THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

STANISLAW B. STOMPER

v.

STEPHEN STOMPOR

317-2007-EQ-00896

DECREE ON MERITS OF PETITION(S)

The matter presently before the Court[1] is a petition, amended multiple times, see Index ## 1, 16, 29 (collectively the "Petition"), see also Index ## 14, 43 (orders concerning amendment of petition),[2] filed by Stanislaw ("Stan") Stompor against Stephen Stompor ("Stephen"), in his fiduciary capacities and individually,[3] asserting that: (1) Broneslaw and Amelia Stompor (collectively, the "Stompor Parents" and, individually, "Broneslaw" and "Amelia") lacked the requisite capacity to execute certain

[1] The Court apologizes for the delay in issuance of this final order. Undue influence and capacity cases are difficult, and as such the Court carefully reviewed: (1) the entire case file of this eight-year-old case; (2) the approximately 5,000 pages of documents submitted at trial; and (3) testimony presented during the five-day trial. It was a time consuming endeavor that required countless hours of judicial time. The trial in this case was one of four lengthy trials held between March and June. The Court endeavored to reach a decision on all as fairly and expeditiously as possible – with a thorough review of argument and evidence presented – as it also addressed other complex matters before it. It is appreciative of the patience demonstrated by counsel and the parties.

[2] As discussed more fully infra, this case has a long and fairly complicated history. Before it was transferred to the Trust Docket, not only had the original lawyers to the action withdrawn from the case, but the Stompor Parents, alive at its inception, both passed away.

[3] Although unclear until after transfer to the Trust Docket, see Index #133 (Order dated Nov. 24, 2014), Stephen is being sued as trustee for both the Amelia Stompor Living Trust, Exh. 19, and the Broneslaw Stompor Living Trust, Exh. 24, and agent pursuant to certain durable powers of attorney executed in 2001 and 2004. See Exhs. 5, 9, 20, 21, 25, 26, 28, 29.

estate documents in 2004 (the "2004 estate planning documents"), see Index #29; and (2) those documents were the product of the undue influence of respondent Stephen. Id. He has also nominally challenged certain transfers made by Stephen pursuant to durable powers of attorney as invalid because Stephen did not execute an agent's acknowledgment until 2007. See RSA 506:6, VII; see generally Index ## 1, 16.[4] Finally, he asserts that the Stompor Parents' wills were not properly witnessed in the course of their respective executions. See Exhs. 18, 23. See *Petitioner's Pre-Trial Statement* ¶5.[5]

The litigation has been extremely contentious, including one appeal to the New Hampshire Supreme Court. See Stompor v. Stompor, 82 A.3d 1278 (2013). After five-day trial on the merits, and consideration of thousands of pages of exhibits submitted at trial, the *Petition* is DENIED for the reasons that follow.[6]

I. Applicable Law

A. Undue Influence

Cases involving claims of incapacity and undue influence are rarely, if ever, easy or straightforward, and the matter presently before the Court is no different. The Court's

[4] The Court observes that the *Petition* does not assert invalidity specifically on the basis of RSA 506:6, VII. From what it can tell, it is only specifically mentioned briefly in Stan's pre-trial brief. See *Petitioner's Pre-Trial Statement* ¶5 (Index #153). Stephen has addressed the claim at length in his post-trial memorandum, see *Stephen Stompor's Post-Trial Memorandum* at 44-46 (Index #154), and as such, the Court will address it.

[5] There is a probate proceeding currently pending in Colorado. Thus, the Court questions whether this is the proper forum to decide the issue and Stan fails to make a specific and/or detailed argument regarding this claim in his post-trial memorandum. However, as set forth infra, even if it was to be decided in this Court, under New Hampshire law this claim lacks merit.

[6] The Court interprets Stan's pleadings as requesting remedial relief in the form of the imposition of a constructive trust and an award of legal fees. See *Petitioner's Trial Memorandum* ¶¶ 74-80 (Index #153). In light of its ruling herein, in particular its determination that the 2004 Documents are valid, it need not consider such relief. In addition, it notes that Stan, although conceding that "this question is not needing answering at this time," appears to request that the Court make a ruling on the Stompor Parents' domicile. It declines to do so given the pendency of the probate proceedings in Colorado; however, even if that was not the case this Court would refrain from doing so in light of his failure to present sufficient informative evidence regarding the concern. .

evaluation rests on documentary/medical evidence that is in some instances over a decade old and its assessment of the credibility of witnesses — many of whom enter the courtroom with long simmering animosity toward each other and who possess competing interests in the outcome of the case.

Undue influence, as one court has observed:

> may result from more subtle conduct designed to create irresistible ascendency by imperceptible means. . . . The nature of . . . undue influence is such that [it] often work[s] in veiled and secret ways. The power of a strong will over an irresolute character or one weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities. Undue influence may be inferred from the nature of the testamentary provisions accompanied by questionable conditions . . . . When the donor is enfeebled by age or disease, although not reaching to unsoundness of mind, and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny. . . . Age, weakness and disease are always important factors. Relations of intimacy, confidence and affection in combination with other circumstances are entitled to weight.

Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920). Given this uncertainty, see id., and that direct evidence is typically unavailable or not readily assistive, the New Hampshire Supreme Court has oft held that 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 his/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). 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 [testators], the family

> relations, the will, [their] condition of mind, and of body as affecting [their] mind, [their] condition of health, [their] 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. 678, 680 (Conn. 1900)(quotations omitted). Further, "undue influence" has not infrequently been described in this jurisdiction as:

> the use of such appliances and influences as take away the free will of the testator[s], and substitute another's will for [theirs], so that in effect the instrument is not the expression of the wishes of the testator[s] in the disposition of the property, but of the wishes of another. But, where no fraud or deception is practiced, mere persuasion will not invalidate a will on the ground of undue influence. On the contrary, . . . testator[s] may properly receive the advice, opinions, and arguments of others, and if, after all such advice, opinions, and arguments, the testator[s] [are] not controlled by them to the extent of surrendering [their] free agency and yielding [their] own judgment or will, then there is no such undue influence as is required to be proved to avoid the will.

Albee v. Osgood, 79 N.H. 89, 92 (1918). 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 will 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, or documents procured "for the sake of peace," cf. Gaffney v. Coffey, 81 N.H. 300, 304 (1924), have been

determined to equate to "force or fear" sufficient to support a conclusion that undue influence was exerted upon a testator or settlor. Bartis, 107 N.H. at 37. 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 will can be made . . . . though no force was either used or threatened." In re Hobbes, 47 A. at 680.

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[s], 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 distributions were the product of undue influence, cf. Gaffney, 81 N.H. at 301, 306, 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)).

The Court now turns to the evidentiary burdens, and "whether [and, if so, when they lie] with the proponent of the [trusts and wills] 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 [trust and/or will] by a competent [grantor and/or testator] and that, in the absence of circumstances arousing suspicion, the proponent of the [trust and/or will] is not required to offer express affirmative proof of the absence of undue influence." Id. 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 [grantors' or testators'] act[s] 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 (emphasis added).

Where a distributee/devisee is acting in a "fiduciary capacity" or is in a "confidential relationship" with the grantors/testators, he 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. at 28 (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 ("*inferences of fact* may be drawn against a confidential agent in cases like this; but there is no *presumption of law* against the agent")(emphasis added); 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 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). A confidential relationship has 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.

It remains unclear to this Court, however, whether, in the instance of a confidential relationship, benefit, and resulting inference of undue influence, the quantum of proof necessary to demonstrate an absence of undue influence is elevated. 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). The law in New Hampshire is ambiguous at best. The New Hampshire Supreme Court, in a case whose facts could have supported a finding of confidential relationship, but did not include such a ruling, Gaffney, 81 N.H. at 303-04 (observing that testatrix was dependent upon the influencer and he was her "advisor and counselor"), noted, inter alia, "if the jury should find upon a consideration of the conflicting testimony upon this issue that a condition of even balance of the evidence has been reached, the proponent of the will has failed to maintain the ultimate burden of proof which is his from the beginning to the end of the trial." Id. at 307; cf. Estate of Washburn, 141 N.H. at 663 (where testamentary capacity is contested, proponent maintains burden to demonstrate capacity throughout the proceeding, he is aided, however, by presumption of capacity, if contestant rebuts presumption, then proponent must persuade court, by a preponderance, of requisite capacity). This would appear to support a determination that the evidentiary measure of persuasiveness required of the will/trust proponent where there is a confidential relation is by a preponderance. It is uncertain, however, whether the Gaffney court even considered the inference of undue influence specifically arising from a confidential relation described by the Archer/ Edgerly courts, as the court first required the will contestant to offer "substantial evidence of undue influence." Gaffney, 81 N.H. at 303.

Archer, 126 N.H. at 28, appears to indicate that in order to generate an inference of undue influence, the contestant need only show that the individual was: (1) a beneficiary and (2) "holds a position of trust and confidence."[7]

In proceedings before this Court, counsel for Stan stated that where there is a confidential relationship and benefit, the absence of undue influence must be shown by a preponderance of the evidence.[8] In his post-trial memorandum, he asserts "that [Stan] does not believe that the question needs to be answered" as Stan prevails under either a preponderance or clear and convincing standard. *Petitioner's Trial Memorandum* ¶ 5 (Index #153). Stephen asserts that the standard is by a preponderance. *Stephen Stompor's Post-Trial Memorandum* at 20 (Index #154). A review of case law from other jurisdictions reveals a deep split. See generally In re Last Will and Testament of Melson, 711 A.2d 783, 786-88 (Del. 1998)(in a case where beneficiary drafted the will, discussing split across jurisdictions regarding the application of burdens, and, by a divided court, adopts preponderance standard).[9] "There are remarkable variations among those states that have a clear-cut rule on the quantum of

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[7] The Court also takes account of the Archer court's specific affirmation of the trial court's ruling that as a result of the inference, the influencer has "the burden of proving *an absence* of undue influence." Id. In a matter concerning testamentary capacity, however, see Estate of Washburn, 141 N.H. at 662, the court was careful to note that if the presumption of capacity is rebutted, the will proponent was not required "to prove a negative – that the testatrix did not lack capacity." Id. at 663.

[8] At a hearing on an evidentiary matter on March 16, 2015, see generally, Order (March 16, 2015)(Index #147), counsel for both parties agreed that the applicable standard of proof is preponderance of the evidence. See Order on Respondent's Motion for Summary Judgment at 4, n. 2 (March 27, 2015)(Index #151).

[9] The Delaware Supreme Court aptly noted that determination of the appropriate burden and quantum of proof "is complicated by the failure of the courts to clearly elucidate the sense in which they have used such terms as 'presumption,' 'inference,' 'burden of proof,' and the like." In re Last Will and Testament of Melson, 711 A.2d at 787 (quotations omitted). As such, the Court, when discussing precedent from other jurisdictions, uses the nomenclature chosen by that court (often "presumption"), recognizing, however, that the New Hampshire Supreme Court specifically decided that a confidential relationship and benefit creates an inference of undue influence. See Patten, 67 N.H. at 528-29. It also observes that in a case decided after Patten, the Supreme Court held, as discussed supra, that as a result of the inference, the distributee in a confidential relation has "the burden of proving *an absence* of undue influence." Archer, 126 N.H. at 28.

proof a proponent must furnish to overcome any presumed undue influence." Eunice L. Ross & Thomas J. Reed, Will Contests, § 7:12 (2d ed. 2015). In some states, such as California, Connecticut, Delaware, Florida, Idaho, and Vermont, preponderance of the evidence is required to rebut any presumption of undue influence.[10] However, Arizona, Illinois, Indiana, Mississippi, Missouri, Nevada, Pennsylvania, New Jersey, and Tennessee require a proof of lack of undue influence by clear and convincing evidence.[11] Notably, it appears that a majority of our fellow Uniform Trust Code states follow the clear and convincing standard: Arizona, Mississippi, Missouri, Pennsylvania, and Tennessee have adopted the UTC. Cf. RSA 564-B:11-1101 ("Uniformity of Application and Construction").

Some jurisdictions impose a higher "clear and convincing" standard where there is a confidential or fiduciary relationship, noting that this standard provides additional

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[10] See Estate of Gelonese, 36 Cal.App.3d 854, 863 (Ct. App. 1st District. Cal. 1974) ("This burden requires that the proponent produce proof by a preponderance of the evidence that the will was not induced by his undue influence."); Berkowitz v. Berkowitz, 147 Conn. 476, 477 (1960) ("[T]here is imposed upon the beneficiary the obligation of disproving, by a clear preponderance of evidence, the exertion of undue influence by him."); Diaz v. Ashworth, 963 So.2d 731, 735 (Dist. Ct. App. Fl. 3rd Dist. 2007) ("That burden must be met by a preponderance of the evidence..."); Matter of Estate of Roll, 115 Idaho 797, 799 (1989) ("To rebut the presumption, the proponent must come forward with that quantum of evidence that tends to show that no undue influence existed."); Estate of Laitinen, 145 Vt. 153, 159 (1984) ("[T]he burden is shifted to the proponent...'who must show affirmatively that the will was not procured by this means.'")

[11] See In re Estate of Shumway, 9 P.3d 1062, 1066 (Ariz. 2000) ("Where a confidential relationship is shown the presumption of invalidity can be overcome only by clear and convincing evidence..."); DeHart v. DeHart, 986 N.E.2d 85, 986 (Ill. 2013) (Holding that a presumption of undue influence can be rebutted if there is "strong evidence in contradiction."); Meyer v. Wright, 854 N.E.2d 57, 60 (Ct. App. Ind. 2006) ("The burden of proof then shifts to the dominant party to rebut the presumption by clear and unequivocal proof that the questioned transaction was made arm's length and was thus valid."); In re Estate of Hood, 955 So.2d 943, 946 (Ct. App. Miss. 2007) ("Once the presumption is established, the burden shifts to the fiduciary to rebut the presumption by clear and convincing evidence."); Malone v. Sheets, 571 S.W.2d 756, 762 (Mo. Ct. App. St. Louis Dist. 1978) (reaffirming case requiring "competent and convincing proof."); Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 901 (N.J. 1981) ("Hence, the presumption of undue influence...must be rebutted by clear and convincing evidence."); In re Estate of Bethurem, 313 P.3d 237, 241 (Nev. 2013) ("Once raised, a beneficiary may rebut such a presumption by clear and convincing evidence"); Burns v. Kabboul, 407 Pa.Super. 289, 313 (Sup. Ct. Pa. 1991) ("...the burden had shifted to Kabboul to rebut the presumption of undue influence by clear and convincing evidence."); Matlock v. Simpson, 902 S.W.2d 384, 386 (Tenn. 1995) ("...a presumption of undue influence arises, that may only be rebutted by clear and convincing evidence...").

protection of potentially vulnerable individuals. In re Jane Tiffany Living Trust 2001, U/A/D Nov. 5, 2001, 177 P.3d 1060, 1063 (Nev. 2008); see generally In re Estate of Bethurem, 313 P.3d 237 (Nev. 2013)(discussing quantum of proof to rebut undue influence where confidential relationship shown and lower standard to demonstrate undue influence in the absence of a presumption); Berkowitz, 162 A.2d at 711 ("clear preponderance"). Others have determined that where a beneficiary assists in drafting *or procuring* a will, a presumption of undue influence arises and this presumption must be rebutted beyond a reasonable doubt. See, e.g., Looney v. Estate of Wade, 839 S.W. 2d 531, 533-34 (Ark. 1992). Still others put a finer point on the issue, and recognize that while ordinarily the quantum of proof needed to rebut the presumption of undue influence where a non-family member is in a position of confidence is elevated, the law will not create a presumption where the confidential relationship involves children who are recognized to be the natural object of one's bounty.[12] See, e.g., Berkowitz, 162 A.2d at 711.

The Court has considered the issue and is inclined to agree with those courts that impose a clear and convincing standard.[13] It has presided over many cases involving claims of undue influence. Of them, numerous, if not the majority, have

[12] The Court notes that Stephen does not assert in this case, where he allegedly stands in a confidential relation with the Stompor Parents, no inference of undue influence should exist given his status as the Stompor Parents' son. Given that the New Hampshire Supreme Court has never so held, and Stephen has not made that request, this Court will make its decision pursuant to the rule set forth in Archer and Edgerly and not create an exception for family members as has apparently been adopted by Connecticut courts.

[13] The Court has given due consideration to Stephen's argument that "[g]iven that the burden associated with allegations of undue influence are so high, the proponent of a trust should not be required to demonstrate the absence of undue influence (to prove a negative) by clear and convincing evidence." *Stephen Stompor's Post-Trial Memorandum* at 22 (Index #154). However appealing this argument is, the Court notes that the other side of the scale is weighted by concern for protection of a settlor/testator, who, if a confidential relation is found, is dependent upon, or trusting of, the proponent of the trust/will. For the reasons set forth infra the Court believes the best course is adoption of a clear and convincing standard. However, because Stan has not advocated this standard and it remains undecided by a higher court, this Court will, in this case, apply the preponderance standard.

concerned influence exerted over individuals rendered vulnerable by age or physical decline, living in the shadows of society. By its nature, undue influence by a confidante is often unseen and nearly undetectable to the outside world. See generally Neill, 126 N.E. at 94. "While this [higher standard of proof] may appear to be a harsh rule at times, it is also true that the law must protect those who cannot protect themselves." Madden v. Rhodes, 626 So.2d 608, 619 (Miss. 1993).

Although the Court recognizes the right of each person to determine the objects of their bounty, "[t]he law watches with the greatest jealousy transactions and dealings between persons occupying a fiduciary relationship, in which the person in a position of influence receives some substantial benefit." Hendricks v. James, 421 So.2d 1031, 1042 (Miss. 1982). "The law will not permit them to stand, unless the circumstances demonstrate the fullest deliberation on the part of the dependent party, and the most abundant good faith on the part of the dominant party." Id. At 1042-43. As such, it strikes this Court that the best rule is one imposing a higher level of proof to rebut an inference of undue influence after a challenger first demonstrates a confidential relation and benefit conferred. It finds instructive the observation of the Ninth Circuit Court of Appeals concerning the general application of a clear and convincing standard:

> commonly, "clear and convincing" is a means of protecting society from the consequences of grave decisions too lightly reached. As [United States Supreme Court] Justice Brennan explained: In all kinds of litigation it is plain that the burden of proof may be decisive of the outcome. There is always in litigation a margin of error. Where one party has at stake an interest of transcending value this margin of error is reduced as to him by the process of adjusting the burden of proof.

Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1252, n. 5 (9th Cir. 1997)(quotations, citations, and ellipses omitted).

In the matter at hand, however, given the uncertainty of New Hampshire law, the deep split across jurisdictions, and, perhaps most importantly, concessions by both Stan and Stephen that where an inference of undue influence arises, the absence of undue influence must be demonstrated by a preponderance of the evidence, the Court has decided to follow the wise path tread by a sister Florida court when the issue was undecided in that jurisdiction. In Hack v. Janes, 878 So.2d 440 (Dist. Ct. App. Fla. 2004), the District Court of Appeal of Florida, was confronted with uncertainty concerning the "question of the quantum of proof the proponent of a will must produce to overcome the presumption of undue influence." Id. at 444. The Hack court rightly observed that while sound policy arguments could be made for imposing a clear and convincing standard, in the absence of clear direction by the Legislature (or presumably here, New Hampshire judicial precedent), it is best to apply the "generally accepted burden of proof in civil matters." Id. 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. at 660 (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.

B. Capacity

Although as noted supra, analysis of undue influence and capacity are often closely intertwined, absence of capacity can itself be an independent basis for invalidating an instrument. See, e.g., Perkins v. Perkins, 39 N.H. 163 (1859). By

statute, the standard for determining capacity to execute a trust is the same as a will. See RSA 564-B:6-601. The standard for establishing testamentary capacity is that the testator[s] at the time of making a will:

> must have been able to understand the nature of the act [they were] doing, to recollect the property [they] wished to dispose of and understand its general nature, to bear in mind those who were then [their] nearest relatives as such, and to make an election upon whom and how [they] would bestow the property by [their] will; that [they] must have had the ability, the mental power or capacity to do this; that if [they] had, the law regarded [them] 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 for years put the focus of capacity on 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 attestation of the [trust/will]."), thus, where a settlor "was under delusion, but the [trust] 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/will] . . . ." Boardman, 47 N.H. at 140 (quotations omitted); see, e.g., In re Estate of Washburn, 141 N.H. at 661-62. As a result, this Court, when determining whether the Stompor Parents possessed sufficient capacity to execute the 2004 estate planning documents, must inquire: "1) whether [they] possessed . . . capacity to execute [them]; and 2) if [they] had such capacity, whether the [documents were] the offspring of a delusion or was created during a lucid interval." In re Estate of Washburn, 141 N.H. at 662. Again, courts are permitted to

consider lay witness testimony concerning the mental capacity of the settlors/testators by those who knew and actually observed them. See, e.g., Pattee v. Whitcomb, 72 N.H. 249, 252 (1903); relying on Hardy, 56 N.H. at 241, 244, 248.

"In New Hampshire, the burden of proving . . . capacity . . . remains on the proponent of the [trust/will] throughout the proceeding." In re Estate of Washburn, 141 N.H. at 662. However, the 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 "proponent need not introduce any evidence upon the issue of the [settlors'/testators'] capacity until a . . . 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 trusts/wills 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 [settlors/testators] possessed the requisite capacity to make the [trusts/wills]." In re Estate of Washburn, 141 N.H. at 663.

C. Other Claims

The Court will briefly address two issues raised in passing by Stan in his *Pre-Trial Statement* (Index # 142), but not given any treatment of note in the *Petitioner's Trial Memorandum*. See Index #153.

1. *Execution of the Wills*

Stan briefly asserts that the Stompor Parents' wills were not properly witnessed. See *Petitioner's Pre-Trial Statement* ¶5 (Index # 142); see generally, Exhs. 18, 23.

Given that the efficacy of the Stompor Parents' wills are currently the subjects of a probate proceeding in Colorado, the Court doubts that it is the proper forum to decide the issue. It also notes that the issue is but summarily, through cited statutory reference, and otherwise only by conclusory assertion, raised in his *Pre-Trial Statement* at ¶¶3, 5 (Index #142). He further fails to make a specific and/or detailed argument regarding this claim in his post-trial memorandum. See Index #153. Thus, the Court pauses only briefly to address the issue, pursuant to New Hampshire law.[14] Finally, because Stan's argument is not well-developed, the Court, based upon the statute cited, discerns that his objection is grounded in RSA 551:2, IV,[15] and contention that the wills are invalid because the witnesses did not sign and attest the documents in the presence of each other.[16]

Although some jurisdictions, by statute, have required that witnesses attest to the will in each other's presence, see generally, Appeal of Lane, 17 A. 926, 927 (1889); cf. C.G.S.A. §45a-251(current Connecticut statute),[17] most hold that the general rule, based upon both common law and statutory interpretation, is that in absence of explicit directive in the statute, joint presence of witnesses is not required to make a valid will. See, e.g. In re Woodburn's Estate, 273 P.2d 391, 395-96, 398 (Mont. 1954). "In the absence of a statute expressly requiring it, the general rule is that it is not necessary

[14] Stan, in raising this argument, cites RSA 551:2. Thus the Court will assume for purposes of this Order that the wills in question are not self-proving, see RSA 551:2-a, and that RSA 551:2 applies.
[15] RSA 551:2 provides: "To be valid, a will or codicil to a will shall: I. Be made by a testator qualifying under RSA 551:1; . . . ; and IV. Be signed by 2 or more credible witnesses, who shall, at the request of the testator and in the testator's presence, attest to the testator's signature. No seal shall be required. . . ."
[16] So far as it relates to will witness execution requirements, self-proved wills require "sworn acknowledgment" that each witness signed at the request of the testator, in the testator[s presence and in the presence of the other witness. RSA 551:2-a (emphasis added).
[17] The current version of the statute does not require attestation in each other's presence. It provides in pertinent part: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, *each of them subscribing in the testator's presence.*" Id. (emphasis added); Wheat v. Wheat, 244 A.2d 359, 364, n. 4 (Ct. 1968).

that the witnesses to a will sign or subscribe the same in the presence of each other." Id. at 395 (quotations omitted) (listing cases). New Hampshire has long held that as a matter of common law, joint presence of witnesses to a will is not required. See Welch v. Adams, 63 N.H. 344, 347 (1885). This rule is in keeping with this State's long held policy favoring due execution. See, e.g., In re Armor's Estate, 99 N.H. 417, 420 (1955).

Even when viewed as a matter of statutory construction, RSA 551:2 does not require contemporaneous execution. Courts look first to the plain language of the statute, see In re Estate of Fischer, 152 N.H. 669, 673 (2005), and "will not add words to the statute that the legislature did not see fit to include." Id. Here, RSA 551:2 requires only that the witnesses attest to the testator's signature in his or her presence. By its plain terms, RSA 551:2 does not additionally require that both witnesses attest in each other's presence, cf. Wheat, 244 A.2d at 363 n. 4; Appeal of Lane, 17 A. at 927 (discussing statute specifically requiring joint presence with later version that omitted that requirement), and it would be inappropriate for this Court to add it by judicial interpretation. See, e.g., Fischer, 152 N.H. at 673.

Finally, although the objection raised by Stan cites the statutory requirements for execution of a RSA 551:2 non-self-proved-will, the Court observes that the language of the wills themselves appear to indicate that they were self-proved wills. See RSA 551:2-a; Exhs. 18, 23. The witnesses specifically attest, in each document, that they signed the wills "in the presence of one another." Id. Their deposition testimony, along with that of the notary, indicates that although they recognize their signatures, they do not remember the actual signing of the will, as it occurred over ten years before their depositions. See Exh. 174 at 8,11; Exh. 175 at 14-15, 20; Exh. 176 at 14, 28; Exh. 177

at 5, 7, 9. Although the notary testified that it was a common practice at Lutheran Social Services to call one witness in at a time when doing routine tasks for her employer, see Exh. 174 at 18-20, it was also her practice to follow the requirements of the document, see id. at 47-48, 72-75, and that it is likely that both witnesses and the testator/testatrix were together when the wills were signed. Id. at 47-50; 72-75. The Court makes these observations in response to Stan's pleadings; however, it makes no ruling on the efficacy of the will execution, as that is within the purview of the Colorado courts and the probate proceedings pending there.

2. *Asset Transfers Under the Power of Attorney*[18]

Stan also asserts in his *Pre-Trial Statement* ¶5 (Index # 142) that certain transfers made by Stephen, see Exhs. 121-122, pursuant to a 2004 power of attorney executed by Broneslaw, were unlawful as it had not been acknowledged in accordance with RSA 506:6, VII.[19] Although again, Stan does not set out a specific and/or detailed argument regarding this claim in his post-trial memorandum, see Index #153, Stephen answers that even if it were required and the 2004 power of attorney is invalid: (1) by default the transfers were blessed and rendered efficacious by virtue of a prior duly executed power of attorney granted him in 2001;[20] or, (2) "those actions were ratified by his parents under the 2004 durable powers of attorney because Amelia and Broneslaw

[18] The Court notes that Stan, in the *Petitioner's Trial Memorandum*, appears to request only invalidation of the 2004 estate planning documents, see id. at ¶ 75 (Index # 153), despite raising claims of improper use of the 2004 power of attorney when transferring certain assets into the Stompor Parents' 2004 trusts in his *Pretrial Statement*. See id. at ¶5 (Index #142). It reasons, however, that even if the assets were improperly transferred into the trusts, are invalidated and disgorged from them, those assets would then pass from the estates of the Stompor Parents to their trusts as residuary devisee and legatee in any event under the terms of their respective pour-over will. . See Exhs. 18, 23. Thus, it questions whether these poorly plead and argued claims, if properly raised at all, are of material consequence.

[19] That statute provides in pertinent part: "An agent shall have no authority to act as agent under a durable general power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment . . . ."

[20] Acknowledgment was not required by statute in 2001, and the statute in effect between January 1, 2002 and December 31, 2003 made execution of the acknowledgment optional. See Laws 2001, ch. 257.

directed, approved, accepted, acquiesced and otherwise affirmatively acknowledged Stephen's performance as agent . . . ." *Stephen Stompor's Post-Trial Memorandum* at 44-45. The Court agrees.

Acts undertaken pursuant to powers of attorney executed after January 1, 2004, see Laws 2003, ch. 312, without a statutory acknowledgment that was executed by the agent and affixed to the document, are done without proper authority. See RSA 506:6, VII(a). The functional effect of failure to execute an acknowledgment was discussed at length in the recent case of Eaton v. Eaton, 165 N.H. 742 (2013)("Eaton II").[21] In Eaton II, the Supreme Court confronted the question of whether: "the absence of an acknowledgment executed by the petitioner and affixed to the durable general power of attorney [there executed in October 2004] precluded the petitioner from acting under the power." Id. at 744. Although the Court agreed that "a power of attorney that does not contain an executed and affixed acknowledgment is not void from the outset, ... to be 'valid,' an attorney-in-fact must be able to use the durable general power of attorney for its intended purposes."[22] Id. at 746. Thus, the Supreme Court stated that: "it becomes clear that to be 'otherwise valid' without a disclosure statement and/or an acknowledgment, a durable power of attorney [executed after January 1, 2004] must be one that did not require these components to be valid at the time it was executed." Id. at 748.

[21] This case was the second attempt by a family member objecting to a petition by a sibling for guardianship, to obtain payment of attorney's fees from the estate of the ward. See In re Guardianship of Eaton, 163 N.H. 386 (2012)(Eaton I); Eaton II, 165 N.H. at 744.

[22] The Court notes that this reading, although based upon the dictionary definition of "valid", does not envision cases involving a distinction between a valid power of attorney document and use that is not strictly "authorized" under that power of attorney. As set forth infra, many states uphold an "unauthorized use" if, pursuant to long-held agency principles, that use is later ratified by the principal.

The Court in Eaton II also, however, explained that the purpose of RSA 506:6, VIII(a)(1)[23] is "to function as a 'grandfather' provision that serves to validate durable general powers of attorney which, although not complying with the present requirements of RSA 506:6, were valid under the governing law (either common law or statutory) in effect when they were executed." As mentioned supra, acknowledgment was not required by statute in 2001, see Laws 2001, ch. 257 (adding an optional acknowledgment effective January 1, 2002) and the statute in effect between January 1, 2002 and December 31, 2003 made execution of the acknowledgment optional. Id.

Finally, the Court notes that it has been recognized that acts outside an agent's authority can be ratified either implicitly or explicitly by the principal.[24] See, e.g., Matter of Mehus Estate, 278 N.W.2d 625, 630 (S.D. 1979); see generally, Epps v. Epps, 438 S.W.3d 422, 424 (Mo. App. Ct. 2014)(daughter acting under power of attorney); Citibank, N.A. v. Silverman, 922 N.Y.S.2d 56, 57 (N.Y. App. Div. 2011)(business associate acting under a power of attorney); Britt v. Albright, 638 S.E.2d 372, 376 (Ga. Ct. App. 2006); cf. Morr v. Crouch, 249 N.E.2d 280 (Ohio 1969)(ratification requires knowledge of act by principal)(lawyer acting as agent in settlement negotiations). Courts recognize that:

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[23] It provides that: "[a] power of attorney shall be valid if it: . . . (1) Is valid under common law or statute existing at the time of execution; . . . ."

[24] While the statute requires a properly executed acknowledgement in order to vest an agent with authority to act, the Court does not read RSA 506:6, VII as abrogating the common law allowing subsequent ratification of an unauthorized act by a principal. Indeed, such a reading would be inconsistent with other provisions of New Hampshire's power of attorney law, namely, RSA 506:7, IV(b) which provides: "When a gift or transfer made by an agent under a durable general power of attorney is challenged . . . the gift or transfer shall be presumed to be lawful if the durable power of attorney is accompanied by the disclosure statement and acknowledgement . . . and explicitly authorizes such gifts or transfers as set forth in RSA 506:6, V. However, if the petitioner establishes that the agent made a transfer for less than adequate consideration, and the transfer is not explicitly authorized by a durable power of attorney drafted in accordance with RSA 506:6, VI and VII, the agent shall be required to prove by a preponderance of evidence that the transfer *was authorized* and was not a result of undue influence, fraud, or misrepresentation." (Emphasis added.)

> [i]n the law of agency, ratification is defined as: [t]he affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. Ratification can be either express or implied by conduct of the principal which is inconsistent with an intention to repudiate the agent's action. Thus, if the principal accepts and retains the benefits of an act with notice thereof, he may be deemed to have ratified it. Also, when an agent is authorized to do an act but exceeds his authority and the rights of third persons are involved, the principal has a duty to repudiate the act as soon as he is fully informed of what has been done in his name or else he may be deemed to have ratified it by implication.

Matter of Mehus Estate, 278 N.W.2d at 630 (quotations and citations omitted)(citing Restatement of Agency).

The Court rules that even though transfers made pursuant to the 2004 Durable Power of Attorney for Broneslaw between 2005-2007 did not comply with RSA 506:6 (VII), they are not void. As set forth infra, Broneslaw executed a durable power of attorney drafted by Attorney Carl Anderson naming Stephen as an agent in 2001. See Exh. 9; see also, Exh. 5 (Amelia). In addition, the 2004 durable power of attorney executed by Broneslaw, see Exh. 26; see also Exh. 21 (Amelia), was not drafted by an attorney, and lacked a signed statutory acknowledgment. Id. One was not affixed in accordance with the statute until May 2007. Id.

RSA 506:6, VII and Eaton II appear to require that an acknowledgement be executed prior to exercise of authority. However, even assuming that the 2005-2007 transfers were not valid because under applicable law at time Stephen needed to have signed and affixed the statutory acknowledgement, the Court agrees that the transfers were yet rendered valid. First, Stephen could be deemed to have acted to the prior

power of attorney executed in 2001.[25] As discussed supra, powers of attorney executed in 2001 did not require an acknowledgment and, per Eaton II, are effective without one. See id. at 747-48. They were not specifically revoked as required by their terms of revocation, thus, it can be argued that even if invalid under the 2004 documents, the transfers are valid under the 2001 powers of attorney.

That said, it might still be argued[26] that because Stephen testified he was unaware of the existence of the 2001 powers of attorney until after this litigation commenced, he cannot seek their shelter. Thus, even if one assumes that Stephen may only rely on authority granted by the 2004 power of attorney and that the transfers made before 2007, see Exhs. 121-122, were unauthorized, the Court holds that those "unauthorized transfers" made between 2004 and 2007, see generally RSA 506:6, VII(b), were ratified by Broneslaw and rendered effective. Notably, Broneslaw paid the bills associated with the real estate assets after transfer from the trust from accounts in the trust's name. See Exh. 114. This check writing demonstrated his awareness that the real estate assets were in his trust — knowledge seemingly inconsistent with any intended or desired repudiation of Stephen's transfers on his behalf. Therefore, from that, a reasonable inference may be drawn that he later ratified, if he did not originally authorize the transfers to trusts made before 2007.

II. Facts

As set forth more fully below, this case relates to certain estate planning

[25] The 2001 powers of attorney require that they be specifically revoked by a subsequent document. See Exh. 9; see also, Exh. 5. They were not specifically revoked in writing or under the terms of the durable powers of attorney executed in 2004, see Exhs. 21, 26, despite a claim by Stephen in a 2010 deposition that they were "superseded" by the 2004 documents. See Exh. 126.

[26] Although this argument was not advanced by Stan, the Court will discuss this potential objection for its own purposes.

undertaken by the Stompor Parents well over a decade ago.[27] In 2001, they hired an attorney to prepare certain estate planning documents. Exh. 16. With the exception of powers of attorney appointing Stephen and his sister Cynthia Stompor ("Cindy"), those documents were never executed. Id. In October 2004, the Stompor Parents executed individual wills, living trusts, and health care powers of attorney (the "2004 estate documents"). Exhs. 18-2. In early January 2005, they executed another set of limited powers of attorney associated with investment accounts appointing Stephen their agent.[28] Exhs. 28-29. It is undisputed that the 2004 estate documents benefit Stephen and his family and exclude Stan and Cindy.

In August 2007, Stan was granted "limited" powers of attorney by his parents, Exhs. 143-44, and it was pursuant to those powers that the instant case was originally filed. See Index #1. Shortly thereafter, the Stompor Parents were relocated to Colorado, where Stephen and his family reside. The powers of attorney granted Stan were purportedly revoked. Exhs. 146-47. Both Stompor Parents died in 2009 while residing in Colorado. Exhs. 40-41. The legal proceedings instituted in Colorado have been apparently stayed pending resolution of the case here at hand.

A. Stompor Family History

In order to understand the rather complicated inter-personal dynamics of the Stompors, the Court first briefly sets forth the following family history.[29] Both Amelia

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[27] The Court first sets forth an outline of events for clarity and will delve into these facts more specifically infra.

[28] Certain real estate assets were also transferred into the Stompor Parents' trusts in 2005, and subsequently sold. The proceeds are being held in escrow pending resolution of this case.

[29] The Court notes at the outset that during a break in the proceedings, it was informed by counsel that although there may be hearsay objections to certain evidence, they decided, jointly, not to offer specific and contemporaneous objections, but rather leave it to the Court to weigh the evidence. The Court observes that it initially perceived this unusual and unsolicited "agreement" to shift responsibility onto the Court to object to evidence offered before it, to be a blanket waiver of any hearsay objections. Instead,

and Broneslaw were born and raised in the same predominantly Polish-American neighborhood in Franklin, New Hampshire.[30] They were married in 1959, and, lived most of their lives in a jointly-owned two-family property at 11 Franklin Street in Concord, New Hampshire. They also maintained ownership and managed the rental of Broneslaw's family home on 52-54 Bow Street in Franklin, New Hampshire. Broneslaw separately owned a large woodlot straddling the Franklin/Salsbury town line. To most of the world, they held themselves out as the parents of three children, Cindy, Stephen, and Stan. There was deposition testimony, however, from Broneslaw's sister[31] and his attorney, that later in life he confided to them that he did not believe that he was the biological father of Stan. See Exh. 46 at 777-79; Exh. 184 at 87. Instead, he stated that Stan's biological father was a "Sam Dearborn" who was married to Amelia's sister, Stella Dearborn. There was no evidence presented that he otherwise ever sought to disavow his parentage of Stan. Cf. Exh. 44 (listing Broneslaw as Stan's father on his birth certificate).

Broneslaw was described as a quiet and hardworking man. He meticulously managed family finances and their rental interests at least through late 2005 into early 2006. See Exhs. 95-110; 113-114. There was, however, uncontroverted testimony at trial that he exhibited certain signs of at least mild paranoia early in his life that developed into deeply troubling paranoia in his final years. In particular, there was evidence that he hated and deeply distrusted his in-laws, the Powinskis and Dearborns. See Exh. 170. Indeed, there is evidence in the record that he sought divine intervention

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however, it came to understand that there was an agreement to allow hearsay, trusting the Court to grant that evidence offered the weight it discerned it to deserve.

[30] Broneslaw was born on July 6, 1919. Amelia was born on June 30, 1920.

[31] Broneslaw's sister, Mathilda Woodward, testified in a deposition that she often spoke with her brother "about his problems, I'd tell him mine." Exh. 157 at 3874.

to protect himself from the perceived or apprehended evil influences they foisted on him or introduced into his life. Id. In a letter dated July 2003, he wrote to Stephen that he believed that the Dearborns, along with a tenant and "Stanley" had sabotaged a water heater. He advised his son to lock his doors and expressed a belief that somebody was surreptitiously controlling his phone. See Exh. 89. His attorney also described him as a "private" man who was "a bit angry" and "bitter." See Exh. 184 at 90-91.

Amelia was described as outgoing and very involved in a local church group, the Catholic Daughters of America. She particularly enjoyed organizing the annual Halloween party and was instrumental in doing so at least through 2006. See Exh. 112. Indeed, some referred to that event as "Millie's Halloween Party." See Exh. 112(D) at 3644. Amelia was a long-time employee of the State of New Hampshire. After her retirement, she took part-time job at a local department store as a "greeter" until health problems forced her to retire from that job in 2004.

Although Amelia and Broneslaw were married for over fifty-years, the Court clearly discerns that there was a certain measure of dysfunction in the manner in which they and their children interacted with each other.[32] As noted supra, Broneslaw at times professed that Stan was not his biological son. Although for most of his life he kept copious records of bills paid, Amelia always maintained a separate, private checking account and would write Broneslaw checks for her "share" of the monthly expenses. Toward the end of their lives, Amelia complained that her husband, although living in

[32] That there was dysfunction is readily apparent to the Court. Stan, Stephen and Jennifer Stompor, his wife ("Jennifer"), however, each provided conflicting testimony about these family dynamics. In particular, they disagreed concerning the degree of anger, bitterness, and possibly violence between Stan, Cindy, and their parents. After consideration of all the evidence, and in particular evidence that was not grounded in the testimony of Jennifer, Stan, and Stephen, the Court concludes that Stan's relationship with his parents was not a traditionally "loving" or functional one. That said, the Stompor Parents did provide him with housing for many years of his adulthood – either in the Bow Street or Franklin Street properties – and offered further support when they lent him money to purchase a trailer in 2005.

the same home, was barely talking to her. See Exh. 91 (letter dated 4/30/2004). As discussed infra, Broneslaw attempted, in 2001, to procure an estate plan that would have prevented Amelia from fully benefitting from their real estate and other assets should he predecease her. See Exh. 184 at 69; 71; 89; 91

The Court finds as supported by the evidence that as they aged, their relationship with at least two of their children became somewhat distant. Daughter Cindy, after graduating from college and moving to Massachusetts, would visit her parents on a less-than-regular basis. Cf. Exh. 80. They expected her to return home after their health declined to take care of their physical needs, but she declined; and there was some evidence presented that this was deeply disappointing to at least Broneslaw. Mathilda Woodward opined, consistent with Cindy's testimony, that the latter would make just brief visits to her parents. Ms. Woodward further stated that their brevity was upsetting to Broneslaw. Exh. 157 at 3877-3878. She also stated, however, that Broneslaw and she never discussed his estate plans and he never revealed an intenion to disinherit Cindy. Id. at 3878.

With respect to Stephen, Mathilda Woodward testified at a deposition that "Stephen did a lot for his father and mother, and my brother trusted Stephen and he didn't trust Stanley." Id. at 3872. She stated that Broneslaw told her in 2004 that he appointed Stephen to "[t]ake care of his affairs" because "he trusted him and he figured it would be done right." Id. at 3874; 3876. Although he moved to Colorado in 1998, Stephen was often in contact with the Stompor Parent's medical providers. It is uncontested that they were very close to his son, Benjamin, who was born in 2002.

Although Stan testified that he had a good relationship with his parents, there was evidence to the contrary. The Court senses that despite living upstairs from his parents from 2000 through June 2004, Stan's relationship with them appears to have been emotionally distant, and certainly Broneslaw did not trust him. A thank you card from Amelia to Stan notes that she hopes "you will be much more friendly." Exh. 129 at 3767. As set forth infra, when a dispute arose between Stan and Stephen over investment properties in Manchester in the late nineties, Stan sent a letter to them addressed to "Mr. and Mrs. B.J. Stompor," telling them he was "[d]eeply [d]iscuted [sic]" and stating that his lawyer "will be in touch." Exh. 72. Mathilda Woodward observed that in her opinion "I guess Stanley wasn't the nicest son." Exh. 157 at 3873. She further noted that Broneslaw "wouldn't leave Stanley in charge. He wouldn't do that." Id. at 3889. Mathilda opined in her deposition that Broneslaw felt that he did not help out with family chores. Id. at 3895.[33] In a letter to Stephen in May 1999, Broneslaw advises him "don't let hate and anger consume you like it has Stanley." Exh. 79. In another note dated April 2000, Broneslaw states that he is concerned that Stan has found a key to a box he kept locked. He further writes: "everything in the house has been rifled over and over if it is not him then it's by mother. I am thinking about getting a safe. Then they will probably smash that." Exh. 81. In July 2003, he advises Stephen to "be careful" and "avoid any conversation with" the Dearborns and Stanley as "they can affect your mind." Exh. 89.

Other more objective evidence supports the conclusion that they were not close. It is uncontroverted that Stan did not inform his parents that he had a child, their

[33] There was also conflicting evidence concerning property damage done by Stan. Time and conflict makes it impossible for the Court to discern whether these conflicts were minor family disputes or serious altercations indicating a deep breakdown in familial relations.

granddaughter, in July 2003. He was never made agent in any of the durable powers of attorney signed in 2001 by the Stompor Parents, see Exhs. 4-10, nor were the medical providers given his contact information. As set forth infra, there is little mention of Stan in the thousands of pages of medical records submitted at trial and he agreed at trial that (despite being the only Stompor child living in New Hampshire after 1998), he never went to either Stompor Parents' medical appointments.[34] Tellingly, the records reflect that caregivers expressed concern that Broneslaw and Amelia lacked a safety net for daily care as Stephen lived in Colorado. There was no mention that Stan, who remained in New Hampshire, was available to assist with provision of their daily needs.[35] Finally, in an (undated)[36] Mother's Day card sent to Amelia, Stan wrote: "[w]ould love to know about what is going on with yours [and] Dad's health! Stop shutting me out Cause i am concerned about you and Dad." Exh. 111 at 3615.

Although there was some evidence that Stephen and Stan were at least brotherly as children and indeed worked together at a yogurt company in early adulthood, it is undisputed that a deep rift developed over disputes concerning fairly unsuccessful joint real estate ventures in the late 1990s. Stan, Stephen, and the Stompor Parents purchased a residential property at 273 Spruce Street Manchester. The brothers also invested in another property at 122 Crosby Street along with Cindy, who contributed $5,000 to that venture. For a time, Stan and Stephen lived together at Crosby Street.

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[34] He also agreed that he never assisted his parents with paying bills, calculating/paying taxes, or managing the Bow Street rental property.

[35] The Court observes, as set forth more fully infra, that although the Stompor Parents, in August 2007, executed a limited power of attorney appointing Stan as agent, see Exhs. 143-144, the medical records call into question whether, given the deep deterioration of their physical and certainly mental health by that time, these powers would have withstood their own judicial scrutiny.

[36] Although not readily apparent from the exhibit, it is noted as being sent in 2005 in a schedule of agreed-upon exhibits.

A number of disputes arose concerning management of the properties and responsibility for the expenses to carry them. After the real estate market faltered and the mortgages on the properties came to exceed their market value, the disputes became more acute. See generally Exhs. 60, 62-69, 71, 74, 76-78. In fact, the record indicates that the brothers ceased, or at least limited, all direct communication with each other. See Exhs. 69, 71. Stan refused to attend Stephen's wedding in 1997, and it is fair to deduce that relations between the brothers did not improve and were not mended by the time Stephen moved to Colorado in 1998. In fact, Stan filed a partition action in March 1999 against Stephen and Cindy. See Exh. 2. An order forcing partition was signed on September 1, 1999. Exh. 3.

The Stompor Parents remained in their home until October 2007 when they were moved to assisted living and/or skilled nursing facilities in Colorado. Amelia passed away on July 6, 2009. Exh. 40. Broneslaw died shortly thereafter on August 5, 2009. Exh. 41.

B. Stompor Parents' Estate Planning – 2001 & 2004

It appears from the record that the extent of the Stompor Parents' estate planning prior to 2001 consisted of attending presentations and gathering materials on the subject. Exh. 58. The documents at issue in this case concern two sets (one set each for Amelia and Broneslaw) including a "Last Will and Testament," "Revocable" or "Living" Trust and various durable transactional, as well as medical, powers of attorney drafted in 2001 and 2004. See Exhs. 4-15; 18-27. The Court observes that although each Stompor Parent had his or her own "set," the terms set forth in each were nearly identical. As such, in the interest of economy in an already lengthy order, the Court will

refer to them as "the wills" or "the trusts," where common observations can be made rather than repeat its findings for each parent's estate planning "set" separately.

According to the deposition testimony of Attorney R. Carl Anderson submitted by agreement to the Court, see Exh. 184, he met with Amelia and Broneslaw to discuss drafting an estate plan in 2001. He stated that he was introduced to them by Stephen and his wife after they hired him to prepare deeds effecting transfer of the Spruce Street property in Manchester to Stephen.[37] Id. at 16-17. He first met the Stompor Parents with Stephen regarding the deed in September 2001. He eventually met with the Stompor Parents alone, after Stephen had returned to Colorado, in October 2001. Id. at 26-28. Wife Jennifer sent him copies of various documents along with a check for his retainer which he returned. Id. at 31-35; Exh. 16 at 124, 244. He then proceeded to draft, then revise, wills and trusts for Amelia and Broneslaw. Exhs. 12-15. These documents were never executed. Id. According to the terms of these documents, each parent left their assets to the other (either by will or as beneficiary of the trust), and then the remaining assets were to be split three ways among Stephen, Stan, and Cindy after both parents died. Id. Stephen was named the successor executor and successor trustee to his parents. Cindy was named successor to Stephen in the wills and trusts. Exhs. 12-15.

Attorney Anderson also drafted a series of durable trasactional and medical powers of attorney, see Exhs 4-11, in which the Stompor Parents were each other's agents. Both Stephen and Cindy were made agents on the durable powers of attorney.

[37] As noted supra, this property was jointly owned by Stan, Stephen, and the Stompor Parents. Although there were many disputes between Stan and Stephen, it was never the subject of formal litigation, and appears to have been resolved by Stephen and the Stompor Parents refinancing the debt after which Stan transferred the deed to them. In 2001, the Stompor parents transferred the deed to Stephen. Attorney Anderson prepared these deeds.

See Exh. 184 at 49. The durable transactional powers of attorney included relatively broad grants of authority, and specifically authorized transfers to trusts and gifts to family. See Exhs. 4-6, 8-10. They remained in effect until revoked in writing. Id. The Stompor Parents executed these documents in October 2001. See Exhs 4-11. At trial, Stephen claimed that although he had discussed the powers of attorney with his father, he never saw these documents until well after this litigation commenced.

The wills and trusts were never executed. Apparently Broneslaw was not prepared to sign them sequentially on the same day that the powers of attorney were executed. Exh. 184 at 60; 67. Attorney Anderson later met alone with Broneslaw who indicated that he "did not want his trust to leave everything to his wife outright." Id. at 68-69; 71, 89. He also expressed a belief that at that time Broneslaw told him Stan was not his son. Id. at 87. He described Broneslaw as "a bit angry. He struck me as a bitter man." Id. at 90. As a result of that conversation, Attorney Anderson withdrew from representing the Stompor Parents recognizing that those pronouncements posed, if not created, a significant conflict of interest. Id. at 87, 89, 91; Exh. 16 at 108-109 (withdrawal letter dated February 12, 2002). He also noted that "[i]t's the first time in my career I ever withdrew because of a joint representation letter." Id. at 93.

The 2004 estate planning documents at issue in this matter were executed on October 21, 2004. See Exhs. 18-27. Their origin is unclear, but they differ from the prior documents in that Stephen and his son Benjamin are the only beneficiaries after either Amelia's or Broneslaw's death. Id. Stephen testified that he first learned of the documents when he visited his parents in October 2004 and they asked him to assist with having the already drafted documents properly executed. He claimed to have no

knowledge of the contents of them until he drove his parents to a notary to have them executed during a week-long visit to New Hampshire that year. Instead, he testified that they only had general conversations regarding "paperwork" his parents needed to complete and that he was willing to assist them.

In a letter to Attorney Anderson dated November 26, 2004, however, Stephen states that: "[s]ome time ago, my parents and I concluded it was essential for them to have executed Wills, Trusts and Power of Attorney, even if these documents were not perfect. Hence[,] in mid[-]October they executed Wills, Trusts and Power of Attorney." Exh 16 at 128. He further informs Attorney Anderson that "[w]e used the forms you provided them as a guideline and modified them to reflect their wishes." Id. He also notes that because "we concluded that we still need able legal representation" they had contacted Attorney Richard B. Couser[38] "to further assist in their estate." Id. When asked about this letter at trial, Stephen categorically denied that he took part in drafting the 2004 estate planning documents and that he did not intend to indicate in the letter that he participated in their formation.

The 2004 estate planning documents were executed at the offices of Lutheran Social Services. According to Stephen, that office was chosen because his wife was a former employee and she was aware that there were notaries at the office. Amelia is alleged to have made the appointments. The women who witnessed and notarized the documents, collectively, appear to have no memory of the event as they were deposed over a decade after it occurred. See Exhs. 174-177. According to Stephen, he drove his parents separately to the offices and he was present for most of the time when they

[38] There was little, if any, evidence presented as to the extent of Attorney Couser's involvement with the Stompor Parents' estate matters.

were signed. He asserted that the witnesses and the notary were also present.[39] In his answers to interrogatories, Stephen also stated that he "helped" both parents "in the preparation of" these documents. Exh. 126. At trial, he indicated that the only "help" he gave them was to drive them to Lutheran Social Services.

Although the passage of time has diminished the clarity of facts surrounding the drafting and execution of the 2004 estate planning documents, what is clear is that their existence was not disclosed to either Stan or Cindy until 2007. Given the unique dynamics of the Stompor family, and apparent dysfunctional intra-family communication, the Court does not discern or infer any nefarious intent from this fact.

Further complicating the situation was the reality, see infra, that by time the 2004 estate planning documents' existence was discovered by Stan and Cindy, both Amelia and Broneslaw were failing physically and mentally. It is undisputed that in March 2007, Cindy became aware of an email written by Jennifer discussing the fact that: (1) Broneslaw, although usually a careful bill payer, had failed to keep the family expenses current; (2) significant damage had been done to the Bow Street property; (3) Stephen had a power of attorney and was taking charge of both bill paying and property management; and (4) that the Stompor Parents' physical and mental health had so significantly deteriorated that a social services agency had been hired to check in on them. See Exh. 115. Cindy shared this email with Stan, who testified that he investigated the public records of the deeds on the Stompor properties and noticed they

[39] In their depositions, the witnesses and notary stated that often they did not attest at the same time the other (mostly immigration related) documents they routinely processed at Lutheran Social Services. However, they could not remember any activities surrounding the Stompor Parents' 2004 estate planning documents and whether they were together or not. However, Dorothy Bryant, the notary, agreed that based upon the requirements set forth in the wills, namely that the witnesses signed in the presence of both the testator and each other, see Exh. 18 at 1037; Exh. 23 at 1061, it is likely that she followed this procedure and that the witnesses, testator and notary were together at execution. See Exh, 174 at 47-49.

had been placed in trust. See infra. Stan testified that h ht these deeds to Broneslaw and Amelia who, he claimed, had no memory ransfers.[40]

It is undeniable that the documents are not shinin les of well-drafted wills or trusts. Both parties have attempted to seize on certain their deficiencies or infirmities as evidence that they were or were not the product of Stephen's direction.[41] The Court pauses briefly to make note of a few. First, it has been noted that the trust documents misstate the middle initial of Benjamin Stompor[42] and that if Stephen orchestrated their creation, this mistake would not have occurred. It is notable that he is properly named in the wills. See Exh. 18 at 397; Exh. 23 at 434. On the other hand, the trust documents include an unusual provision that the grantor could amend or revoke his or her trust at any time, provided they obtain "approval of the trustee, Stephen Stompor." See Exh. 19 at 403; Exh. 24 at 440.

Finally, the Court discerns that the durable powers of attorney executed contemporaneous with the trusts and wills in 2004, see Exhs. 20-21; 25-26, were likely not drafted by an attorney, as they do not include the statutorily required

[40] The Court notes that after a review of the Stompor Parents' medical records, it is more likely that this testified to lack of memory was the result of the Stompor Parents' – in particular Broneslaw's – then medically documented memory deficits than the product of a lack of knowledge at the time they were executed. See infra. The Court also notes Stan's claim that he hired Attorney Braiterman, see infra, at Broneslaw's direction. The Court finds this claim dubious, and, as set forth more fully infra, it is deeply troubled by events surrounding the drafting and execution of certain powers of attorney in 2007 that initially gave rise to this litigation.

[41] There was no evidence that they were drafted by an attorney. Apart from that, after review of them and out of deference to the New Hampshire Bar, the Court would otherwise be inclined to find that they were not the product of a professional's preparation or drafting.

[42] His middle name is Stephen, but he is referred to as Benjamin J. Stompor. See Exh. 19 at 405; Exh. 24 at 442. However, in a subsequent paragraph, he is properly named as residuary beneficiary. See id.

acknowledgment. See RSA 506:6 (VII).[43] A statutory acknowledgment was affixed on May 31, 2007. See Exhs. 21, 26. In 2010 deposition, Stephen notes that the "2000" POA was "supersede[d]" by 2004 POA. However, by the time he was deposed, he had already signed and affixed an acknowledgment. Exh. 26.

C. Asset Transfers

After the 2004 wills and trusts were executed, the process of transferring liquid personal property and real estate assets of the Stompor Parents' into the Amelia P. Stompor Living Trust, see Exh. 19, and the Broneslaw J. Stompor Living Trust. see Exh. 24, commenced. See generally, Exhs. 121-122 (asset transfer logs).[44] Most of the deeds were transferred in July 2005, with liquid assets following later in 2005 through 2007. Transfers of the Bow Street and Franklin Street properties were executed by Amelia personally and Stephen as agent for Broneslaw, see Exhs. 32-33. The "woodlot" transfer was also executed by Stephen on behalf of Broneslaw. See Exh. 34. Of further note, although previously owned jointly, both the Bow Street and Franklin Street properties were deeded to the Broneslaw P. Stompor Living Trust only. See Exhs. 32-33. Otherwise, it appears that each parent, consistent with their apparent lifelong practice of keeping separate personal accounts, had their individual retirement, investment, and bank accounts transferred to their respective individual trust. See Exhs. 121-122.[45] The Court also takes note that at least through November 2006, Broneslaw later paid the bills associated with the real estate assets with money in trust

[43] As earlier stated, when the 2001 powers of attorney were executed, state law did not require such acknowledgement. See Laws 2003, ch. 312.
[44] The Court is uncertain who prepared these logs and it has no way to gauge their veracity. They are part of the agreed-upon exhibits. In addition, counsel for Stan used them in his direct examination of Stephen without challenging their accuracy.
[45] Unlike the real estate transfers, certain stock transfers appear to have been executed by Broneslaw himself.

bank accounts. See Exh. 114.[46]

Stompor Parents' Medical History 2004-2009[47]

The Court finds informative, if formidable in volume, the medical records submitted for consideration by the parties. It makes the following findings of fact based upon its review of those records, observing first, that the records are far more extensive regarding Amelia. She was challenged by many more physical ailments than Broneslaw, and her mental faculties appeared to decline more slowly. Broneslaw's records are remarkable in that he remained relatively robust physically until the end of his life, but his mental decline, when it came, appeared to occur precipitously. Their long-time personal physician, Dr. Julia Burdick, testified credibly that at least through most of 2005, both Amelia and Broneslaw retained the mental capacity to make medical decisions for themselves and that although this level of functionality may not equate their capacity to sign legal documents, it shows a certain level of ability to understand choices presented and the consequences of decision making.

The Court begins with Amelia. Her records show that she presented in 2004 as an aging woman with multiple physical ailments, fatigue, and recurring urinary tract infections ("UTI"), see, e.g., R. at 2529; 2539; 2550; 3164; 3167; 3183; 3192, whose cognitive abilities were fairly in-tact at least through the summer of 2004. See, e.g., R. at 3148. As discussed more fully below, possible mild mental "slippage" was observed

[46] While the individual checks were still in his name, the bank account statements, with his notations on the envelopes, indicated that the account was in the name of his trust.

[47] When referring to the Stompor Parents' medical records the Court will reference only the page number in the record. The parties submitted hundreds, if not thousands, of pages of medical records. Thus, it is easier to reference the record ('R.") page number, as opposed to the exhibit and page number.

in the fall of 2004, with increasing concern about her abilities voiced in 2005, and that those concerns became more serious by late 2006 and into 2007.

Notes from an August 2004 check-up, and those submitted prior to that date, did not note any severe or recurrent cognitive issues[48] other than the observation that Amelia was a "difficult historian" or could be "vague" when describing her symptoms. R. at 2423-25; see, e.g., R. at 2440; 2454; 2480; 3151; 3180. In March/April 2004, Amelia was still working three-days per week, R. at 3152, and despite some observed depression and anxiety, her judgment was deemed fair and her memory intact. See, e.g., R. at 2447; 2456-57; 2472; 3153-54. Around that time, Amelia gave her providers permission to speak with Stephen, but stated that her other two children were "not receptive" to providing assistance with home care. R. at 2447. Notes from a May 2004 checkup reflect that her memory and judgment were intact. R. at 2441; 3157. On September 13, 2004 she contacted her doctor complaining that her head felt "kind of woozy," but that it had cleared. At that time, she was experiencing an UTI. See R. at 2403; 3181.

In October 2004, medical providers noted during an office visit that she often seems confused and has some memory trouble, but she and husband deny it, "seem unconcerned," and blame it on her hearing issues. R. at 2382; 3192. At a November 19, 2004, check-up, her physician expresses concern about medication compliance, but reports that she showed intact judgment, orientation, only "mild global memory

[48] There was one phone conversation in which Amelia stated her "head was fuzzy" made the day after a diagnosis for a urinary tract infection in early March 2004. R. at 2487-89. In a mid-March appointment she presented as "anxious and confused about [the] plan of care," but is noted to be oriented, have fair judgment, and an intact memory. R. at 2472. At trial, her personal physician testified that it is common for elderly patients with a UTI to have temporary bouts of confusion caused by the UTI that dissipate as the UTI is treated.

impairment." R. at 2370. At trial, Amelia's physician testified credibly that she believed that Amelia understood what the physician was discussing with her and the consequences of her actions. A VNA note from late November 2004 similarly reflects no sensory impairment, with normal attention and memory, and alert/oriented cognitive functioning; albeit with only a fair judgment and awareness of deficits. It also indicates growing difficulty with medication compliance. R. at 2701-07; 3289-3292.

At an office visit on January 5, 2005, she exhibited no cognitive issues with judgment, orientation or memory. R. at 2356; 3205. A week later, however, on January 12, 2005, Amelia was admitted to the hospital for treatment for a UTI and was displaying some cognitive issues. R. at 1456; 2355; 3222. A mini-mental status exam given ("MMSE") on admission scored very low. R. at 1456; 2322; 3234-35. Stephen is contacted on the 13th, but denies she is confused. Instead, he requests that a MMSE be administered, R. at1462; 3244, and after given later that day showed only a mild cognitive deficit. R. at 1505. Another MMSE administered on the day of Amelia's discharge from the hospital, January 15, 2005, shows her cognition was "within normal limits." R. at 2322; 3234-35. VNA notes a day later recorded similar observations, including the one that Amelia demonstrated "no apparent functional deficits or mental confusion." R. at 2721-2722; 2725-26.

There remains lingering concern about her medication compliance during this time, with one VNA nurse noting "[i]t is hard to tell whether [the patient] has been taking her medications as ordered because she is lucid and convincing one moment then repetitive and forgetful the next." R. at 2731; 2737; 2741. Her February and March VNA visits show some increasing ability to manage her medications, with only one

notation that she could be "forgetful" and observations that her attention and memory is normal, but ability to judge her safety and awareness of deficits is poor. R. at 2743-2769. During a February 2005 office visit with her primary care physician, intact judgment and memory is recorded. R. at 2282; 3258. Around that same time, a VNA nurse notes, however, some lingering depression and boredom and makes the observation that Amelia's "[h]usband is non-communicative and they go days without talking." R. at 2553.

In early April 2005, the VNA nurse notices increased confusion along with an urinary tract infection. R. at 2770-71. Stephen and Jen voice concern about her cognitive health, but doctors find that Amelia is competent. R. at 2219. A MMSE conducted on April 13, 2005 shows a strong score of 29/30. R. at 2221; 2543; 3262. At trial, her primary care physician testified that in response to a question from Stephen concerning Amelia's competence, the doctor opined that Amelia was still competent to make decisions for herself.

By May 2005, Amelia's cognitive status becomes less clear. In early May, the VNA nurse observed that Amelia was "alert and oriented x4" and "lucid when answering questions which is typical for her." R. at 2780. A report issued nearly two weeks later documents short term memory impairment, forgetfulness and depression, although apparently in "new or complex situations only." R. at 2785. Notably, the VNA observes that Stephen has voiced concerns about her health and expresses a belief that Amelia should have a psychological evaluation and be placed in assisted living. R. at 2792.

By his July 2005 visit, Stephen voiced concern about his parents' cognitive safety, his wish that they move to assisted living, and that he was touring facilities in

New Hampshire. R. at 3271. He specifically reports to a licensed social worker that he discovered several medications (both old and new) scattered about the family home. He was informed that Amelia had passed a competency evaluation, and her doctor was unwilling to invoke her health care power of attorney as she felt Amelia was competent to make her own decisions. R. at 3267; Id. The social worker however called the state Bureau of Elderly and Adult Services "following in office visit [with] son" for an investigation into possible "self neglect." R. at 3270. The investigator reported troubling signs of poor hygiene, inability to account for medications, cognitive deficits and recommended to Stephen that he obtain a geriatric psychological evaluation of his mother. R. at 3269-70. Amelia meanwhile continued to insist that she did not want to enter assisted living. R. at 3269.

Both Amelia and Broneslaw rejected Stephen's concerns and remained "adamant" that they wanted to continue living in their own home with VNA supports. R. at 3267; 3276. Their physician reported that when it was mentioned that Stephen had issues with the state of their living conditions, Broneslaw responded that he had fought with Stephen during the July visit and believed that Stephen is the one with "issues." R. at 2165-2172; 2824; 2826.

During the month of July 2005, Stephen, despite multiple meetings with providers and "fight[s]" with his parents, was ultimately unsuccessful in convincing his parents to move from their home. He told a VNA nurse during this time that he believed that his mother "would thrive in an atmosphere where she could socialize" and that "assisted living would be best." R. at 2824. He questioned, however, whether Broneslaw would accompany her, "but that would be his goal." Id. As noted supra, Stephen reportedly

investigated New Hampshire assisted living options after voicing concern for his parents' safety. R. 3124; 3271. His apparent attempt to have them moved to a local facility was also unsuccessful, with health care providers noting that Amelia scored a 29/30 on a MMSE and that the Stompor Parents are unwilling to move. Id. Skilled nursing notes register Stephen's concern about medication compliance and Amelia's apparent lack of understanding. R. at 3125. It also documents reduced attention, impaired short-term memory, forgetfulness and poor judgment. R. at 3129. Of particular importance to this matter is that at this time (July 2005), Stephen was unable to force activation of the health care power of attorney and/or placement of his parents into assisted living. At month's end, a case manager assigned to follow Amelia reported that both Amelia and Broneslaw were capable of appropriately answering questions. R. at 3265.

The medical records show that in August 2005, concerns were raised about Amelia's increased confusion and "underlying dementia." R. at 2164. Visiting nurse notes from this period reveal that Amelia is "hard to assess" because of memory issues, and despite challenges encountered performing the regular activities of daily living, "[s]he is against going to an assisted living [facility] as her son wants for her safety." R. at 2537; 2694. VNA notes from this period reflect that she was by this time demonstrating consistent memory and functional deficits and impaired decision making. R. at 2797; 2832; see, e.g., R. at 2853; 2856; 2860. Compliance with her medication regime was noted to be very problematic. See, e.g., R. at 2838; 2882.

In March 2006, a VNA nurse observed that Amelia exhibited serious issues with

personal hygiene;[49] showed trouble responding to questions; had some memory deficits, but was still able to make own decisions; and despite concerns about safety at home, the Stompor Parents did not want assisted living. R. at 2112-13; 2127; 2139-40; 3285. During April and May 2006, Amelia reported that she had had more than one serious fall at home. Records from an April 2006 hospital visit note that she had fallen at home several times. There is a report to hospital staff that there are feces in several places on the floor, very problematic personal hygiene, R. at 1127; 2101, and increasing dementia. R. at 1129. Although her doctors felt that it was no longer safe for her to live at home, they observed that, in their view, she was still competent to make her own medical decisions. R. at 1124-25. In addition, because of her "obvious cognitive defects," they queried whether she could make financial ones and if it was safe for her to be living independently. R. at 1130. On May 1, 2006 she was administered a psychiatric exam and deemed competent to ignore medical advice. R. at 1125, 1130, 2038.

Records from the spring of 2006 demonstrate that VNA reports included serious questions about Amelia's mentation and the safety of her living arrangements. R. at 2976-2985; see also 2052; 2062. Another VNA note from this period includes an observation that the Stompor Parents' living conditions posed certain dangers, were unclean and that Amelia continued to "be confus[ed] with inappropriate answers and conversations." R. at 2521. An April 2006 urology record makes note of recent confusion and "apparent hygiene issues." R. at 2523. Amelia, however, was still refusing to move to assisted living, despite providers and social workers' concerns

[49] There was testimony at trial that even during her relative youth, Amelia did not take personal hygiene seriously in that she did not often bathe or clean her ears. The issues observed in the health care worker's notes rise well-beyond concerns about personal odor and failure to attend to grooming.

about her mental state, managing her own affairs, unkempt presentation and unclean living conditions,[50] failure to bathe, and medication compliance. R. at 1142-43; 2099; 2101; 2903; 2913; 2919; 2937-38; 3015; 3022. She appeared disheveled and had feces on her face, legs, and under her fingernails. R. at 2098; 2945. Nevertheless, significantly, in May 2006 it is recorded that she was refusing to consider moving to assisted living in New Hampshire and that the "only place I'll go to is Steve's." R. at 1144. Similarly, May 2006 records indicate that Stephen voiced concern for his parents' safety, and raised the possibility of placement in assisted living, but that his parents still have adamantly refused to move. R. at 2096. A September 2006 entry in Amelia's records indicated, however, that she suffers only from mild dementia. R. at 2033.

The downward trend in her health continued, with increasing confusion noted in late June/early July 2007. R. at 2026. An August 2007 VNA note indicates that Amelia demonstrated "decreased memory," R. at 2585, and "easily becomes confused." R. at 2598. In September and October 2007 it is observed multiple times by VNA that she is forgetful, R. at 2610; 2645; 2646; 2650, and has a lot of difficulty with proper hygiene and maintaining safe living conditions. Id. Provider notes from September show that she is experiencing increasing confusion, R. at 1020, 1986-87, and her health care power of attorney was finally activated on September 5 2007. R. at 1996. The following month it is noted by her physician that she lives with her husband who has "advanced dementia" but that she is "reluctant to talk about her husband's progressive dementia"; and although she still denies memory problems, she recognizes that she has deficits. R. at 1976-77. Her doctor writes that "she does have insight into the illness of her

[50] One note observes, however, that a social worker visited the home and found no issues, R. at 2103; and another only mentions the dinner area as being cluttered with papers. See R. at 2929-2931.

husband" and "again" there is "a long conversation with family about need for placement." R. at 1977.

Broneslaw's rapid mental decline after 2005 is apparent from his medical records. He appears able to discuss and evaluate medical choices in March 2004. R. at 1876-78.[51] During a routine check-up in July 2004, however, his provider makes no mention of mental issues, rather, it notes other physical concerns. R. at 1854-1856. Broneslaw is recorded as capable of making informed medical decisions in February 2005. R. at 1825. In fact, there is little note of mental issues until mid-year 2005 when Stephen expresses concern to providers that his father should not be driving, his paranoia had increased, and he was declining cognitively. R. at 1808; 3133.

In February 2006, R. at 2138, Broneslaw told a provider that although "he has some occasional trouble with his memory, . . . he does all his own bills and has only been late on payments a couple of times." R. at 1788; 3135. His physician noted "he is definitely forgetful . . . but can hold a normal and otherwise coherent conversation" during the visit that he attended alone. R. at 3137. He is diagnosed with "dementia, presenile" at that time. R. at 3141. By April, 2006, his health care providers express concern about his being home alone while Amelia was hospitalized. In May 2006 Stephen is said to have contacted health care providers expressing concern "regarding the safety of both parents" and reported that the prior year he had attempted to convince them to try assisted living but they "adamantly refused." R. at 1778; 3143.

Broneslaw's problematic mentation becomes more pronounced in his 2007 medical records. Doctor's office notes in June 2007 include the observation that

[51] Although Amelia's records reveal that in April 2004, Stephen expressed concern about Broneslaw's "mentation." R. at 2452.

Broneslaw told his physician that "he is concerned that there are people coming in and out of the house that he does not know. He [thinks] that someone was putting things on his head at night [and] making his hair grow all over the place." R. at 1770; 4102; see also R. at 4026 (July 3, 2007 skilled nursing home visit). Stephen is with his father at that appointment and states that his father has a "fair amount of paranoia" is "reluctant to take the medications" and "is not doing well." Id. There is a global concern about his safety. R. 3293-94. In early June, the records reveal that his physician decided that Broneslaw could no longer drive due to advancing dementia. R. at 1762.

His health care power of attorney was activated in July 2007 due to "his progressive dementia" and "decline in executive function." R. at 1751. In August 2007 health care providers reported him to be "forgetful" and "a little bizarre" but not delusional. R. at 1736. Hospital records indicate a very poor memory and some dementia. R. at 1620.

As discussed supra, Broneslaw was always very deliberate in paying bills and tracking payments for physicians, utilities, taxes and the like. He kept invoices and related envelopes where he tracked services rendered, payments made (often with the date and check number) before and during the period that the documents were signed, and well into the end of 2005, if not beyond. Exhs. 59; 90; 95; 98; 100; 109; 114. He kept copious records of rental payments by tenants of the Bow Street property during this time. Exh. 96. These records also included those bank statements and checks showing that his assets had moved into his trust. Exh. 114. However, by March 2007, an email from Stephen's wife reflects that both parents' ability to manage rental properties and their own affairs had become critically impaired. Exh. 115. Stephen

assumed payment of the bills, and a private pay provider was hired to manage the Stompor Parents' daily cleaning and transportation needs. Exh. 116.

Home health care notes from September 2007 state that the need for home care is driven by early onset dementia and behavioral issues. R. at 1918; 3975. The initial assessment describes Broneslaw as pleasant "with periods of forgetfulness. R. at 1918. It is troubling, however, that though the visiting nurse observed that he was alert and oriented, R. at 1919; 4020, he was at the same time chillingly paranoid.[52] Id. On October 2, 2007, Broneslaw is referred to a neurologist for an evaluation. It is noted that he "has been increasingly forgetful" and "no longer manages his own finances." It also is observed that "[u]nfortunately over the past year or so this gentleman has become somewhat paranoical & delusional. He sees people coming/going from the home even though they are not." R. at 1722. The neurologist concludes that he "presents today with fairly severe neurodegenerative dementia. Unfortunately he is having significant difficulties with hallucinations. . . . I strongly suggested that the family make arrangements for their parents to be transferred to a nursing home." R. at 1724. Yet, he warned that a move to Colorado "would more than likely worsen" the symptoms. The neurologist followed this caution with comment that: "Mr. Stompor's son might need to take legal action to protect his parents from a sibling." Id. Broneslaw's physician echoes the critical need for institutionalization as "[c]learly he has fairly rapidly progressive disease and has paranoid hallucinations." R. at 4100. She stated that Broneslaw can no longer be left alone due to his advanced dementia and delusions.

[52] It was reported that he believed that the source of his constipation is that a neighbor has been released from jail and sneaks into the house at night to place objects in his rectum. Id. This medical record also notes that this is impossible as he has been treated at the hospital for this issue and there is no evidence of embedded foreign objects.

His physician "stressed [the] need for placement and [Stephen and Jennifer] are considering moving [the Stompor Parents] to Colorado. R. at 1720; 4098-4100.

At this juncture, the Court breaks to note that during this litigation, Stan has implied that the Stompor Parents' relocation to Colorado was directed by Stephen's desire to subvert or hide from claims of undue influence. While certainly the timing indicates that it closely followed Stan's filing suit in October 2007, their medical records indicate a more varied reason. Well before the lawsuit, the medical records document that Stephen had long unsuccessfully attempted to have his parents moved into assisted living. In fact, he first tried to convince them to relocate to a facility in New Hampshire, and that Amelia, while preferring to remain in her home, expressed preference for a move to Colorado. They also reflect that the prior July, two months before Stan was "granted' a power of attorney, Stephen was already planning a trip to New Hampshire for that October. R. at 1755. As such, the move was not likely solely the result of Stan's petition. Indeed, based upon the Court's searching review of these records, it can only conclude that the move was primarily driven by a critical need to preserve the Stompor Parents' personal safety in light of Amelia's poor or lack of hygiene and physical challenges, as well as Broneslaw's advancing dementia, and Stan's institute of this lawsuit was at best secondary. Thus, it cannot credit, the October 2007 relocation as strong proof of undue influence.

D. Procedural History of this Matter

The case at bar was initiated on October 15, 2007, before the death of either of the Stompor Parents, under a petition by Stan seeking, inter alia, dissolution of the Broneslaw J. Stompor Living Trust. See *Petition* (Index #1). The petition was filed by

Stan Stompor "on behalf of" the Stompor Parents pursuant to a durable power of attorney executed on August 27, 2007 "in the presence of and notarized by [Stan's then counsel]." Id. ¶ 2; see Exhs. 143-144 (2007 powers of attorney).

The Court is somewhat vexed by the origin of this litigation,[53] as it informs the credibility of Stan and to a lesser extent Stephen, as witnesses. As noted supra, medical records indicate that the Stompor Parents' medical and physical infirmities were quite severe at that time. In particular, Broneslaw's mental acuity had suffered a rapid decline and his providers opined it was not safe to be left alone.

Moreover, the document(s) state, in bold, that they empower Stan "to carry on **SPECIFIC AND LIMITED INVESTIGATIVE FUNCTIONS CONCERNING MY ASSETS AND FINANCES**" and "is **not intended** to enable my agent to transact any business in any manner" but only "investigate such matters on my behalf so that I know and understand what has or has not been done by me or others acting or supposedly acting on my behalf." See Exhs. 143-144.[54] The title(s) of the document(s) imply an intent by the drafter, however, that some form of litigation is expected as it is "LIMITED DURABLE POWER OF ATTORNEY TO INVESTIGATE AND/OR ADJUDICATE FINANCIAL MATTERS." Id. Finally, although the main body of each text appears to grant only limited powers, two sentences before the signature line, it states: "This instrument is to be construed and interpreted as a general power of attorney." Id.

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[53] As noted infra, early in the proceedings, new counsel for Stan, and current trial counsel, successfully petitioned to amend the pleadings to add the counts presently before the Court which would give Stan standing to sue. Therefore, while its origin is of concern, when the case arrived at the Trust Docket (after detour to the Supreme Court), Stan, as a potential heir, had apparent standing independent of the powers of attorney to bring forth the litigation.

[54] Because the documents submitted as trial exhibits appear to be missing a page, the Court can only draw conclusions from the pages provided, and to the extent submitted, the limited powers may or may not have included suit.

According to deposition testimony by the attorney who drafted and attested to these powers of attorney, and filed the initial petition,[55] see Exhs. 48-49, they were executed at the Stompor Parents' home. Id. at 21. He also stated that he was never alone with them, rather, Stan was always present and that "[i]ts not like it was Broneslaw and Amelia's idea." Id. at 21, 36-37; 49. Legal proceedings were apparently never discussed. Id. at 97-99. He stated that he was concerned because the Stompor Parents did not appear to remember transfer of the real estate deeds. Id. at 35. He offered that he felt they understood the purpose of the powers of attorney. Id. at 39-41. It is uncertain, however, based upon the medical records discussed supra, of the significance of this apparent memory lapse as it relates, or may relate, to the validity of trusts and deed transfers created/effectuated two-three years prior when the Stompor Parents' health was not so dramatically compromised. What seems reasonable for the Court to discern is that investigation into the Stompor Parents' mental capacity to execute the 2007 powers of attorney by legal counsel was lacking. See id. at 55-56; 73-74.

Also submitted with this Court were "cancellations" see Exhs. 146-147, executed by Amelia and Broneslaw in August/September 2007. See Exhs. 146-47. In November 2007, Amelia signed an affidavit stating: "My son, Stephen Stompor, is the agent under a durable power of attorney that I executed in 2004. I ratify and approve all the transactions that he has done as my power of attorney, including transferring assets into my living trust." Exh. 149. It further states: I have discussed this matter with my husband, and neither of us wishes this court proceeding to go forward. Neither of us understood that Stan would have any authority to take this action, and it was not our

[55] He is not Stan's trial counsel.

intent to provide Stan with such authority." Id. The Court has similar concerns about the ability of the Stompor Parents to cancel the powers of attorney and execute affidavits.

On June 6, 2009, the petition was amended to include allegations that Stephen Stompor exercised undue influence over his parents in 2004 when they lacked capacity to execute certain estate planning documents that effectively disinherited Stan Stompor. See Index # 16. After Amelia and Broneslaw passed away during the summer of 2009, it was amended again in October 2009. See Index #29.

III. Analysis

The Court, for the reasons set forth more fully below, concludes that the 2004 estate planning documents were not the product of undue influence exerted upon the Stompor Parents by Stephen. As stated earlier, evaluation of a claim of undue influence is, by its very nature, a difficult task. The Court's decision in this case was made even more challenging by the more than decade-long passage of time since the documents' execution that has dimmed witnesses' memories and rendered evaluation of the facts more complex. Also, deep and lasting animosity between the parties, and their often conflicting recitation of events, makes it difficult to apportion credit to Stephen, Jennifer and Stan's testimony.[56] In addition, the Court did not find that expert testimony offered by Dr. Eric Mart and Dr. David Bourne of great assistance because of the one-sided nature of each. 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]"). Thus, in reaching its decision, the

[56] Moreover, the Court found both Stephen's and Stan's testimony to be, at times, more than a bit self-serving. Stan, in particular, demonstrated a selective memory.

Court has depended largely upon non-family member testimony and documentary evidence as set forth infra. In particular, it found testimony by the Stompor Parents' long-time personal physician, Dr. Julia Burdick, highly credible.

Although the Court will not invalidate the 2004 estate planning documents, that determination does not mean or reflect the view that the Court endorses the post-mortem dispositional schemes and choices as Amelia, and particularly, Broneslaw made. Undue influence or lack of testamentary capacity, however, is not to be used by courts to "disturb those numerous testamentary dispositions of property which are made by those whose . . . affections may not run in the same channel with those of their neighbors." Boardman, 47 N.H. at 138-39. It has long been observed in this state that:

> [w]e all have likes and dislikes among our acquaintances and even among our relatives, and, it may be, among the members of our own families, for which we might not be able to give an intelligible reason, or one that would be satisfactory to another person, who did not see with our eyes and hear with our ears, and the operation of whose mind might not be like ours in every essential particular, and yet are we all insane because we dislike somebody that someone else likes, and because we make a will according to these peculiarities of our views, must it be set aside? . . . But so long as the law allows a man to do what he will with his own, he may exercise his individual privilege of having preferences and prejudices as between friends and relatives and even children, without his being called on to give any reason further.

Id. Thus, this Court reaches its decision only after careful consideration of: the totality of the trial testimony; extensive documentary evidence including their medical history; and the unique history of the Stompor family. In reaching its decision, the Court has carefully applied the common law governing undue influence, as well as all applicable inferences permissible when there is a confidential relationship.

A. Undue Influence

As is often the case in undue influence matters, a decision must be reached upon mostly circumstantial evidence. See, e.g., Patten, 67 N.H. at 528; Hobbes, 47 A. at 680. The 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. (Emphasis added). 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, the Court holds that the 2004 estate planning documents were executed in and under rather suspicious circumstances, namely, that Stephen, one of the primary beneficiaries of those documents, had a hand in assisting with their execution. Although the circumstances of their drafting is shrouded in uncertainty, it is undisputed that Stephen and his wife Jennifer "helped . . . in the preparation of" the 2004 estate planning documents, see Exh. 126, at the very least[57] by way of suggesting that they be executed at Lutheran Family Services and providing transportation. In addition, the presence of the term prohibiting amendment of the trusts without Stephen's approval is highly unusual. Although perhaps arguably falling slightly short of "substantial proof of undue influence" that would rebut a presumption of undue influence, the amendment provisions, along with circumstances of the drafting and execution of them leads the Court to decide that the presumption of validity does not either arise, and even if it did, that presumption has been successfully rebutted.

[57] The Court observes that Stephen's November 26, 2006 letter to Attorney Anderson, see Exh. 16 at 128, can rationally be read as an admission that Stephen offered greater assistance than simply transportation.

Next, the Court finds that Stephen stood in a confidential relationship with his parents. 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 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. Although the evidence demonstrates that the Stompor Parents were not, in 2004, dependent upon Stephen for transportation and bill paying,[58] the Court finds that he was named their agent under the 2001 powers of attorney. Moreover, Mathilda Woodward noted the position of trust and confidence he held with his parents. There was further evidence in their medical records that he was often consulted regarding their affairs, even if he was not in a position to make medical and living choices for them. Thus, there is sufficient support to conclude that he was in a confidential relationship with them.

It cannot be disputed that Stephen benefitted from, and that his son and he became distributee(s) of, the 2007 estate planning documents. Given that he stood in a confidential relationship with his parents and was present at the documents' execution, an inference arises that it was the product of undue influence. Edgerly, 73 N.H. at 408-09; Archer, 126 N.H. at 28. They can only be declared valid, therefore, if Stephen

[58] In particular, given his residency in Colorado and Broneslaw's meticulous recordkeeping, they were not at that time dependent upon him for financial assistance or the tasks necessary for daily living. Thus, although the Court finds that he stood in a confidential relationship with the Stompor Parents, it is not of the nature courts often encounter in undue influence cases where a relative or close friend effectively comes to govern many, if not most, aspects of the testator/settlor's life.

demonstrates an absence of undue influence. Archer, 126 N.H. at 28. As discussed at length supra, proof must be established by a preponderance of the evidence.

After considering "all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the [Stompor Parents], 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), the Court has determined that Stephen has successfully demonstrated, by a preponderance of the evidence,[59] an absence of undue influence. Though there is no one fact that alone is determinative, when the extensive record is taken and evaluated as a whole, the Court is convinced that the 2004 estate planning documents were not the product of undue influence. It is mindful that New Hampshire law requires that for there to be a finding of undue influence, there must also be rulings that there was "opportunity and ability" as well as "design and accomplishment." Harvey, 83 N.H. at 240. In this matter, the Court has determined that the following facts indicate a lack of ability to unduly influence his parents in 2004, and to a lesser extent, design and opportunity:

- The Stompor Parents' medical records are particularly informative concerning Stephen's ability to unduly influence their personal choices. In particular, the records set forth supra show that despite his efforts to place his parents in assisted living, he was repeatedly rebuffed by them and that they adamantly refused to concede to his wishes. Indeed, in July 2005, well after the estate planning documents were executed, Broneslaw is noted as saying that he had fought with Stephen over the issue and still rejected his suggestion that they move into assisted living.

[59] The Court need not decide if Stephen has met his burden by clear and convincing evidence given the concessions by counsel. It concludes, however, if it were called to do so, the outcome of this matter, although less certain, likely would not change.

- Stephen, in July 2005, strongly voices his concerns to health care providers about his parents' living conditions and mental health. His concerns lead to an investigation by elderly services into his parents' cognitive and physical safety. That year he also requests that his mother have a MMSE. This is behavior that is inconsistent with an intent or design to keep cognitive issues in the shadows or away from independent scrutiny. As noted supra often an influencer isolates the individual from view.

- The Stompor Parents in 2004 were not dependent upon Stephen for their daily physical needs, transportation, or management of their finances. This lack of dependence made them less open to coercion. Cf. Edgerly, 73 N.H. at 408 (extent of dependency a factor to consider).

- In 2004, Stephen lived in Colorado, and had been living there since 1998. While there was testimony that he spoke with his parents weekly, the Court concludes that distance and lack of regular in-person contact makes the ability to unduly influence his parents' estate plans less likely.

- Although there was evidence that the Stompor Parents' mental health was declining in 2004, they were still quite functional and able to independently make decisions. Amelia was active in her Catholic community. Broneslaw was properly following the family finances, methodically paying bills, and managing the rental property. Thus, the Court does not conclude that their mentation was so weakened as to make them particularly vulnerable to undue influence. Cf. Patten, 67 N.H. at 528 (quality of mind a factor).

- Dr. Burdick opined that at least through 2005, the Stompor Parents were evaluated and deemed competent to make their own medical decisions and choices. Although not the equivalent of legal competency or capacity, her observations and the medical records supporting them, along with

other evidence presented at trial, leads this Court to conclude that the Stompor Parents were not especially susceptible to undue influence.

In addition, the Court observes that Stephen offered compelling evidence to explain the Stompor Parents' decision not to benefit Stan in their estate plans. Although Stan denied it, there was strong evidence that he threatened to sue his parents, see Exh. 72, and that at least Broneslaw held an unhealthy level of distrust of Stan. There was also significant evidence of emotional distance from both parents and that he did not assist them with, or was consulted about, their medical appointments or any financial matters prior to 2007. He did not inform them that he had a daughter, and they did not inform him of their estate plans. Although the Court is highly suspicious of the veracity of Broneslaw's belief that Stan was not his biological son, it is clear that Broneslaw posed doubt of his paternity.[60]

The Court also observes that although is not natural for parents to disinherit children, given the Stompor family's unique dynamics, it is seen by it as very likely that it was their own inspired election to leave Cindy and Stan out of their estate plans. Of measured account is the Stompor Parents' rejection of the estate plan drafted by Attorney Anderson that split their remaining assets three ways. Although Attorney Anderson stated in his deposition that the failure to execute was in part driven by Broneslaw's desire to effectively "cut out" Amelia should he die first, it is notable that she independently did not execute documents at that time that included all three children. Instead, they were cast aside. Similarly, the Court has taken into

[60] There was less evidence presented regarding the decision to disinherit Cindy. The Court notes, however, that after she moved to college she was less involved in her family's life and that was upsetting to her fairly traditional parents. As noted supra the Court cannot second guess whether the choice to disinherit Cindy was reasonable, see Boardman, 47 N.H. at 138-39 (people are allowed their own preferences and prejudices), rather, it notes that there was *a reason* presented for it.

consideration that Stan vehemently argues that the 2004 estate plans are suspect because they differ from the 2001 plans. However, the 2001 plans were rejected by the Stompor Parents, thus, significantly reducing their relevance as a comparative tool.

Finally, the Court rejects Stan's argument that the Stompor Parents' move to Colorado is a strong indicator of undue influence by Stephen. The medical records demonstrated that as the year 2007 progressed, it became increasingly dangerous for the Stompors to remain in their home, despite their desire to remain there. Years earlier, Amelia in fact had voiced a singular preference for assisted living in Colorado. Records indicate that Stephen had planned a visit to New Hampshire for October 2007 well prior to the execution of the 2007 powers of attorney. Although Stan's newfound involvement in his parents' affairs may well have influenced the decision to relocate them, it appears from the record that that event was not the only reason for their relocation, though quite possibly a secondary one.

Consequently, after considering "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," In re Estate of Cass, 143 N.H. at 61 (quotations omitted), the Court has determined that Stephen has successfully demonstrated a lack of undue influence.

B. Capacity

The Court has also determined that the Stompor Parents, although showing signs of aging, retained sufficient mental capacity through October 2004 to execute the 2004 estate plan documents. As noted supra, the law requires: (1) understanding of the nature of the act; (2) a recollection of property and its nature; (3) recollection of the

nearest relatives or natural objects of his/her bounty; and (4) ability to make elections as to disposition. See, e.g., In re Estate of Washburn, 141 N.H. at 661. While there were concerns about Amelia's waning mental capacity, at the time of execution she was still capable of understanding the documents, knowing her children and her property, and making informed choices. If there were times, particularly when she was experiencing an UTI, of diminished capacity, less than a month after executing the documents she demonstrated intact judgment, orientation and only "mild deficits." Even as late as January 2005, when she demonstrated UTI connected diminished capacity, after treatment and upon discharge from the hospital, she displayed cognitive abilities within normal limits. In addition to the medical evidence, it was demonstrated that in October 2004, Amelia maintained the cognitive strength to organize and direct activities at the Catholic Daughter's Halloween party. Partygoers did not observe any problems with her mentation.

Too, Broneslaw, although always displaying certain paranoid tendencies, did not lack capacity to execute the 2004 documents. His medical records do not reveal any real concern by his providers[61] about his mentation until after the documents were executed. Indeed, a medical note from February 2005 shows he is deemed capable of making his own informed medical decisions. There is no evidence he did not know who his family was in 2004. He continued to successfully manage the family finances, including prepare tax returns, see Exh. 101 at 3576-93, and oversee the rental properties operations during this time.

[61] It is true that in April 2004, Stephen voiced some undefined concern; however, his providers still did not note concern about his mental faculties until raised by Stephen again in mid-2005.

Finally, the Court observes that Stan either explicitly[62] or impliedly concedes that his parents had the requisite capacity to execute limited powers of attorney in 2007. It, early in the proceedings indeed queried of counsel how the Stompor Parents could have lacked capacity in 2004, but had it in 2007. Counsel stated, in effect, that this question would be satisfactorily addressed at trial. The Court is left unsatisfied. Indeed, as the trial progressed and during its review of the extensive exhibits submitted, it became increasingly dubious of the Stompor Parents' capacity to execute both the 2007 limited powers of attorney and subsequent cancellations. As such, it concludes that both Amelia and Broneslaw maintained the requisite capacity to execute the 2004 estate planning documents.[63]

C. Other Claims

As set forth more fully supra, the claims not fully raised by Stan concerning due execution of the wills and powers of attorney have been considered by the Court and respectfully rejected.

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).

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[62] See Exh. 35 at 547-48.

[63] As discussed supra, the Court notes that Stan, in the *Petitioner's Trial Memorandum* appears to request only invalidation of the 2004 estate planning documents, see id. at ¶ 75 (Index # 153) despite raising claims of improper use of the 2004 power of attorney when transferring certain assets into the Stompor Parents' 2004 trusts in his *Pretrial Statement*. See id. at ¶5 (Index #142). It reiterates, again, that even if assets were improperly transferred into the trusts and they were disgorged from them, those assets would then pass through the pour-over will of each parent to their respective trust in any event. See Exhs. 18, 23.

In accordance with the above findings and rulings, the Court enters the following order: the *Petition*, see Index ##1, 16, 29, is DENIED and the action against Stephen Stompor is DISMISSED.

SO ORDERED

Dated: 2/9/16

Gary R. Cassavechia, Judge