party 'to be paid by another party as justice and equity may require.' While the statute does not provide specific criteria for such an award, it gives the trial court flexibility to determine what is fair on a case by case basis.

Shelton, 164 N.H. at 502 (quotations, citations and ellipses omitted). As to recovery by a trustee, RSA 564-B:7-709(a)(1) directs that a trustee is only "entitled" to reimbursement from the trust for "expenses that were *properly incurred* in the administration of the trust." This directive is in line with the common law that in trust matters, "the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958).

First, the Court addresses whether a successful challenger may recoup his attorney's fees from the trustee of a trust that has been found invalid on the basis of

undue influence. As set forth supra, RSA 564-B:10-1004 provides that a Court may, "as justice and equity may require," award reasonable attorney's fees "to be paid by another party or from the trust that is the subject of the controversy." The New Hampshire Supreme Court has made clear that this provision of the New Hampshire Trust Code sets forth a broad exception to the "American Rule" concerning fees awards. Shelton, 164 N.H. at 502. In the exercise of its discretion, courts "must provide a reason, grounded in equity, as to why such an award should be made." Id. In particular, although trustees generally should not be found personally liable, a court is empowered to do so if, under the facts and circumstances of the case, it determines that such an award is fair. Id. In interpreting this provision of the Uniform Trust Code, the Restatement notes that: "[s]ome cases have required trusts to pay reasonable litigation costs of successful beneficiary-plaintiffs. Other cases have held wrongdoing trustees directly liable for the litigation costs of plaintiff-beneficiaries. . . . [F]actors relevant to [fee-shifting include the] degree of culpability, bad faith in conduct of litigation, the ability of the offending party to satisfy an award of attorney fees, and whether the award would deter similar misconduct by others." RESTATEMENT (THIRD) OF TRUSTS LIABILITY OF TRUSTEE FOR BREACH OF TRUST §100, *Reporter's Notes* - cmt. b(2) (2012); see, e.g., Dardovitch v. Haltzman, 190 F.3d 125, 145-46 (3rd Cir. 1999). Of note here is the observation that it is appropriate to charge a trustee personally "when the trustee has acted wrongfully, especially where the litigation itself is made necessary by the trustee's defalcation." Dardovitch, 190 F.3d at 146. As noted infra, trustees may be charged with costs in an effort to restore the assets of the trust. RESTATEMENT (THIRD) OF TRUSTS, LIABILITY OF TRUSTEE FOR BREACH OF TRUST §100 (2012). The "make whole objective . . .

of recovery from a trustee . . . may include, in an appropriate case, the attorney fees and other litigation costs of a successful plaintiff — that is, a co-trustee or successor trustee, or a beneficiary . . . ." id., Comment on Liability Under Clause (a) - cmt. b(2). Ultimately, the Court's decision is grounded in equity, and thus it is reminded in rendering it that: "[e]quity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for loss, *in so far as this can be done without injustice to the trustee or third parties.*" BOGERT'S LAW OF TRUSTS AND TRUSTEES, ch. 41, §861 *Remedies of the Beneficiary Against the Trustee* (6th ed. Supp. 2016)(emphasis added).

The Court finds additional guidance in the common law. In New Hampshire, "[a]ttorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." In re Dumaine, 135 N.H. at 110 (quotations omitted). In addition, whether a beneficiary may be awarded attorney's fees includes the question of whether the litigants' "primary motive was the benefit of the trusts as a whole or [their] own benefit." Id.

Another related inquiry concerns whether a trustee in this situation must reimburse a trust for payments made in his or her defense. Jurisdictions are divided over whether to employ a per se rule that a fiduciary may not recover his or her own fees in defense of that invalidated trust, or if the court has discretion despite its ultimate conclusion that the instrument is invalid. Compare Matter of Estate of Pfleghar, 670 P.2d 677, 680 (Wash. App. 1983)("a conclusion of undue influence perpetrated by a

[fiduciary] and sole beneficiary . . . imports a finding of bad faith") with Fields v. Mersack, 577 A.2d 376, 381-82 (Md. App. 1990)(rejecting per se rule in favor of discretionary one); see generally, In re Estate of Herbert, 979 P.2d 1133, 1136-37 (Haw. 1999). Although Shelton allows that generally fees will not be awarded where a trustee is "acting in the proper exercise of her official duties," Shelton, 164 N.H. at 502, it also emphasizes that "the use of the word "any" [in the New Hampshire Trust Code] conveys broad authority upon the trial court to award attorney's fees to any party 'to be paid by another party' . . . ." Id.

It further has been observed that a trustee committing breach may be chargeable with the cost of restoring disbursed assets of the trust. RESTATEMENT (THIRD) OF TRUSTS, Liability of Trustee for Breach of Trust §100 (2012). Although "not a routine part of trustee liability for breach of trust" id.; cf. Concord Nat. Bank v. Hill, 113 N.H. 490, 496 (1973), factors courts can consider, in the exercise of their discretion, "are the nature and extent of trustee misconduct in committing the breach, the conduct of the trustee in presenting the accounting or defending the surcharge action, and the significance of imposing costs on the trustee as a deterrent to misconduct." RESTATEMENT (THIRD) OF TRUSTS, Liability of Trustee for Breach of Trust §100, Comment on Liability Under Clause (a) - cmt. b(2) (2012). The Court notes that even those courts that allow for an award of fees where a trustee has acted in good faith, generally do not award them where a fiduciary has acted primarily for his or her own benefit. See In re Estate of Zonas, 536 N.E.2d 642, 645 (Ohio 1989)(observing that "[i]f an executor's actions do not benefit the entire estate but instead are merely done to benefit himself personally, then his fees and his attorney's fees generally are disallowed"). Similarly,

the Massachusetts Supreme Judicial Court noted, pursuant to a statute incorporating similar language to RSA 564-B:10-1004, that "the party whose conduct triggered the need for litigation has been ordered to pay the expenses arising from that litigation." In the Matter of the Estate of King, 920 N.E.2d 820, 826-27 (Mass. 2010). It has been recognized at common law that a fiduciary should not be allowed to recoup attorney's fees where he or she "advanced [his or her] own interest" as an heir or beneficiary. See, e.g., In re Estate of Zonas, 636 N.E.2d at 645 (collecting cases).

Ultimately, however, the Court concludes that the Shelton decision rather clearly and firmly indicates that courts possess broad discretion, made on a "case-by-case basis," to decide if a trustee's fees may be reimbursed by an invalidated trust.

III. Analysis

A. Undue Influence

For the reasons more fully set forth below, the Court concludes that the 2012 Trust and associated asset transfers must be invalidated as the product of undue influence. Similarly, the Court orders return of the proceeds of bank accounts, IRAs and CDs that were re-titled by Becky in 2012 or latter up to Jean's death. It reaches its decision on the basis that Becky was in a confidential relationship with Jean, and as primary beneficiary of the 2012 Trust, has not carried her burden of demonstrating an absence of undue influence. Simply put, Jean's relative isolation, deep dependence on Becky and her family for daily support, questionable cognition including hallucinations/delusions, the sudden change of a long-held estate plan after less than a year of partial estrangement from Bob, and the circumstances of the 2012 Trust's execution raise grave concerns about its validity. Cf. In re Estate of Cass, 143 N.H. at

61 (courts consider a variety of circumstances, including the condition of the donor and reasonableness/nature of the disposition); O'Rourke, 848 N.E.2d at 392-93 (courts consider, inter alia susceptibility, unnatural disposition, opportunity, and accomplishment through "improper means"). The counter-evidence proffered by Becky to prove the absence of undue influence by a preponderance is deemed insufficient to counter the taint attendant the circumstances of the 2012 Trust's execution, and persuade the Court that Becky has carried her evidentiary burden. See Archer, 126 N.H. at 28; see also Edgerly, 73 N.H. at 408-09.

Legal analysis begins with a presumption of the absence of undue influence. See, e.g., Albee, 79 N.H. at 91. This presumption arises only "upon proof of the voluntary, formal execution of the [document] by a competent testator and . . . *in the absence of circumstances arousing suspicion* . . . ." Id. It is suspended, however, when contestants of an estate plan show there is "substantial evidence" of undue influence. Gaffney, 81 N.H. at 307. In this matter, Bob offered substantial proof of Becky's "opportunity and ability" as well as "design and accomplishment[,]" Harvey, 83 N.H. at 240, and he has sufficiently rebutted the presumption of validity. Jean and Bud had long planned on leaving the residue of their estate(s) to their two children in equal shares. This plan had not been disturbed since at least 1990, even as Bud's health failed and during the period of Becky's disengagement from her parents. Indeed, after Bud's death, Jean re-affirmed that plan to both of her children. As noted supra, the Court finds that Jean's failing mental health continued after Bud's death and this condition, along with her coincident increasing isolation and dependence on Becky and

her family for support, increased her susceptibility to the influence of those closest to her.

Becky, the primary beneficiary of the change, not only chose and contacted the drafting attorney, see Edgerly, 73 N.H. at 408-09 (when a donee actively assists in procurement of a gift, undue influence may be inferred), but developed a relatively close relationship with her, seemingly calling into question the nature of Attorney Fox's client relationship with Jean. The relationship between Becky and Attorney Fox began with the power of attorney and advance directive documentation that was drafted "for" Jean without benefit of any direct, person-to-person participation by her, and importantly, personal confirmation of terms, including, but without limitation, the designation of agent and contingent agent, as dictated by Becky. When formulating the terms of the trust, Becky not only directed certain terms of the trust and the time and place of Jean's meetings with Attorney Fox, but she controlled and limited information flowing to Attorney Fox concerning Jean's mental health.[25] At each of those meetings, in her testimony Attorney Fox represented that she met first, for a lengthy period of time, with both Becky and Jean, and then for, gauged from a comparative basis, very abbreviated periods with Jean only.[26] Finally, Jean's apparent near immediate and long-term ignorance or failed recollection of the altered estate plan offers enhancement to doubt concerning its validity.

The Court is mindful that in September 2012, Jean and Bob's previously close relationship had been sadly altered by the disagreement over the postcards. Although

[25] Indeed, Attorney Fox admitted at trial that she completely trusted Becky and would have conducted a more searching review of Jean's health had she been informed of additional, and the Court believes crucial, information about it from Becky.

[26] Although not dispositive in-and-of itself, the Court is disquieted that the Will was not contemporaneously altered because it would have required witness attestation.

the estrangement eventually continued over multiple years, at the time Becky contacted Attorney Fox in August 2012 claiming that Jean was anxious to disinherit Bob, their rift was less than a year in duration. It is clear from her diary entries, however, that she dearly missed and loved her son and, the Court discerns more expressed feelings of longing and frustration than transformative displeasure or anger. It finds it unusual that by September 2012, Jean up-ended an estate plan formalized at least by 1990, based upon a relatively short estrangement compared to, and without consideration of, a many years-long close and loving relationship with Bob. It is also of note that although Becky emailed Attorney Fox that she had "tried to get them to reconcile at one point," P's Exh. 10 (F-21), she did not, other than arranging for the meetings, in any substantive fashion attempt to foster its successful accomplishment.

Consequently, in view of the totality of the circumstances giving rise to the execution of the 2012 Trust and related asset transfers, the Court concludes that the evidence presented precludes invocation of the usual presumption of an absence of undue influence.

Next, the Court finds that Becky stood in a confidential relationship with Jean when the 2012 Trust was executed. As discussed supra, a "confidential relationship" is found where "between two persons . . . one has gained the confidence of the other and purports to act or advise with the other's interest in mind. It is particularly likely to exist where there is a family relationship or one of friendship." Cornwell, 116 N.H. at 209 (quotations, brackets, and ellipses omitted). A confidential relationship has also been found supported where an individual "was dependent upon [another] for transportation, banking services, the preparation of checks, and the payment of bills." Archer, 126 N.H.

at 28. Becky and her family enjoyed a very close personal relationship with Jean such that she would trust that they acted in her interest. Becky was agent on the power of attorney and John was the contingent agent. She was dependent upon them for groceries, more taxing chores, and transport to appointments and/or other travel other than a short walk to her neighbor, Jinx. Becky, even before execution of the power of attorney, was assisting with bill paying and management of Jean's financial affairs.

Becky, and to a lesser degree her family, see P's Exh. 3 (2012 Trust Art. II (B)-(C)), were the primary beneficiaries of the 2012 Trust and asset transfers. An inference of undue influence arises because Becky stood in a confidential relation with Jean and was more than instrumental, and in some instances directive, in the trust formation and re-titling of Jean's financial accounts. Accordingly, the 2012 Trust may only be declared valid and potential invalidation of the attendant asset transfers be avoided by proof by a preponderance of the evidence that the 2012 Trust and attendant asset transfers were not the product of undue influence. Archer, 126 N.H. at 28.

The Court rules that Becky has not carried her burden after its careful review of "all the circumstances surrounding a disposition, [including the oftentimes dubious-to-unpersuasive demeanor and manner of her delivered testimony], relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties." In re Estate of Cass, 143 N.H. at 61 (quotations omitted). As noted at length supra, the 2012 Trust and attendant asset transfers were accomplished under a set of circumstances arousing substantial suspicion of the presence of undue influence.

It is well-established that with an individual suffering from dementia and other, as in this case, related mental challenges, their susceptibility to undue influence increases. Harvey, 83 N.H. at 240 ("manifestly less influence is required to dominate a weak mind than to control a strong one"). In opposition to the apparent concerns about Jean's mental health, Becky offered that: (1) her mother "recovered" from her hallucinations/delusions as she suffered less grief over Bud's death; and (2) she did not suffer from dementia. As already referenced, the Court simply did not find her proffer concerning Jean's apparent "recovery" credible.

Similarly, Becky asserted that her mother was an independent and strong-willed woman capable of remaining in her home and thus was not dependent upon Becky and her family. Although Jean's physical prowess enabled her to remain at home, it is clear from testimony and the record that she was able to remain home as long as she did only with provision of considerable assistance with very basic daily needs. Most important, the Rules provided access to groceries, without which she could not eat, and transportation as necessary. Becky made sure the bills were paid as Jean became more forgetful. Important chores and maintenance were provided by John. Although Jean may have wanted to remain in her home, it is unlikely she would have been able to do so without substantial assistance from the Rule family. Cf. Edgerly, 73 N.H. at 408-09.

Further, also as previously indicated, the Court does not place much weight on the testimony of Attorney Fox's observations of Jean during the two meetings in September 2012 as assistive in sustaining Becky's burden to demonstrate lack of undue influence. Attorney Fox's professional relationship with her client, Jean, is seen as

having been at best minimized and at worse substandard to deficient, relying heavily on the discretional representations of Becky concerning Jean's health and reasons for disinheriting Bob. She decided on a plan well before meeting Jean and took direction from Becky concerning key terms of the 2012 Trust. The unwillingness to draft, or failure to arrange to have executed, a substitute will is additionally concerning, as is the assistance afforded Becky with the re-titling of financial accounts either before meeting Jean, or after a seeming perfunctory engagement alone with her. Thus, her lack of diligence, reliance on, and strong relationship with, the primary beneficiary of the 2012 Trust, calls into question Attorney Fox's fundamental judgment and her direct knowledge of her putative client and the latter's greater circumstances or capabilities.

The note written by Jean on September 8th is only partially persuasive. The syntax and structure of it was not similar to Jean's writings in her diaries and the genesis of it is unclear. The Court is left to only speculate that Jean endeavored to provide her best writing because it would be shared with Attorney Fox, as it similarly can only speculate that the unusual neatness and relative grammatical precision resulted from dictation or coaching.

The Court does not fully credit Becky's claim that Jean was anxious to disinherit Bob out of anger at his absence. As discussed supra, diary entries as of September 12, 2012, simply do not evince the provocative rage that Becky portrays. Indeed, less than a week later, Jean writes about how glad she is to see him. Moreover, it strikes the Court as curious that so many years of mutual devotion and affection would be so destroyed by ten or eleven months of partial disengagement as to promote or prompt so

drastic an action as the repudiation any beneficial post-mortem disposition of property or assets to her only other surviving child.

Consequently, the Court does not deduce that Becky has carried, by a preponderance of the evidence, her burden to demonstrate an absence of undue influence. The 2012 Trust is thus ruled invalid and asset transfers to it or subsequently from it are also declared void. RSA 564-B:10-1001(9).

B. Lack of Capacity

Given the Court's invalidation of the 2012 Trust on the basis of undue influence, it need not reach the question of whether Jean lacked capacity to execute the document on September 12, 2012.

C. Fees

Both parties seek reimbursement of attorney's fees from the opposing party. See *Verified Petition* at 13, Prayer E (Index #1); *Amended Answer* at 13, Prayer F (Index #10); see generally, RSA 564-B:10-1004. As discussed supra, determination of the fee reimbursement requests is made on a case-by-case basis at the discretion of the Court. In the instant matter, it decides that as to reimbursement of Bob's fees, it is most fair to allow both parties to brief the question in light of the principles of law set forth supra. The Court also observes, however, that it at this time it is not clear whether the 2012 Trust paid the cost of its defense, and as such it cannot fairly consider whether Becky is liable to Jean's estate for her fees and costs.

D. Findings of Fact and Rulings of Law

Finally, 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 within. Any of their requests that are inconsistent, either expressly or by necessary implication, are denied or determined otherwise unnecessary. See Crown Paper Co. v. City of Berlin, 142 N.H. 563, 571 (1997).

RECOMMENDED

Dated: 12-8-17

Gary R. Cassavechia, Retired Judge
and current Judicial Referee

SO ORDERED

I hereby certify that I have read the foregoing recommendation(s) and agree that, to the extent the Judicial Referee has made factual findings, he has applied the correct legal standard to the facts determined by him.

Dated: 12-8-17

Michael L. Alfano, Judge