THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

JOSEPH BONANNO

v.

ROBERT BONANNO, INDIVIDUALLY AND AS TRUSTEE OF THE BONANNO FAMILY TRUST

AND

JOELYN BOULANGER, JOSEPH P. BONANNO, AND CATHERINE BONANNO, AS ADDITIONAL INTERESTED PARTIES

317-2017-EQ-00048

FINAL ORDER

A six-day hearing was held on June 19-21, 25-26, & 28, 2018,[1] to resolve the eight remaining claims[2] made in the *First Amended Petition for Declaratory Judgment, Constructive Trust, Damages, and Other Relief*, filed by Petitioner Joseph M. Bonanno ("Joseph M."), see Index #43, and joined by "additional parties," Joelyn Boulanger ("Joelyn") and Joseph P. Bonanno ("Joseph P.") (collectively the "Petitioning Parties"). See *Joseph P. Bonanno's Answer to the Amended Petition* ¶¶ 10, 13, 16, 19, 21, 23 (Index #71); *Joelyn Boulanger's Answer to Amended Petition* ¶¶10, 13, 16, 19, 21, 23 (Index #70). Respondent, Robert Bonnano ("Robert"), individually and as Trustee of the

[1] In addition, by agreement of the parties, the Court reviewed, and considered, a video deposition of Dr. Ioan Cristian Badau, M.D., after submission of agreed upon exhibits to that deposition on July 24, 2018. See Index #81.

[2] A ninth claim was dismissed by this Court prior to the final hearing. See Order dated March 26, 2018 (Index #40).

Bonanno Family Trust (the "Bonanno Trust") answered, seeking dismissal of the *Petition* and submitting a *Cross Petition*, notifying the Court of an intent to request an order authorizing payment of his fees and expenses defending the action from the Trust or by Joseph M. directly. See Index #61; see generally, RSA 564-B:7-709; B:10-1004; Shelton v. Tamposi, 164 N.H. 490, 502 (2013) (pursuant to RSA 564-B:10-1004, courts have broad discretion to determine fees awards in trust matters so long as it "provide[s] a reason, grounded in equity"); In re Alice Stedman 1989 Trust 2013 Restatement, No. 2017-0288 (N.H. Aug. 15, 2018)(reaffirming that fee statute, RSA 564-B:10-1004, reaches "beyond bad faith and wrongful conduct"(emphasis in original; quotations omitted)). Interested party Catherine Bonanno did not participate in the matter. Attending final hearing were: Attorney Roy S. McCandless on behalf of Joseph M., Joelyn, and Joseph P.; and Attorney Frank E. Kenison and Attorney Bridget Mary Denzer on behalf of Robert. For the reasons that follow, the Court **ENTERS** the following **ORDERS**:

- The Court **DENIES** the *First Amended Petition for Declaratory Judgment, Constructive Trust, Damages, and Other Relief.* See Index #43. In sum, and as set forth more fully below, it holds that the Petitioning Parties failed to demonstrate two essential foundational claims of all those asserted, namely that Robert: (1) unduly influenced Nancy and Armando to favor him in their estate planning documents; and/or (2) that he made specific and ascertainable promises to them to induce changes to their estate planning documents. At most, it was demonstrated that Nancy and Armando, although respecting their son's advice, did not hesitate to ignore it. Although they indicated to others certain amorphous aspirations that Robert would "take care of" other family members after their death, the contours and meaning of this hope remain unclear even after seven days of trial.[3] As such, the evidence simply did not support

[3] Indeed, as set forth below, Joseph M.'s testimony contradicted the theory of the case put forth in his pleadings. Specifically, Joseph M., in his pleadings, asserted that Armando and Nancy intended for Robert to specifically arrange for Joseph M., Joseph P. and Joelyn to "inherit equal shares in Armando's and Nancy's estate." See *Petitioners' Proposed Findings of Fact* ¶200 (Index #76). At trial, however, he testified that his parents intended for their entire estate to be shared with him by Robert, after which he would further share with his children. The Court finds neither theory of recovery supported by the evidence or testimony.

invalidation of the Third and Fourth Amendment to the Bonanno Trust, or that Robert has an enforceable, ascertainable, legal duty to share the proceeds of the Bonanno Trust. It is important to note that, even if the Petitioning Parties demonstrated that the Third and Fourth Amendments were invalid, they would still not prevail as the Second Amendment provides that all assets of the Bonanno Trust are to be distributed to Robert if he survives his parents.

- The Court **MARKS AS READ AND NOTED** the Respondent's *Cross Petition* to the extent it puts the Court on notice that Robert may seek authorization to use assets of the Trust to fund the defense of this litigation pursuant to RSA 564-B:7-709 or seeks an award of fees and expenses from Joseph M. individually pursuant to RSA 564-B:10-1004.[4] Should Robert decide to affirmatively seek the relief he noticed to the Court, he is directed to file a motion for fees and costs setting forth the basis for, and amount of, his claim **within sixty (60) days of the date of this Order**. The *Petitioning Parties* may then reply or object in the normal course.

I. Facts and Procedural Background

Upon consideration of the evidence presented at trial, including the admitted exhibits from twelve large binders of documentary evidence and the videotaped deposition of a physician-witness, the Court finds the following facts. It notes that Robert, Joseph M., Joseph P. and Joelyn, among many others, testified. It found much of the testimony of both Robert and Joseph M. self-serving and does not find either of them to be particularly credible, although it found Robert to be slightly more credible than his brother. Although Joelyn and Joseph P. testified more credibly, their testimony was insufficient to support the theories presented by the Petitioning Parties, in particular that Nancy and Armando acted as a result of the undue influence of Robert, or that he made specific promises to induce them to make him the sole beneficiary of their estate. The Court relied on the testimony of third parties and the documentary evidence

[4] The Court observes that as sole beneficiary of the Trust, Robert effectively funds fees and expenses whether paid individually or by the Trust. To the extent Robert would seek reimbursement from Joseph M. personally, the Court makes no ruling today absent a more affirmative request for relief from Robert as the *Cross Petition* seeks only to provide notice of a possible intent to seek reimbursement of fees and costs. See id. at 13, ¶2 (Index #61).

presented at trial in large part to reach its findings set forth below. As in most cases of this nature, the credibility of the various witnesses was an important factor in the Court's ultimate decision.

A. Procedural History of the *First Amended Petition*

The Court begins with a discussion of the procedural posture of this matter. It discerns that it is necessary to make clear the posture of the claims properly before it as, particularly late in the case, the Petitioning Parties attempted to shift the nature of the relief/claims or include additional claims of relief, from the allegations in the *First Amended Petition*. Compare *First Amended Petition* at 26 (Index #43)(seeking order disallowing the Third and Fourth Amendment to the Bonanno Trust) with *Petitioning Parties' Proposed Findings of Fact* ¶ 202 (proposing a finding that Robert unduly influenced his parents into executing *all* four amendments to the Bonanno Trust).

This case involves the Bonanno Family Trust (the "Bonanno Trust"), originally executed on May 17, 2000 by Armando and Nancy Bonanno. That trust was amended four times (2003, 2008, 2012, and 2014). See R's Exhs. A-E. As set forth more fully below, the original version of the Bonanno Trust terms provided that after Armando and Nancy's death, all trust assets were to be distributed equally to their three children, Robert, Susan,[5] and Joseph, per stirpes with the eldest son, Robert, as trustee. R's Exh. A. Subsequent amendments made changes to the Bonanno Trust's distributive provisions, see R's Exhs. B-E, notably, the Third Amendment, executed on July 18, 2012, directed that all trust assets be distributed to Robert after the death of Nancy and Armando. See R's Exh. D. Joseph M. filed the *Petition* in January 2017 alleging, inter

[5] Susan died in 2007, however, and it is further alleged that under the initial terms of the trust, her share would go to her daughter Jacqueline Hudkins. Id. ¶¶ 9, 16.

alia, that the Third Amendment was made on the understanding that Robert would share the trust assets with Joseph and his niece Jacqueline Hudkins.[6] *Petition* ¶¶23-24 (Index #1). Armando died in 2014, id. at ¶6, and Nancy died in 2016. Id. ¶4. The *Petition* alleged that after Nancy's death, Robert liquidated the assets and with a minor exception, refused to distribute any proceeds of the trust to Joseph M. or Jacqueline. Id. As such, Joseph M. filed the *Petition*, asserting eight separate claims, including: (1) invalidation of the trust amendment(s) on undue influence/capacity grounds; (2) specific performance; (3) breach of fiduciary duty; (4) declaratory judgment; (5) fraud, duress, or undue influence; (6) breach of contract and covenant of good faith and fair dealing; (7) fraud; and (8) exemplary damages and attorney's fees. Id. at ¶¶ 41-77. The Respondent filed an *Answer*, see Index #6, and asserted a *Cross-Petition* for attorney's fees. See id. at 9.

On February 5, 2018, the Petitioner filed a *Motion to Amend Petition*, see Index #22, and a draft *Amended Petition*, see Index #23, primarily in response to a *Motion to Dismiss*, expanding the respondents to include the Respondent's wife Judy, and Nancy and Armando's grandchildren,[7] adding an additional ninth claim for "Intentional Interference With Inheritance and Expectancy," and expanding the factual allegations, but otherwise alleging eight substantially similar claims as those in the original *Petition* filed in January 2017. Id. After the Respondent objected to filing of the draft *Amended*

[6] Jacqueline testified that she was contacted numerous times by Petitioning Parties' counsel's office before this action was brought and that she was "shocked", "displeased", "angry" and "put off" to later learn that her name was included as part of this lawsuit. She has specifically disavowed any interest in her grandparents' estate.

[7] The Court noted in an earlier order that the parties listed in the caption of the *Amended Petition* did not comport with the parties listed in the body of it. See *Amended Petition* ¶¶ 1-8. (Index #23). It assumed that the body of the *Amended Petition* demonstrated the intent of the Petitioning Parties.

Petition, see Index #26, the Court held a hearing on March 6, 2018,[8] and determined, inter alia, that it would allow most of the *Amended Petition* to proceed. It disallowed the new Count IX asserting "Intentional Interference with Inheritance and Expectancy," see *Amended Petition* ¶¶147-154 (Index #23), because, given the facts known at that time of filing the *Petition*, the claim could have been pleaded a year earlier and it was unfair to the Respondent to be required to respond to a new claim, yet unrecognized in New Hampshire, with only a few months left to trial. See Order dated March 26, 2018 at 4-11 (Index #40). The Court then instructed Joseph M. to submit a "cleaned up" version of the draft *Amended Petition*, and to work with the Clerk's Office to issue orders of notice as soon as practicable.

On April 13, 2018, roughly two months before trial, Joseph M. submitted the *First Amended Petition*, see Index #43, naming Joelyn, Joseph P., and Robert's daughter Catherine, as "additional parties but not respondents."[9] See id. In the *First Amended Petition*, Joseph P. asserted, in 145 numbered paragraphs, eight counts similar to those submitted in the *Petition*, but buttressed by additional allegations of fact, as set forth more fully below, premised on two foundational claims: (1) that the Third and Fourth Amendments to the Bonanno Trust were invalid because Nancy and Armando either lacked the capacity to execute them, or that these amendments were the product of the undue influence of Robert, see RSA 564-B:4-406; and/or (2) that these amendments were made by Nancy and Armando in reliance on a promise(s) or through fraudulent conduct by Robert, that he would share the estate assets with other family members.

[8] The March 6th hearing considered a series of some 15 pleadings filed since late January, including the motion to dismiss and motion to amend petition, and several assorted discovery motions.
[9] Catherine, although named as a party, did not participate in the matter by way of answer or attendance at trial. See Index #49.

First Amended Petition (Index #43). Notably, the Court observes that the Petitioning Parties, in the *First Amended Petition,* id. at 26-27, did not seek invalidation of the Second Amendment executed on February 8, 2008, see R's Exh. C, which, for the first time, provided that after Nancy and Armando died, all assets of the Bonanno Trust were to be distributed to Robert exclusively, and only if he predeceased his parents, would they be shared by Nancy and Armando's grandchildren, Jacqueline, Joseph P., Catherine, and Joelyn.[10] Id. No provision was made for Joseph M. in the Second Amendment, yet the *First Amended Petition* did not call for its invalidation. Id.

Joseph P. and Joelyn filed their *Answers* as "additional parties but not respondents" on June 14, 2018, less than one week before the start of trial on June 19th. By way of *Answer,* Joseph P. and Joelyn attempted to add substantive amendments to the causes of action set forth in the *First Amended Petition*, including seeking affirmative relief in the form of receipt of specific items of personal property and, notably, invalidation of the Second Amendment, whereas the *First Amended Petition* only sought invalidation of the Third and Fourth Amendments.[11] See *Joseph P. Bonanno's Answer to the Amended Petition* at 4-7 (Index #70); *Joelyn Boulanger's Answer to Amended Petition* at 4-7 (Index #71). On the first morning of trial, before any evidence was presented, Respondent's counsel objected to the last minute "answers" which he alleged were a backhanded way of trying to add substantive claims that were being raised for the first time. The Court, having only reviewed these pleadings just

[10] Accordingly, Joseph M. is neither a direct nor contingent beneficiary of the Trust under the Second Amendment. In the Third Amendment, however, he is a contingent beneficiary with three of the grandchildren, Catherine, Joseph P. and Joelyn. Jacqueline is specifically disinherited.

[11] Similarly, in their *Proposed Findings of Fact* filed on the first morning of trial, the Petitioning Parties sought a finding, for the first time, that "Robert Bonanno misled his parents and unduly influenced [them] into executing the *first, second, third, and fourth amendments* of their trusts, thereby entrusting all their assets to him based on Robert's promises . . . ." Id. ¶202 (emphasis added)(Index #76); compare *First Amended Petition* at 21(Index #43).

before the hearing, ruled from the bench that any new or additional claims raised in these newly filed answers would not be considered as part of this case. Attorney McCandless told the Court that he understood, but had filed the answers to preserve the tort claims for appeal on behalf of his new clients. The Court reiterates that it will not entertain these additional claims as they were not timely, nor properly, filed.[12] See Cir. Ct. – Prob. Div. R. 135; see generally, Coan v. New Hampshire Dep't of Envtl. Servs., 161 N.H. 1, 10–11 (2010)("amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence"); RSA 514:9.

The Court observes that after close of Petitioning Parties' case, Robert sought dismissal of all claims on basis that: (1) there was no undue influence; (2) the Petitioning Parties did not offer proof of a confidential relationship; and (3) there was no enforceable promise to share made by Robert. The Court deferred ruling on the dismissal pending conclusion of the case. At this juncture, the Court **DENIES AS MOOT** the request made during trial as, although the Court concludes that there was a confidential relationship between Robert, Armando, and Nancy, the Court nonetheless otherwise rules in Robert's favor.

B. Potential Conflict of Petitioners' Counsel

The Court pauses to address concerns it expressed, and that remain, over representation of the *Petitioning Parties* by a single attorney. When the initial petition

[12] Counsel is an experienced trial attorney, and the Court is surprised at this late attempt to amend the pleadings. Indeed, the Court queries whether counsel for Joelyn and Joseph P. fully explained the likelihood of success on these claims. The Court observes that during trial, Joseph P. explained that he initially endeavored to stay out of the litigation and did not decide to join the case until after his deposition in May, when he was led to believe that he might be entitled to additional bounty from his grandparents' estate if he joined the suit.

was filed in this matter on January 17, 2017, Joseph M. was the sole petitioner, and was represented by Attorney McCandless. The *Petition*, see Index #1, identified Joelynn (sic) and Joseph Paul as children of Joseph M. At that time, Joseph M. and his children had been estranged for many years. As noted earlier, the *Petition* sought only to invalidate the Third Amendment of the trust. Joseph P. and Joelyn initially wanted nothing to do with the lawsuit and were not involved until well after the court scheduled the matter for a multi-day trial in June 2018 by order issued December 4, 2017. See Index #15. At that time, although there continued to be flurries of discovery disputes, the only two parties were Joseph M. and Robert.

On February 22, 2018, Joseph M. and Joelyn filed a joint *Motion to Intervene*, seeking to add Joelyn as a party. Attorney McCandless filed the petition on behalf of each, having now filed an appearance as counsel for Joelyn. See Index ##31, 32. In its order of March 26, 2018, the Court addressed the issue of Joelyn joining the case at this late stage of the proceedings. In granting the *Motion to Amend*, the Court noted that Joelyn had been added as a party in the *Proposed Amended Petition*, and, on that basis, denied her *Motion to Intervene*, as moot. See Order dated March 26, 2018 at 2 (Index #40). Contemplating that new orders of notice would issue, the Court admonished Attorney McCandless to read the provisions of Rule 1.7 of the Rules of Professional Responsibility, noting that it appeared that these two clients would be competing for the same trust assets and the Court questioned whether one attorney could represent both parties under the rule. See id. at 10-11. The Court further ordered Attorney McCandless to comply with Rule 1.7 (b)(4) and obtain written consents from both parties should he elect to proceed with representation of them both. Id. at 11.

As noted above, a new version of an *Amended Petition* was filed on April 13, 2018 (Index #43) in compliance with the March 26th Order. In this version, Joelyn Boulanger, Joseph P. Bonanno and Catherine Bonanno were added as parties "BUT NOT AS RESPONDENTS". See Index #43. Orders of notice were issued with a May 15, 2018 return date. Joseph P. Bonanno was served by the Merrimack Sheriff's office, Attorney Kenison accepted service on behalf of the Respondent and Attorney McCandless accepted service on behalf of Joelyn Boulanger. Mr. McCandless filed another appearance on behalf of Joelyn on May 3, 2018, but did not file the waivers of conflict as previously ordered. Catherine Bonanno, Robert's daughter, sent a letter to the Court, after being served, indicating that she did "not want to participate in this case or have any involvement in it." See Index #49. No party sought a continuance of the June trial which had now been scheduled for several months.

Robert filed an answer to the amended petition on May 24, 2018. See Index #61. On June 4, 2018, two weeks before the scheduled trial, the Court issued a supplemental scheduling order addressing pending motions, and scheduling a motions hearing for June 8, 2018. See Index #64. In the order, the Court once again addressed its concern about the conflict, stating: "[t]he Court will also discuss with counsel for Joseph and Joelyn why representation of them does not present a conflict of interest, and further, why he has still not complied with the Court's Order dated March 26, 2018 concerning notice of compliance with New Hampshire Rule of Professional Conduct 1.7(b)(4)." Id. at 2. Apparently in response to this order, Mr. McCandless filed a written consent form signed by Joseph M. and Joelyn, along with a *Motion to Seal* (Index #66). On June 12, 2018, one week before trial, Mr. McCandless filed an appearance on

behalf of Joseph P., see Index #68, and filed a nearly identical consent agreement with all three signatures and a *Motion to Seal*. See Index #69. On June 14, 2018, the Court received answers from Mr. McCandless, on behalf of Joelyn (Index #70) and Joseph P. (Index #71). These answers, discussed above, alleged new facts concerning specific bequests of property allegedly made to Joelyn and Joseph P., raised for the first time, attempted to re-introduce the tort claim alleging Intentional Interference with Inheritance, and, most notably, for the first time alleged that the Second Amendment to the Trust was invalid.

As noted above, the relief sought by Joelyn and Joseph P. are denied in their entirety. The claims were not timely brought, and provided no opportunity for opposing counsel to file objections, let alone conduct some basic discovery on the claims.[13] The Court also observes that testimony at trial was also not helpful in proving the Petitioning Parties' claims. It was evident from Joseph P's testimony, which the Court found credible, that he initially had no intention of joining this litigation. He had not spoken to his father in years and did not want to be involved in the case. Joseph P. testified that it was only after being deposed in the litigation on May 16, 2018 and being informed by Attorney McCandless that he was entitled to approximately $200,000.00 from his grandparents' trust that began to take an interest. Based on his testimony, however, it was clear he never had any expectation of such inheritance prior to his deposition. As discussed below, at one point his Uncle Robert was offering to buy him a pickup truck

[13] It appears that counsel realized at the last minute that even if he were successful in setting aside the Third and Fourth Amendments to the Trust, that his client(s) take nothing under the Second Amendment. By attempting to open this door at the last minute there was an attempt to change the material term of the trusts at issue, that which specifically leaves everything to Robert in the event that he survived his parents. Joseph M. is not a distributee, and Joelyn and Joseph P. only take from the Bonanno Trust if Robert predeceased Armando and Nancy – which obviously did not come to pass.

and he thought at the time that this might be his inheritance. He also testified that his grandfather had promised to give him a firearm but, again, this claim was raised at the last minute and with virtually no notice to the Respondent and will not be entertained by this Court. Joelyn's testimony similarly suggested that she had been informed by her father's counsel that she was "in the trust" and therefore entitled to a share of her grandparent's estate. She also testified that she had been promised jewelry by her grandmother many years before. Joseph M., the initial client of Mr. McCandless, testified that he understood the estate would be split three ways, one-third to him, one-third to Robert and one-third to Jaqueline. He further testified that the grandchildren were "not part of the plan," and to the extent they would receive anything from the trust, it would be through his share.

While the final outcome of the case is not affected as the evidence simply did not support any of the claims made, the Court concludes that its concerns about potential conflicts were well-founded. Both the pleadings and the testimony of the three Petitioning Parties did not put forth a consistent theory. Because the Court has found that none of the Petitioning Parties have met the burden to prove a case under the various theories, no harm has come from the conflict as it played out in the proceedings.[14] The Court feels compelled, however, to advise the Petitioning Parties' counsel that he should be more cautious in the future and carefully consider the conflicts which can arise under Rule 1.7 when representing multiple parties with potentially conflicting interests.

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[14] This finding, however, assumes that had each party been represented by their own counsel, there still would not have been even partial settlement(s) by Joelyn, and/or Joseph P. (It is not clear whether, or to what extent Joseph P. or Joelyn participated in the unsuccessful March 29, 2018 mediation. See Index #41. Even if they had, it is an open, and ultimately unanswerable, question whether one or the other would have settled if represented by independent counsel.)

C. The Bonanno Family

The Court now proceeds to decide the merits of the case. It begins with a discussion of the Bonanno family dynamics. Nancy and Armando Bonanno were born in 1922 and 1923 respectively, married in 1944, and raised three children to adulthood in Concord, New Hampshire. Nancy was described as social, strong willed, outgoing and opinionated, and although nurturing, could exhibit, at times, an explosive personality. Armando was described as humble and easy-going. He was quieter, and more reserved, than his wife, but equally strong-willed and caring. Both struggled with long term effects of traumatic experiences of their youths,[15] but these challenges did not hinder their ability to make decisions concerning the disposition of their assets.

Although the Court concludes that they cared for all three of their children – Robert, who was born in 1946, Susan, who was born in 1950, and Joseph M., who was born in 1952, – their relationship with each was not easy, and could sometimes be strained. Indeed, medical records show that Nancy complained to health care providers that Susan bullied her and that she had difficult relationships with them. See Exh. UU 1 (Medical Notes dated 10/28/04; 11/26/04). Susan, at least toward the end of her life, lived in Italy, and Nancy in particular was devastated when Susan passed away from breast cancer while living in Italy in July 2007.

Their relationships with both the Petitioner and Respondent can fairly be described as dysfunctional. There was credible testimony that both parents were disappointed with Joseph M. for a perceived lack of personal success as a mason, carpenter, and roofer, and his inability to make well-considered financial and life

[15] There was evidence presented that Nancy was a sexual assault survivor and Armando witnessed the horrors of war during his service in the Pacific Theater during World War II.

choices. For example, later in life, Armando sold some real estate in Massachusetts and promised to share the proceeds with Joseph M., however, he gave him the funds over time as he did not trust Joseph M. to use the cash wisely if given a lump sum. In addition, Joseph M.'s visits to the family home were irregular, and often fraught with discord. The Court finds that although Nancy would sometimes give Joseph M. cash to help him out when he would visit, they also did not have a great deal of trust in him, even changing the locks on their house at one point to keep him out when they were not home. Joseph M. did not have a close relationship with his children, and it could be fairly found that he was estranged from them for several years before this matter was filed.

Importantly, although there was conflicting testimony on this point, the Court concludes that there was credible testimonial evidence that Nancy and Armando were upset with Joseph M. for selling the family camp on Tom's Pond in Warner, New Hampshire in December 2002. Specifically, Nancy and Armando purchased a small camp on the Tom's Pond, and an adjoining lot, as a vacation property when their children were young. Joseph M. began living fulltime at the camp in high school, and lived there for many years rent free.[16] In their initial estate plans, namely the May 1997 Will(s), Nancy and Armando specifically directed that after their death, the camp would be deeded to Joseph M, in addition to his receipt of a one-third share of their estate. See R's Exh. G. In August 1997, however, Joseph M. was deeded ownership of the

[16] There is a dispute whether Nancy and Armando or Joseph M. paid the taxes. In addition, Joseph M. contended that he put a lot of work into the camp, however, others testified that Nancy and Armando felt that he had not taken good care of it.

Tom's Pond Camp and the underlying parcels of land for $1.00.[17] See R's Exhs. Z-AA. In 2002, Joseph M. sold the camp and did not share the proceeds with his parents. See Exh. DD. Although it is disputed whether Nancy and Armando were angry with Joseph M. for selling the camp and pocketing the proceeds, several third party witnesses testified that they were unhappy with the sale. Even Joseph P. stated that Armando regretted deeding the camp to his father.

The Court observes Nancy and Armando's relationship with Robert could be difficult as well. Robert and his wife Judy had significant financial assets, and although proud of this, relations could still be tense. During adulthood and until his retirement, Robert lived and worked outside New Hampshire in a family business owned by his wife's family. Until he retired, Robert rarely ventured to New Hampshire to visit his parents. After retirement, he returned to New Hampshire on a more regular basis, spending his winters in Florida and summers at a home on Lake Sunapee. There was credible testimony that although in regular telephone contact with them, Robert could sometimes, intentionally or not, criticize his parents cruelly, which made them unhappy. The Court does not conclude that Robert's criticism was intentionally cruel or harsh, but, based upon other testimony concerning advice given a niece, and that of Joseph P. concerning Robert's conversations with Nancy, the Court is inclined to believe that Robert often offered, sometimes unsolicited, advice that was more direct and harsh in tone than that which may be otherwise deemed by the average person as socially appropriate. Indeed, it appears to the Court that Robert acts like a "know-it-all." Certainly this appears true in his dealings with his nieces and nephew, and the Court

[17] It is disputed whether Joseph M. informed his parents that his neighbors, the Bean Family, intended to also deed their property to him. See R's Exhs. EE-FF. In any event, the transfers were made on August 11, 1997. See R's Exh. Z-AA.

concludes that based on testimony at trial, it was likely true of his dealings with his parents as well. Nevertheless, likely because of his business background and status as eldest child, Nancy and Armando did seek his advice on a variety of matters. Notably, however, as discussed below, they were capable of rejecting that advice, including their refusal to move to assisted living and by naming Joseph M. as successor trustee.[18] Nancy, in particular, could respond harshly to Robert as well – as evidenced by testimony that following an argument on one particular birthday, she threw Robert and Judy out of her home and disposed of birthday presents in the trash.[19]

The Court also concludes that the Bonanno siblings, in particular, Robert and Joseph M., had uneasy relationships with each other as well. They were not close, and the brothers rarely spent time with each other unless at family gatherings. There was evidence that Robert did not approve of Joseph M.'s less privileged lifestyle and rent-free use of the Warner camp. In addition, Nancy and Armando indicated to others that Robert was not pleased that Joseph M. pocketed the proceeds from the sale of the camp, and that Robert's wife Judy, in particular, felt that the value of the sale should be deducted from Joseph's M. distribution(s) from the Bonanno Trust. It is clear that since childhood, Joseph M. considered Robert a bully. The relationship did not improve upon the death of their parents. The evening that Nancy died, January 5, 2016, Joseph M. sent his brother a text, acknowledging that he would be in charge of the estate, "2 bad we lost Nancy Well hows it feel to be king of the shit house now." Two days later,

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[18] Joseph P. testified that sometimes Armando listened to Robert, "sometimes not." Similarly, Nancy, who was not afraid to speak her mind, sometimes could be submissive to Robert, but other times would not listen to him.

[19] Although not necessary for its determination that Nancy and Armando were not always swayed by Robert's opinion, the Court observes that Robert testified that when he attended settlement conference on a personal injury claim made by his parents, they rejected his advice that they hold out for a higher sum than offered by the defendant-and the claim was settled against Robert's advice.

Joseph M. called Attorney Masland demanding a copy of the trust, threatening to sue him if it wasn't provided. Joseph M. had somewhat of an obsession with the case involving Lorraine Gabusi, suggesting to his niece Jacqueline Hudkins that he'd like Robert to be "put in jail." He texted Robert that he should "punch in State vs Loraine Gabusi wouldn't want 2 c u get in trouble wit the state", suggesting that he "cod get in a lot of trouble theft by deception very bad mabe prison U woldnt last"[20] Later text exchanges between Robert and Joseph M. show that there may have been weak attempts at a brotherly relationship, but there is clear enmity between them, and a certain amount of superiority on Robert's part. See R's Exh. GGG.

Nancy and Armando had four grandchildren, Catherine Bonanno (Robert's daughter), Jacqueline Hudkins (Susan's daughter), and Joelyn and Joseph P. (Joseph M.'s children).[21] Although they spent time with each as children, near the end of their life it seemed that they were particularly close with Joseph P.,[22] who spent the most time with, and caring for, his grandparents. As a child, Joseph P. lived with his mother[23] in a home nearby Armando and Nancy and was a frequent visitor at their home. In 2008, he lived at their home when he was experiencing some personal and professional challenges. After moving from the home, getting married, and starting his family, Joseph P. remained close to his grandparents, visited them with his children, and continued to assist them with transportation and home projects as needed.

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[20] State v. Lorraine Gabusi is a reported criminal case. See 149 N.H. 327 (2003). Prior to the criminal matter, this judge presided over a probate case in 1998 involving allegations and findings of undue influence, which then led to indictment of Mrs. Gabusi, her conviction, and a state prison sentence.

[21] Joelyn and Joseph P. are step-siblings.

[22] Nancy and Armando, late in life, had a rocky relationship with Jacqueline. Although proud of her accomplishments as a lawyer, they disagreed with the use of her inheritance from Susan's estate and felt abandoned by her.

[23] Joseph P. did not live with his father for long, if at all, and they do not appear to have a close relationship. That said, he was close to, and supportive of, his grandparents.

Joseph P. testified credibly that when he struggled with maintenance issues with his plow truck, Nancy and Armando indicated that after they passed, he would have some money to buy a reliable truck and/or be taken care of by his Uncle Robert. They did not, however, give Joseph P. any details about their plans nor did they draft and execute any documents to benefit him. Cf. Lemire v. Haley, 91 N.H. 357(1941)(equity does not enforce oral contract to grant devise in will). There were not any specific discussions as to the meaning of what his grandparents meant by "being taken care of," instead, it was often offered as reassurance when he was having personal challenges. Joseph P. testified that there was no specific promise that he would inherit a percentage of their estate, just, in his words, a "hint" that all family members would receive "something." He never heard Robert specifically promise to take care of him or share the estate with anyone. Armando only specifically indicated that he would receive a limited edition Smith & Wesson firearm, and had given Joseph P. some ammunition. Notably, none of the documents executed by Nancy and Armando – even those whose validity was undisputed in the *First Amended Petition*, made any specific, direct, bequests to Joseph P., who never had more of an interest in the trusts than as a contingent beneficiary.

After Armando died, Robert sent Joseph P. a $500 personal check for in a birthday card purportedly from Nancy. See Exh. 157. He also gave him approximately $500 in cash after Nancy died. Robert also offered to pay for a new plow truck and aggressively weighed in on the make and model of it. The purchase was never consummated after Robert had a disagreement with a salesperson. Although initially Robert indicated that he was using his own money to purchase the vehicle, he later

indicated that given the pending lawsuit he was unable to make the purchase. Joseph P. testified that he has never received the gun.

As a child, Joelyn also had a close relationship with her grandparents. She briefly lived at the Tom's Pond camp, but at a very young age moved to Manchester to live with her mother. She often visited Nancy and Armando, and had her own room in their home. Although unclear, it appears that she remained close with her grandparents until they died.[24] Joelyn claims that her grandmother set aside jewelry in a box with her name on it, and that Joelyn was unhappy that a collection of Beanie Babies purchased for her was not saved and given to her by Robert. Like her brother, however, none of the documents executed by Nancy and Armando – even those whose validity was undisputed in the *First Amended Petition*, made any specific, or direct, bequests to Joelyn.

Finally, and importantly, the Court makes the following findings concerning the nature of claimed "promises" or "assurances" Robert may have made to his parents that certain family members would either "be taken care of" or given a share of the residue from the Bonanno Trust. The Court observes that it heard many different iterations of assurances/statement/hints, and parties and witnesses alike offered differing understandings, of what "promises and/or assurances" were allegedly made by Robert, if at all, to his parents and the nature of Nancy and Armando's understanding of them.[25]

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[24] There was some testimony indicating that after Armando's death Joelyn was supposed to have lived with Nancy and help care for her, but never did. The exact terms of this understanding, and if it was Robert's only and opposed by Nancy who valued her independence, remains in dispute.

[25] The Court observes that at first, there were disputes between the parties concerning the admissibility of certain statements to the effect that Nancy and Armando told others that they would share the proceeds of the Bonanno Trust with various family members. On multiple occasions, before and during trial, the Court reminded counsel that former New Hampshire Rule of Evidence 804(b)(5) concerning an exception to the hearsay rule for statements of a deceased person in probate matters was struck from the rules effective July 2017. As such, testimony concerning statements made by Armando or Nancy that are

Indeed, Robert testified that he in fact promised/assured his parents that since Joseph M. was less well-off, he would ensure that Joseph M.'s basic health care and other needs were met. He denies, however, offering to share, in part or in whole, the proceeds from the Bonanno Trust directly. From Joseph M.'s testimony, it is fair to conclude that he feels as though his basic needs, including healthcare, are presently met. He resides in a setting where rent and utilities are taken care of, he owns a vehicle, and is able to meet his needs with social security income and Medicare.

As discussed more fully below, although the attorney drafting the Bonanno Trust and amendments took note that he thought Robert would establish separate accounts for family members, he testified credibly that those notes were his own supposition and it was never clear what, if any, the understanding between Nancy, Armando, and Robert was concerning "taking care of" family. Most notably, Joseph M.'s trial testimony that he would receive a distribution from the Bonanno Trust proceeds and then his children would (at some undisclosed time) receive something from him, is at odds with his own pleadings.

D. Nancy and Armando's Estate Plans

The Court now turns to review the specifics of Nancy and Armando's estate planning documents that are at the heart of this dispute. Notably, they executed, with the assistance of counsel, six iterations of an estate plan between 1997 and 2014. See R's Exhs. A-M; W. Although the Court will focus primarily on the events surrounding the

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hearsay would not be admitted, subject to objection or agreement by the parties, unless admissible under another exception(s) to the hearsay rule. At first, many statements to that effect were objected to by counsel for Robert and the Court made various rulings concerning admissibility. Although many of these statements were ultimately allowed in, the Court notes that although it does not give significant weight to any hearsay statements offered and objected to, even if admissible, it is clear that there was no definite and discernable understanding of the nature of any "promise/assurance" made by Robert or "hint[s]" to that effect discussed by Nancy and Armando, and that certain decisions were made in reliance on any alleged promise.

Third and Fourth Amendment – as those documents are subject to challenge – it will briefly address the entire history of their estate plans for context. In doing so, it is mindful that it is well-settled New Hampshire law that a settlor's/testator's intent is discerned, "whenever possible, from the express terms of the trust [or will] itself," Shelton v. Tamposi, 164 N.H. 490, 495 (2013)(settlor); King v. Onthank, 152 N.H. 16, 18 (2005)(testator), and that "[a]lthough extrinsic parol evidence is inadmissible to vary or contradict the express terms of a trust, such evidence may be received to determine the settlor's intent where the language used in the trust instrument is ambiguous." Bartlett v. Dumaine, 128 N.H. 497, 505 (1986); see, e.g., Simpson v. Calivas, 139 N.H. 1, 8 (1994) ("where the terms of a [trust] are ambiguous, . . . extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the [trust]").

In May 1997, Nancy and Armando executed wills drafted by a friend who was an attorney in Massachusetts. See R's Exhs. G, K; P's Exh. 15. These wills were nearly identical, with the survivor among Nancy and Armando receiving the entire estate, and after the death of the survivor, they provided for certain specific bequests of property with the residue split three ways between Robert, Susan, and Joseph M. equally with their issue to take by right of representation, per stirpes. See R's Exhs. G, K. Both Nancy and Armando's wills specifically devised to Joseph M. the Tom's Pond property. Id.

In 1998, Nancy and Armando contacted Concord attorney Thomas N. Masland for further estate planning advice. See P's Exh. 15. After meeting with Nancy and Armando, and reviewing their options, the Bonanno Family Trust was drafted and executed on May 17, 2000. The original Bonanno Trust provided, in pertinent part, that

after the death of both Nancy and Armando, the assets in the trust would be split equally between their three children, with the grandchildren taking per stirpes should a child predecease Nancy and Armando. See R's Exh. A.[26] Robert was named successor trustee, and should he be unable or unwilling to serve, Susan was named as his successor. Since the Tom's Pond camp already had been deeded to Joseph M., it was not mentioned in the Bonanno Trust, nor was there any indication that the shares would be equalized for this inter vivos gift. Id.; see also P's Exh. 17, 19.

After the Tom's Pond camp was sold in December 2002, see P's Exh. DD, Nancy called Attorney Masland, stating that the camp had been sold and Joseph M. had pocketed the proceeds. She stated that her other children, in particular Robert and his wife Judy, were upset and she wanted to know how to "deal with it." P's Exh. 20. After a meeting on January 3, 2003, which Robert and Judy attended, to address changes due to the sale of the camp and to provide for Susan's daughter Jacqueline should Susan predecease her parents, see P's Exh. 22-23, Attorney Masland drafted the First Amendment to the Bonanno Trust. See P's Exh. 24; R's Exh. B. In his testimony,[27] Attorney Masland observed that the discussions held in January 2003 were "animated," as apparently all discussions with Nancy and Armando tended to be. He did not specifically recall whether Robert and Judy were angry at the meeting about the sale of the camp, but he believes they were upset. He also recalled that Nancy and Armando

[26] In correspondence from Attorney Masland, the Bonanno Trust was originally intended to provide that should a child predecease Nancy and Armando, the share of that child would be split between his/her siblings. See P's Exh. 18; Bonanno Trust §4.2. It appears from Attorney Masland's testimony that the distributive provision in the final document changed so that it would be consistent with the 1997 Wills, which, per Nancy and Armando's choice, remained in effect.

[27] The Court finds that Attorney Masland testified credibly as to his recollection of the events in question. It notes that Attorney Masland practices in the same law firm as counsel for Robert, and took that fact into consideration when evaluating his credibility. Still, the Court found that Attorney Masland testified credibly and directly answered all questions posed to him, during a very lengthy examination.

were upset about it as well. The First Amendment provided that should the net trust estate after their deaths total more than $225,000, then Joseph M. would receive $100,000 less than his siblings. See R.'s Exh. B. Moreover, if either Robert or Joseph M. predeceased Nancy and Armando, the remaining sibling(s) would split the proceeds. This effectively removed any interest the children of Robert and Joseph M. had in eventual distribution of trust assets. However, the First Amendment also established a subtrust for Jacqueline should Susan, who had been diagnosed with breast cancer, predecease Nancy and Armando. See R.'s Exh. B. After the original amendment was drafted, Armando sent a note to Attorney Masland stating that he was holding them for Robert to review when he returned to New Hampshire. P's Exh. 25. The First Amendment was executed on September 5, 2003. R's Exh. B. Attorney Masland testified that although he could not recall whether Robert or Judy was present when the amendment was executed, it was very unlikely that they attended the signing.

After Susan died on July 13, 2007, Nancy and Armando sought to make additional changes to the Bonanno Trust. At first, Nancy indicated in a phone call that since Susan had died and left her estate to Jacqueline, they wanted the residue of the trust to be split equally between Robert and Joseph M. Contemporaneous notes from Attorney Masland's file also indicated that he perceived some estrangement between Nancy and Armando and Jacqueline.[28] See P's Exh. 26. Less than a month later, on January 2, 2008, however, Nancy called Attorney Masland back, indicating that because Joseph M. had done "something unforgiveable" during the Christmas holiday, she wanted Robert to be the sole beneficiary of the residue of the trust. See P's Exh.

[28] Jacqueline's testimony confirmed that there was an estrangement over her mother's funeral and Jacqueline avoiding contact with family after her mother's death.

27. She also brought up the fact that he had taken the proceeds from the sale of the Tom's Pond camp. He testified that she made it clear that the holidays had been "miserable," and that she did not want the trust to benefit Joseph M.

Later that month, on January 30th, Attorney Masland spoke with both Nancy and Armando. They re-affirmed that they did not want to set up and fund a trust for Jacqueline since she had not "been a good granddaughter," and that none of the residue should distribute to Joseph M. after their deaths. See P's Exh. 29. At the time of their discussion, Nancy and Armando were unsure about what would happen to the residue if Robert predeceased them. Id. Attorney Masland testified that the issue of the Tom's Pond camp was brought up again during the telephone conversation.

Nancy and Armando also indicated during that call that Robert "promised to take care of [Joseph M.] and is already helping him out." Id. Attorney Masland testified that he did not know how the "promise" factored into the decision to amend the trust or what Nancy and Armando meant by "take care." The Court notes that there was no mention of any "promise" by Robert in the notes to the earlier January 2nd phone call concerning the alleged "unforgiveable" act. Further, although the executed Second Amendment, see R's Exh. C, directs that Robert alone is to receive the residue of the trust, it does not mention a "promise" by him as being required before distribution or as offered in exchange for the distribution. Id. It was clear to Attorney Masland at the time he drafted the Second Amendment, and at the time that it was executed, that Armando and Nancy were estranged from Joseph M., and that their clear intent was to disinherit him, with no conditions.

Notably, although the Second Amendment eliminated a trust for Jacqueline, at some point Nancy and Armando reconciled at least in part after being invited to her law office and being favorably impressed. See Exh. 32. As such, Nancy and Armando directed that she be named successor trustee to Robert. In addition, the grandchildren, whose interests were removed by the First Amendment, were now named as equal contingent distributees of the residue of the trust if Robert predeceased his parents. See R's Exh. C. Nancy and Armando executed the Second Amendment on February 8, 2008, id. and, per their instructions, a copy was sent to Robert who was not present at the signing. See P's Exh. 34.[29] Wills executed by Nancy and Armando the same day, see R's Exhs. I; M, state that Susan is deceased and that they are "estranged" from Joseph M. Id.

Three years later, in March 2011, Nancy contacted Attorney Masland again, insisting that Jacqueline be removed as alternate executor to the 2008 Will(s) and as an alternate successor trustee and contingent distributee of the trust because Armando and she felt abandoned by Jaqueline. See P's Exh. 35, 38. On March 21st, Armando indicated to Attorney Masland by phone that he wanted two granddaughters removed as contingent distributees of the trust and from being named in the Will. See P's Exh. 39.

On May 11, 2011 Attorney Masland had an office conference with Nancy and Armando to discuss changes to the trust and the will(s). See P's Exhs. 40-41. Robert was in attendance. At this May 11th meeting, Nancy and Armando indicated a desire

[29] The Petitioning Parties implied that sending a copy to Robert indicates that he had influence or control over his parents when the Second Amendment was signed. The Court notes, however, that it is not unusual for a settlor(s) to send copies of trust amendments to successor trustees.

that none of the grandchildren be named contingent beneficiaries.[30] They also indicated that they wanted Robert to be successor trustee, but that there was no clear candidate after Robert for trustee should he be unable or unwilling to serve. At the meeting, it was decided that the amendment would be drafted naming Joseph M. as an alternate to Robert. Attorney Masland noted "they were estranged [from] but perhaps have made some form of reconciliation." P's Exh. 41. They continued to express a desire to leave all the residue to Robert, and "sa[id] that he has promised to care for his brother." Id. Nancy and Armando reject the suggestion by Attorney Masland that they leave the assets in equal shares to the brothers as "they would rather leave everything to Robert and have him provide for his brother." Id. There was no elaboration in the record as to what it meant "to provide for" or "care for" Joseph M., and their specific intent remains unknown even after many days of trial.

Notably, Nancy and Armando also rejected certain precatory language suggested to them by Attorney Masland that he stated would not have created a legal obligation, but would have made clear a statement of their intent. Specifically, he suggested that they include a statement in the amendment that they "leave everything to Robert confident that he will carry out our wishes and his promises to see that other family members are cared for and their needs met." Id. A few days later, on May 13, 2011, Nancy contacted Attorney Masland, and put drafting of the Third Amendment "on hold" as they had consulted Robert and he apparently indicated that he did not believe it is a good idea to name Joseph as alternate given concerns over his health and the possibility that his wife will take the inheritance. See P's Exh. 42.

[30] They apparently were disappointed in their grandchildren, in particular Jacqueline. They believe Catherine is well cared for, and indicated that they do not want to leave anything to Joseph P. and Joelyn. Id.

A year later, Nancy and Armando returned to Attorney Masland and scheduled a meeting to finalize the terms of the amendment on July 18, 2012. In one preliminary phone call between Attorney Masland and Nancy on July 13, 2012, with Armando and Robert chiming in, it appears that he was directed that if Robert predeceased his parents, then "shares" of the residue would be split between Catherine, Joseph P., Joelyn, and, at the suggestion of Robert, Joseph M. See P's Exh. 44. Attorney Masland had another phone conversation with Nancy, in advance of a planned meeting, and she directed that Joseph M. would be named as alternate trustee – despite Robert's misgivings.[31] See P's Exh. 47. Attorney Masland then drafted the Third Amendment for their signature. Id.

At the July 18th meeting, Nancy and Armando confirmed that they did not want Jacqueline to have a role or benefit from their estate or trust. Id. Importantly, Attorney Masland recorded the following:

> An ongoing concern is the possibility that Bobby will predecease them. He is named as successor agent and under the document is left the entire estate. It *appears* that Bobby's intention will be to maintain anything he receives in separate accounts and act as an 'informal' Trustee providing funds to his brother and the other beneficiaries over time, rather than keep it for himself.

Id. (Emphasis added). At the hearing, Attorney Masland testified credibly that the term "informal trust" was his own description of an understanding that over time family members may be helped by Robert if in need. Nancy and Armando specifically rejected any formal trust mechanism, and at that meeting, he did not recall Robert indicating/promising that he intended to set up separate accounts, or even sharing

[31] Joseph M. was also named as successor agent in their advanced directives and other medical authorizations. See id.

specific amounts of the assets with others. Attorney Masland did note that "I spoke to Bobby about possible Trustee arrangements and I think the family will continue these discussions." Id. As such, the Court concludes that at least by the date of execution of the Third Amendment, there was no clear understanding about: (1) the nature, details, and extent, of any "promise" made by Robert; and (2) the meaning of the terms "share" with or "take care of" other family members.

Attorney Masland counseled them again that they should create a formal trust for Robert and others, but Nancy and Armando insisted on making Robert the sole beneficiary as they expressed "disappoint[ment] in other offspring". Id. They rejected Robert's suggestion that Joseph M. not be named as alternate trustee, but "remain[ed] concerned over his ability to manage funds." Id.

Consequently, the Third Amendment was executed on July 18, 2012. See R's Exh. D. All assets in the trust after the death of both Nancy and Armando were to be distributed to Robert alone. If he predeceased his parents, the residue was to be shared equally between Joseph M., Catherine, Joseph P., and Joelyn. Joseph M. was named alternate successor trustee to Robert should he be unwilling or unable to serve upon the death of Nancy and Armando. See id. An extra copy was made for them if they wanted sent it to Robert. P's Exh. 49.

Finally, Attorney Masland contacted Nancy shortly after Armando died on March 25, 2014, offering advice concerning management of her affairs and offering, as suggested by Robert, that they meet. See P's Exh. 53. After that meeting, the Fourth (and final) Amendment was executed on April 2, 2014, naming Robert as Co-Trustee with Nancy, and giving both the ability to act unilaterally. See P's Exh. E.

E. Nancy and Armando's Relevant Medical History

Finally, the Court reviews Nancy's and Armando's medical history as the Petitioning Parties allege it is relevant to the issue of undue influence. As noted below, although being medically infirm can make a person more susceptible to the influence of others, cf. Harvey v. Provandie, 83 N.H. 236, 240 (1928), the Court in this matter concludes that although Nancy and Armando struggled with health issues as they aged, these challenges ultimately did not tend to show undue influence by Robert.[32] In forming this conclusion, the Court reviewed numerous medical documents submitted by the parties, and approximately 4½ hours of video testimony and a deposition transcript of Nancy and Armando's long-time physician, Dr. Ioan Christian Badau, who had been their primary care physician since 2005. See P's Exhs.TT; UU; VV; *Revised Motion re: Exhibits 25 and UU-1 and Badau's Deposition Exhibits.*[33] See Index # 81. It found Dr. Badau's testimony to be thoughtful and well-considered.[34] He testified that despite their

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[32] Indeed, although Nancy in particular may have struggled with depression and a mild mood disorder, it appears to have made her more combative and volatile, thus it is equally possible that she became less susceptible to the influence of others.

[33] The Court notes that although numerous medical records were submitted in the trial binders, many were not admitted as full exhibits at trial. Following trial, the parties conferred, and the Petitioning Parties submitted a *Revised Motion re: Exhibits 25 and UU-1 and Badau's Deposition Exhibits* with a list of agreed-upon medical records to be reviewed by it, in addition to those admitted at trial.

[34] The Court, by comparison, did not give significant weight to the testimony of Dr. Eric Mart, cf. Powley v. Lessard, 117 N.H. 991, 995 (1977)(in a case alleging abuse of a confidential relationship, the Supreme Court opined that the finder of fact is "not required to accept the testimony" of a proffered expert), as he is not a medical doctor nor did he know the Bonannos. The Court observes that he opined that *anything* that makes a person uncomfortable or causes increased pain or anxiety increases susceptibility to undue influence to an unknown degree, and does not find this base-line belief persuasive as, taken to its logical conclusion, most, if not all, people over a certain age would be necessarily susceptible to undue influence. Cf. id. (court did not disturb "uncoerced wishes of [the property owner] simply because of age, for the aged have as much right to control and dispose of their own property as the young").

In addition, it appears to the Court that in rendering his opinion, Dr. Mart focused only on those factors that would favor a finding of susceptibility, and did not adequately consider countervailing facts or explain why they did not affect his analysis of undue influence. While Dr. Mart testified to numerous examples of indicia that could be indicative of undue influence, he acknowledged that a number of indicia were not present in this case and the "fact that there are indicia doesn't necessarily mean that there's any funny business." In short, this testimony was not helpful to the Court in making its factual findings necessary to decide whether the Respondent exerted undue influence over his parents. Cf. Fenlon v.

many health challenges - including chronic physical conditions and emotional issues - both maintained an ability to make informed consent concerning their medical care until late in life, and certainly during the time-frame that the Third and Fourth Amendments were executed. As to Armando, Dr. Badau testified that he had above-average mental acuity for his age group and remained able to make health care decisions at least until February 2014. He opined that Nancy, despite an incident in December 2011/January 2012, where her care team was briefly, and Dr. Badau admitted likely mistakenly, concerned about her mental health, was able to make informed decisions about her health care and was able to communicate and demand that her wishes were followed. He testified that many times she chose not to follow his advice. Indeed, he expressed an opinion that Armando and Nancy generally made their own medical decisions and that until Nancy's power of attorney was activated in November 2014, well after all amendments to the Bonanno Trust, it was his experience that Robert deferred to the wishes of his parents.[35]

Briefly, the testimony and medical evidence provided reveals that Armando, although suffering from hypertension and lymphoma and taking medications for an atrial fibrillation and depression, approximately six-and-one-half weeks before he died demonstrated a "normal mood and affect; normal attention span and concentration." See e.g. *Revised Motion re: Exhibits 25 and UU-1 and Badau's Deposition Exhibits*, Tab 9 (Index #81)(Office visit 2/7/14). Dr. Badau testified that Armando, although elderly, had fewer medical issues than his peers, and the conditions he did have did not

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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]").

[35]Indeed, the records reviewed by the Court reveal that most often, Robert did not accompany them to their medical appointments, and, especially in Armando's case, is barely mentioned.

adversely affect his decision making. A review of his medical records leading up to, and directly following, execution of the Third Amendment, see R's Exh. VV at 00212-00283 (records between 1/25/10-8/23/12), support Dr. Badau's testimony. Indeed, until his admission to the hospital days before his death on March 25, 2014, where his records reveal that due to extremer drowsiness he was unable to stay awake, id. Tab 10 (hospital admission record 3/23/14), Armando was alert and able to actively participate in, and direct, his medical care. The evidence further demonstrated that Armando managed the family's finances and wrote checks for the household bills up until a few days before he died, without help from the Respondent or others. R's Exh. SS.

Nancy's records reveal a history of a variety of illnesses, including diabetes and hypertension, along with indications that she was under stress following Susan's death in July 2007. See *Revised Motion re: Exhibits 25 and UU-1 and Badau's Deposition Exhibits*, Tab 12 (Index #81)(Office visit 2/5/08). Although she mostly presented as "alert and cooperative; normal mood and affect; normal attention span and concentration," see, e.g. id. at Tab 14 (Office visit 4/9/10); Tab 15 (Office visit 12/21/10), she struggled with anxiety and depression and could have an explosive personality. This condition was exacerbated by Armando's death in March 2014. Id. Tab 17 (ER visit 6/14/14).

Dr. Badau, however, testified credibly that despite her anxiety and sometimes emotional behavior,[36] Nancy was consistently able to express her wishes concerning

[36] Nurse Julie Percy testified about a series of provider notes from 2000-2009 where Nancy appeared to be in an elevated emotional state, particularly when her daughter Susan was struggling with, and then eventually died from, breast cancer. Notably, these provider notes, which involve a period during which Nancy executed trust amendments whose validity is not challenged, for the most part show a higher level of stress, anxiety, and volatility than those presented concerning the time period during which the Third and Fourth Amendment were executed. See generally, P's Exh. 171.

her medical care and make well-informed choices up until activation of the power of attorney for health care in November 2014, over seven months after execution of the Fourth Amendment. Like her husband, a review of his medical records leading up to, and directly following, execution of the Third Amendment, see R's Exh. UU-1 at 00426-00742 (records between 11/27/09-10/19/12), support Dr. Badau's testimony. During this time, Nancy could become anxious, however, she was capable of making informed independent decisions about her health care and whether or not to engage in certain procedures. See e.g. id. at 00573 (Concord Orthopaedic Surgery Note 8/9/10)(observing that Nancy understood nature of back procedure).

At trial, Nurse Julie Percy testified to an incident in December 2011, seven months before the Third Amendment was executed. On December 21, 2011, Nancy contacted Dr. Badau's office about medical records that had been sent to her lawyer by the clinic, as she was involved in litigation concerning an automobile accident in 2009. See P's Exh. 171. Nancy presented as very angry that records sent to her lawyer included a notation that she was dancing three times per-week. She disputed that this statement was accurate, and was angry because she believed the inaccuracy had "sabotaged" her case. Nurse Percy indicated in her note that Nancy was "explosively yelling," kept perseverating about the notation, and would not calm down. Nancy accused the medical practice of "telling lies" and accused them of ruining her life. Nurse Percy testified that she called Robert, who verified that Nancy was angry and stated he was concerned about "increasing issues." He noted that on November 16, 2011, he

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Notably, however, provider notes closer in time to the Third and Fourth Amendments also describe her a presenting as a nice or "very pleasant" elderly woman, despite testimony that she could also have a volatile personality. See, e.g. see R's Exh. UU-1 at 00542 & 00564(hospital admission/discharge notes for 7/31/10 & 8/3/10).

visited his parents on his birthday and Nancy became "very argumentative." A "huge altercation" followed and "Nancy ended up throwing [Robert and his wife Judy] out of the house." She also demanded he return the gifts she gave him – and he complied. Id. at 00770 (Note dated 12/29/11). Concerned about Nancy's behavior, and believing she exhibited paranoid behavior, Nurse Percy recommended that they "activate our emergency [plan]" to ensure Nancy and Armando's safety. Id. at 00770-00771. Nurse Percy, on the basis of this angry phone call, opined that her "diagnosis is likely dementia with behavioral disorder [and] paranoid delusions." Id. at 00771.

Dr. Badau, based upon Nurse Percy's notes, activated an "emergency plan" that involved contacting law enforcement and emergency medical responders. The following day, Nurse Percy recorded a phone call from Robert voicing concerns about Nancy's mental health and noting that "he has tried to bring up the issue of assisted living in the past, which has not been well recepted [sic] by [Nancy and Armando]."

Dr. Badau testified that the next day, Armando called the office. Nurse Percy returned the call, and explained to him why the emergency plan was activated. She further stated that he indicated Nancy was not home, and Nurse Percy jumped to the conclusion that he was "calling in secret." Id. 00786. After Dr. Badau expressed concern that Nancy had gone missing, Nurse Percy called Armando back. He confirmed that Nancy was at her "regular" Friday hairdresser appointment and has "calmed down nicely." Id.

Dr. Badau testified that a few days later, Nancy was contacted by the nursing staff supervisor who reviewed the situation because of it "unusual" nature. Nancy objected to how Nurse Percy handled her care. She stated that she was "embarrassed"

and "humiliated." Id. In his trial deposition, Dr. Badau stated that although at first he was inclined to suggest a psychiatric evaluation for Nancy, after meeting with Armando and her a few months later in February 2012, see generally, *Revised Motion re: Exhibits 25 and UU-1 and Badau's Deposition Exhibits* at 0711 (Index #81), he did not think it was necessary. He indicated in his trial deposition that Nurse Percy's phone diagnosis of dementia was not appropriate since she did not meet with the patient and was reacting to an angry phone call. He further noted that after meeting Nancy and Armando in person a few months later, he continued on with his prior plan of care and did not add as a current diagnosis dementia or a behavioral disorder like paranoia. The Court has reviewed both the notes and testimony of Nurse Percy and Dr. Badau and concludes that the phone diagnosis of dementia was likely premature, and as such, she was not suffering from this condition when executing the Third Amendment seven months later in July 2012.[37] Indeed, Dr. Badau did not activate her health care power of attorney until more than two years later in November 2014.

It was also alleged during these proceedings that Nancy was more likely to be influenced by others as she might have been abusing prescription medication. Specifically, Nancy and Armando were involved in a car accident in 2009 where their auto was hit in the passenger rear side by a driver who ran a red light and Nancy hurt her back . See generally, R's Exh. UU at 00502 (Office visit 5/13/10). She was prescribed Vicodin "as needed for pain," See generally, R's Exh. UU. However, despite suggestions by the Petitioning Parties otherwise, there was no indication of significant drug overuse that would have rendered her subject to undue influence at the execution

[37] In Dr. Mart's testimony discussing his review of the medical records, he noted that there was little mention of Nancy's mood disorder during the 2012 timeframe.

of the Third and Fourth Amendment. Indeed, during his trial deposition, Dr. Badau credibly debunked the allegation of drug misuse during this time, testifying that he never had any reason to believe she misused narcotics or that her "as needed" Vicodin prescription interfered with her ability to make informed medical decisions. Her records reveal concerns about her ability to properly use her medications following her release from a rehabilitation/nursing facility in November 2014 following a hip fracture, however, this was well after the documents were executed. See id. UU-1 0963; 00985-00987.

The Fourth Amendment was executed on April 2, 2014. See R's Exh. E. It is clear from medical provider notes from a routine follow-up appointment later that month, see R's Exh. UU-1 at 00768-773, that she was grieving over the loss of Armando. Her records indicate, however, that she was alert and cooperative with a normal affect, attention span and concentration. Id. A few months later on June 14, 2014, she went to the Emergency Room, complaining of abdominal pain. Id. at 00774. The cause of the pain was unclear, and she had multiple tests taken. Notably, a CT scan of her brain was normal, and showed "no acute process." Id. at 0783. Shortly after her discharge, however, she was readmitted for slurred speech, id. at 00820-25, and although a stroke was ruled out, id. at 00822, doctors noted that the family may need to consider placement in assisted living. Id. at 00821. After consultation with Nancy and Robert, id., she was discharged home with some skilled nursing assistance. See id. at 00851 see generally, UU-4 at 00132. Notably, at intake on her second hospital visit, it was noted that the family "feel[s] as though she cannot take care of herself at home," R's Exh. UU-1 at 00820, and eventual "placement" was considered. Id.; see also id. at 00856. However, she was released to her home after her stay with nursing care. Id. at

00850-51. Her primary care team voiced concern about Nancy remaining at home after two hospitalizations, id. at 00855-56, however, Nancy told Dr. Badau that she felt "OK" at home. Id. at 0056. The team was concerned, but recognized that "[t]his has always been the patient preference (and [possibly] the family)" as they had for years discussed housing options with her. Id. at 00856. The Court concludes that despite her family's concerns about Nancy living alone, and her health issues, she prevailed upon them, and caregivers, to let her go home after the June 2014 hospitalizations.

Accordingly, both medical records, and those provided by the visiting nurses association, indicate that she was experiencing deep grief, however, she continued to live at home alone with assistance and that her comprehension was clear and was able to "express[] complex ideas, feelings, and needs clearly, completely, and easily in all situations and with no observable impairment." Id. at 00102-00103. Records indicate that despite her deep grief and palpable depression after Armando's death, she remained capable during the period immediately following execution of the Fourth Amendment, of communicating her beliefs and needs clearly, to make independent medical decisions, and understand complex ideas. See UU-4 00080-00137. Dr Badau testified credibly that until her power of attorney for health care was activated months later in November 2014 (after release from a rehabilitation facility and concerns about the risk of falling), see UU-1 at 0985-0986, she was able to make informed decisions concerning her health care and refused to consider living out her final days in an assisted living facility.

Nancy remained in her home, where she died on January 5, 2016.

II. Analysis of Claims

As discussed supra, there are eight surviving claims of *First Amended Petition* before this Court for consideration. The Court will address each one in turn. Again, it pauses however to note that as written, the *First Amended Petition* only seeks invalidation of the Third and Fourth Amendments. Under the unchallenged Second Amendment, Robert takes all, Joseph M. is disinherited entirely, and the grandchildren, including Petitioning Parties Joelyn and Joseph P. only take if Robert predeceases his parents. As such, none of the Petitioning Parties would have a right to trust assets even if the Court granted the relief requested in the *Amended Petition* on the basis that it invalidate the Third and Fourth Amendments.

A. Count I – Invalidity of the Third and Fourth Amendments to the Bonanno Family Trust

In their first claim, the Petitioning Parties seek to invalidate the Third and Fourth Amendments to the Bonanno Family Trust under RSA 564-B:4-406 on the basis that they were the product of Robert's undue influence[38] over Nancy and Armando. See *First Amended Petition* ¶¶102-108. They also seek to impose a constructive trust over any and all assets of the Bonanno Trust, and "the Estates of Armando and Nancy Bonanno" for the benefit of Joseph M., Joseph P., and Joelyn, and ordered reimbursement of fees and costs, including attorney's fees. Id. ¶108. The Court denies Count I because, although Robert was in a confidential relationship with Nancy and Armando, he has

[38] The *First Amended Petition* also sought invalidation on a theory that they lacked capacity. That claim was withdrawn before trial.

successfully demonstrated, by at least a preponderance of the evidence,[39] an absence of undue influence. In addition, it will not impose a constructive trust.

RSA 564-B:4-406(a) provides that a "trust is void to the extent that it was not validly created in accordance with this chapter or its creation was induced by fraud, duress, or undue influence." Determination of whether amendments to trust executed later in life are the product of undue influence is in the best of circumstances a challenging task for courts as the settlors' circumstances, health, and intent is rendered uncertain by his or her decease. Given this uncertainty and that direct evidence is typically unavailable or not entirely useful, the New Hampshire Supreme Court has often recognized that undue influence, or the lack thereof, 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 [settlor], the family relations, the [trust], [his] condition of mind, and of body as affecting [his] mind, [his] condition of health, [his] 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

[39] The Court observes that although the Petitioning Parties suggested that an absence of undue influence must be demonstrated by clear and convincing evidence, see *Petitioner Joseph Bonanno's Pre-Trial Statement*, ¶3(g)(Index #55), the Supreme Court recently indicated that the appropriate quantum of proof is by a preponderance. See In re Estate of Amy Marjorie Patnaude, No. 2017-0544, at 4 (Unpublished Order June 29, 2018). In any event, the Court also concludes that even if the appropriate standard was "clear and convincing," it would still conclude that the Third and Fourth Amendments were valid.

> 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).

"Undue influence" is defined in New Hampshire 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." Albee v. Osgood, 79 N.H. 89, 92 (1918). An instrument will not be invalidated, however,

> 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.

Id. 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. However, "importunity that could not be resisted," Albee, 79 N.H. at 92, or documents procured "for the sake of peace," 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 v. Bartis, 107 N.H. 34, 37 (1966). Consistent with these guideposts, Connecticut courts have explained that "pressure" in the context of undue influence is "[p]ressure, of whatever character, whether acting on the fears or hopes, if so exerted as to overpower volition without convincing the judgment, is a species of constraint under which no 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, 83 N.H. at 240; 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 v.

Provandie, 83 N.H. 236, 240 (1928); 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 [trust] 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] by a competent [grantor] and that, *in the absence of circumstances arousing suspicion*, the proponent of the [trust] is not required to offer express affirmative proof of the absence of undue influence." Id. (emphasis added). This "presumption of fact, which excuses such offers of proof, however, neither extinguishes the original issue nor shifts the burden of proof to the contestant. It simply suspends the requirement of further proof of the voluntary character of the [grantor's] act until it is called in question, if at all, by the submission of substantial evidence of undue influence by the contestant." Gaffney, 81 N.H. at 306-07.

Where a distributee is acting in a "fiduciary capacity" or is in a "confidential relationship" with the settlors, 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 part[ies] making the transfer." Archer v. Dow, 126 N.H. 24, 28 (1985)(inter vivos transfer); relying on Edgerly, 73 N.H. at 408-09 ("[W]henever it appears that the [donors were] dependent upon or under the control of the donee, and that the latter took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence." (will contest)); see, e.g., Patten, 67 N.H. at 528-29; In re Estate of Sharis, 990 N.E.2d 98, 102 (Mass. App. Ct. 2013)(grandson with power of attorney had "burden to prove that the will was not the product of his undue influence").

Until recently, it was unclear in this jurisdiction, however, the nature of the quantum of proof necessary to demonstrate an absence of undue influence. See generally 25 AM. JUR. 2D DURESS AND UNDUE INFLUENCE Weight and Sufficiency of Evidence §42 (noting split in jurisdictions over whether standard is preponderance, clear and convincing, or beyond a reasonable doubt). This Court, in prior cases concerning undue influence, applied 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. Its decision to apply that quantum of proof was recently affirmed by the New Hampshire Supreme Court, albeit in an unpublished decision, see In re Estate of Amy Marjorie Patnaude, No. 2017-0544, at 4 (Unpublished Order June 29, 2018), and as such, it will continue to do so in this matter.

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

In this case, the Court first concludes that Robert was in a confidential relationship with Armando and Nancy. Nancy and Armando were proud of their son Robert's business success, and although their relationship with him could be difficult, it is clear from the evidence presented that they sought out his advice on a variety of matters, and Robert was certainly not shy in giving advice. In this matter, Nancy and Armando did not keep their estate plans from Robert, and he was consulted by them on many estate matters during their later years. Important for this analysis is that just prior to execution of the Third Amendment, Robert participated both in a telephone call on July 13, 2012, and invited to attend the July 18th meeting during which the documents were executed. Armando and Nancy justifiably believed he would advise them with their interests in mind. And certainly, after Armando's death, Nancy sought the advice of Robert.

It is also abundantly clear that Robert benefited from the Bonanno Trust, and as such he has the burden of proving an absence of undue influence by a preponderance of the evidence. Here, the Court concludes that he has met this burden. As noted above, the Court concludes that the evidence demonstrated that both Armando and Nancy knew their own minds when executing the Third and Fourth Amendments. Notably, they ignored Robert's advice that Joseph M. not be named successor trustee, and he was blatantly unsuccessful in convincing them to appoint another person. He was also unsuccessful in convincing Nancy to move into a facility as she aged. Although they both respected him and asked for his advice, they did not always follow it. Moreover, the fact that Robert's advice was sought by his parents does not, by itself, equate to undue influence. See, e.g. Albee, 79 N.H. at 89 ("A testator may properly receive the advice and opinions of others, and though influenced thereby, there is no undue influence if he is not controlled to the extent of yielding his own judgment or will.")

In addition, other circumstantial evidence of undue influence was not present here. Specifically: (1) Robert did not reside in Nancy and Armando's home and they were not dependent on him for transportation or other activities of daily life; (2) he did not even live in New Hampshire for a large part of the year and did not have a strong physical presence in their lives; and (3) although he attended some of the meetings with Attorney Masland, he played no part in retaining him, and only was present at a small minority of Nancy and Armando's contacts with Attorney Masland. Finally, there was no evidence that he attempted to isolate Armando and Nancy, or that through this isolation they were physically and emotionally dependent on him. Accordingly, the Court concludes that the Third and Fourth Amendments were not the product of Robert's

undue influence. Cf. Bartlett v. McKay, 80 N.H. at 576 (the testatrix's "right to prefer" distributions to one child and not another will not be disturbed in the absence of evidence that a respondent imposed her will over the testatrix).

Having concluded that Robert did not exercise undue influence over his parents, the Court declines to impose a constructive trust over the proceeds of the Bonanno Trust on the basis the that Third and Fourth Amendments are invalid pursuant to RSA 564-B:4-406. The Court observes, that although in Count I the Petitioning Parties seek imposition of a constructive trust on the distributions made from the Bonanno Trust on the basis of lack of capacity, undue influence, or duress pursuant to RSA 564-B:4-406 only, even if it reads Count I broadly, they also have not made the case for a traditional imposition of a constructive trust based upon long held equitable principles. At common law, determination of whether the equitable remedy of constructive trust may be more broadly applied even in the absence of an invalid trust. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §55(a) Constructive Trust (2011)(quotations omitted); see, e.g., Milne v. Burlington Homes, Inc., 117 N.H. 813, 816 (1977). As such, "[a] constructive trust will be imposed whenever necessary to satisfy the demand of justice." In re Estate of Couture, 166 N.H. 101, 112 (2014)(quotations omitted). Although there are no rigid requirements for imposition of the equitable remedy of constructive trust, before a court imposes it, a petitioner generally must demonstrate "that: (1) a confidential relationship exists between two people; (2) one of them transferred property to the other; and (3) the person receiving the property would be unjustly enriched by retaining it, regardless of whether the person obtained it honestly." In re Estate of McIntosh, 146 N.H. 474, 478–79 (2001); see, e.g., In re Estate of Cass,

143 N.H. 57, 60 (1998). As such, some courts have held that even if a Respondent took the property interest honestly and intended to perform on a promise, either explicit or implicit, see Marcucci v. Hardy, 65 F.3d 986, 990 (1st Cir. 1995)(applying New Hampshire law), a constructive trust may be imposed for unjust enrichment arising from a failure to perform on that promise. Kachanian v. Kachanian, 100 N.H. 135, 137 (1956).

Assuming that the Petitioning Parties properly pleaded this claim, the Petitioning Parties have not demonstrated, by clear and convincing evidence, failure to perform even an *implicit* promise to take care of family members' needs.

B. Count II – Specific Performance

Next, the Petitioning Parties assert a claim for Specific Performance. See *First Amended Petition* ¶¶109-112 (Index #43). Specifically, they assert that certain promises were made by Robert and "accepted, exchanged for consideration, and detrimentally relied upon by Armando and Nancy," when they executed the Third Amendment. Id. at ¶110. Consequently, they assert that the Petitioning Parties "are entitled to enforce specifically the Promises," id. ¶111, and seek transfer of the equivalent value of all the assets in the Bonanno Trust at the date of Nancy's death be transferred to them by Robert individually.[40] They also seek reimbursement of their fees and costs, including attorney's fees. Id. ¶112.

"The granting of a specific performance of a contract is not a matter of right to which the party is entitled when he has proved his contract, but is always a matter of sound and reasonable discretion on the part of the Court in the exercise of which

[40] Again, the *First Amended Petition* seeks that *shares of* the assets be transferred to all three Petitioning Parties, id., however, at trial, Joseph M. asserted that all the assets would flow to him directly, and that in turn, he would share with his children.

discretion it grants or withholds relief according to the circumstances of each particular case." Bourn v. Duff, 96 N.H. 194, 200 (1950) (quotation and ellipses omitted). As such, in order to assert a remedy of specific performance, there must be proof that an oral contract existed. See generally, Cushing v. Thomson, 118 N.H. 292, 294 (1978). "To establish a contract of this character there must be an offer and an acceptance thereof in accordance with its terms." Id. (quotations and ellipses omitted). It is axiomatic that in determining the existence of any "contract," including oral contracts, "[i]n addition to offer, acceptance, and consideration, a valid contract requires that the parties assent to the same terms; that is, that they have a meeting of the minds. Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995).

Where an alleged oral contract involves a devise of property, the New Hampshire Supreme Court has indicated that proof of the contract must be made by clear and convincing evidence. See Sullivan v. Dumaine, 106 N.H. 102, 104 (1964). This heightened level of proof is required as:

> Much of the litigation concerning contracts to make wills has been prompted by nothing more than a feeling that the decedent ought to have made a certain property disposition and that he therefore must have contracted to that effect. To this it need only be said that moral oughtness, however strong or compelling, does not create a legally enforceable obligation. Guarding against an otherwise probable tendency to find a contract based on moral oughtness rather than upon offer and acceptance supported by consideration is the rule requiring a higher degree of evidence to sustain a contract to make a will than is required in contracts generally. While this rule has been variously stated, its most usual form is that the evidence of contracts to devise or bequeath must be clear and convincing.

Id. (quotations omitted).

In the present case, the Court concludes that the Petitioning Parties did not prove, by clear and convincing evidence,[41] the existence of a "contract" between Nancy and Armando and Robert that this Court should enforce. First, it is not clear whether there was ever a "meeting of the minds" between Robert and his parents as to the specifics of any "promise." After multiple days of trial, the Court cannot discern whether there was a "promise" to "share with" or simply "take care of" other family members. Certainly credible evidence of discernable percentage distributions of assets is not found. Indeed, the testimony of the Petitioning Parties was inconsistent as to what was "promised" as they did not agree on how any promised sharing of the Bonanno Trust assets should be allocated.

Moreover, there was not sufficient evidence of detrimental reliance on the amorphous "promise" in terms of the Third Amendment, as Robert already was due to receive distribution of all trust assets under the Second Amendment (which remains unchallenged in the claim for specific performance) and Joseph M. had been specifically disinherited. In addition, there is insufficient evidence to support a finding that even if Robert promised to "take care of" or "share" with the Petitioning Parties, that promise was intended to induce his parents to disinherit Joseph M. and possibly by extension Joseph P. and Joelyn.[42]

Consequently, the Court declines to order the specific performance requested by the Petitioning Parties. Count II is DENIED.

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[41]The Court also concludes that the Petitioning Parties would not have satisfied their evidentiary burden by a preponderance of the evidence either.

[42] This is even assuming that as third parties to the alleged "contract", the Petitioning Parties can assert a claim for specific performance. In addition, the Court observes that Joseph P. and Joelyn were never direct beneficiaries under any version of the Bonanno Trust. At best, they were entitled to distributions only if Robert, and in earlier versions of the estate plan, if Joseph M., predeceased their parents.

C. Count [III] – Breach of Duty By Trustee and Agent

Next, the Petitioning Parties assert a breach of fiduciary duty claim against Robert. See *First Amended Petition* ¶¶113-118 (Index #43). They contend that as trustee of Bonnano Family Trust, and as "trustee in fact" for Joseph M., Joseph P., and Joelyn, Robert had a duty to preserve and distribute trust assets to them. They contend that Robert breached his fiduciary duty by distributing the assets to himself, and therefore, he must pay all costs and damages, including attorney's fees and costs and exemplary or enhanced damages for willful, malicious breach of duties. Id. They also seek an order requiring Robert to submit a complete accounting of his acts as trustee and agent under a power of attorney. Id.

The Court DENIES COUNT [III]. Since the Bonanno Trust does not provide for any distributions to the Petitioning Parties, and therefore Robert, as trustee, does not possess a duty to distribute assets to them pursuant to the terms of the Bonanno Trust, the Court assumes that their claim is premised on creation of an oral trust. RSA 564-B:4-407 provides that: "a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence." Trusts may be created by, inter alia, a "transfer of property to another person as trustee during the settlor's lifetime . . . or other disposition taking effect upon the settlor's death." RSA 564-B:4-401(1). The Trust Code also provides that a trust can only be found created if: "(1) the settlor has capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust has a definite beneficiary . . .; [and] (4) the trustee has duties to perform . . . ." Similarly, at common law, "[t]echnical language or formalities [were] not necessary in order to create" a trust. In re Charlie's

Quality Carpentry, LLC, No. 02-11983-JMD, 2003 WL 22056647 at *4 (Bankr.D.N.H. Aug. 25, 2003). Intent of the parties was the touchstone, and as such, "there must be a proper manifestation of the intention to do so, either by the settlor or in communications between the settlor and the intended trustee." Id.

The Court holds that the Petitioning Parties did not demonstrate, by clear and convincing evidence, the existence of an oral trust, and thus Robert cannot be held accountable as a "trustee in fact." Most glaringly, the alleged trustee duties are undefined, and even the Petitioning Parties' witnesses and pleadings were inconsistent on the scope of those alleged duties.[43] It was never made clear whether Robert was to "share" trust assets, and in what proportion, or "provide for" or simply take "care of" family members.[44] and what exactly that term meant.

Moreover, the claim that Armando and Nancy intended for Robert to be trustee over property specifically held for Joseph M. (and possibly others) is belied by the fact that according to Attorney Masland's testimony, and supported by contemporaneous notes, they specifically rejected his strong suggestion that it would be most prudent to establish a formal trust for Joseph M. See P's Exh. 47. Instead, they indicated that they wanted all assets to be distributed to Robert and have him either "care for" or "provide for his brother." P's Exh. 41.

D. Count IV – Declaratory Relief

The Petitioning Parties also seek declaratory relief, see *First Amended Petition* at ¶¶119-122 (Index #43), that because of the claims preceding this one, Joseph M.,

[43] As noted above, the pleadings assert that Robert was to have shared trust assets equally with Joseph P., Joelyn, and Joseph M. In his testimony, however. Joseph M. indicated that he would receive his share of the trust assets and then, Joelyn and Joseph P. would take through him.
[44] The functional meaning of the phrase "take care of" is still a mystery to the Court.

Joelyn, and Joseph P. "are each entitled to equal distributions of the Trust corpus and the Property," id ¶120, and a "declaratory order setting forth the value and allocation of the distributions due" Joseph M., Joseph P. and Joelyn. Id. ¶122.[45]

Count IV is DENIED. As set forth in this Order, and indeed, as contradicted by Joseph P's own testimony, the Court cannot conclude that the Petitioning Parties are "*each* entitled to equal distributions" from the Bonanno Trust.

E. Count V – Determination of Trust Induced by Fraud, Duress, or Undue Influence (RSA 564-B:4-406)

The Petitioning Parties, in Count V, make similar claims, and seek similar relief to that sought in Count I. Id. ¶¶ 123-131. They assert that the Third Amendment is void as the product of Robert's undue influence over Armando and Nancy, or because it was executed due to Robert's promise he would share the property with Joseph M., Joseph P. and Joelyn. Like Count I, they seek imposition of a constructive trust over any and all funds in Robert's possession relating to the trust or the estate or assets of Nancy and Armando. Id. They also assert that the Fourth Amendment was product of Robert's undue influence over Nancy, seek an order declaring it void under RSA 564-B:4-406, and imposition of a constructive trust over any and all funds in Robert's possession to the Trust or the estate or assets of Nancy under the Power of Attorney.

For the reasons set forth in the Court's denial of Count I, the Court DENIES Count V. Simply put, the Petitioning Parties have not demonstrated that the Third and

[45] There is also a request for a declaration that because of Robert's "fiduciary relationship to his parents, Robert has the burden to prove that Catherine was intended to benefit from her grandparents' estate and Trust, rather than be excluded as identified by Armando and Nancy in May 2011." Given that Catherine has not participated in this matter and there was no evidence offered to support this allegation, the Court will not address it.

Fourth Amendments are invalid, and in the case of a claim of undue influence, Robert met his burden to show an absence of undue influence.

F. Count VI – Breach of Contract, including Covenant of Good Faith and Fair Dealing

The Petitioning Parties also seek relief pursuant to a theory that Robert breached the implied covenant of good faith and fair dealing, see id. ¶¶ 132-134, and "thus damaged Joseph, Joe P. and Joelyn, who have right to enforce promise and receive the benefits of good faith and fair dealing as third party beneficiaries." Id. at ¶134. They also contend that the "breach is and has been willful and malicious" and therefore seek exemplary and or enhanced compensatory damages and attorney's fees. See id. ¶¶135-136.

The common law doctrine concerning the covenant of good faith and fair dealing involves "three distinct categories of contract cases: those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance . . . ." Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139 (1989). It appears from the *First Amended Petition*, that the Petitioning Parties assert that Robert has breached the implied covenant in performance of a contract he had with Armando and Nancy, and that as third party beneficiaries of that contract, they suffered damages.

Assuming without deciding that they could be compensated as third party beneficiaries for a breach to Nancy and Armando, the Court, for the reasons set forth above, has already concluded that there was no enforceable contract between Nancy and Armando and Robert. Cf. id. at 144 (in its analysis, a court must determine if

"competent evidence indicate[s] that the parties intended by their agreement to make a legally enforceable contract"). Therefore, it cannot conclude that he "thwart[ed] a reasonable expectation of the other party," id. at 141, pursuant to the terms of a contract that would entitle them to collect damages. The Court DENIES Count VI.

G. Count VII – Fraud

In their final substantive claim, the Petitioning Parties base their claim of entitlement to an equal distribution of assets in the Bonanno Trust on an allegation that at the time Robert made the alleged promise to his parents to "share" with Joseph M., Joseph P., and Joelyn, he had no intention to do so, and thus "fraudulently induced" Armando and Nancy to change their estate plans. See *First Amended Petition* ¶¶137-139. They further assert that Robert's conduct was willful and malicious and thus they are entitled to exemplary and/or enhanced compensatory damages and attorney's fees. Id. ¶¶135-136. The Court DENIES Count VII.

As this Court earlier recognized, see Index #40, to state a fraud claim under New Hampshire law, the Petitioning Parties must show that the Respondent "made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely on it," and that the party who relied on it, "suffered pecuniary loss due to justifiable reliance upon that misrepresentation." Snierson v. Scruton, 145 N.H. 73, 77 (2000)(quotations omitted); see also Gray v. First NH Banks, 138 N.H. 279, 283 (1994).

After review of the evidence, the Court, assuming that the Petitioning Parties, in particular Joseph M. given that he was already disinherited by the Second Amendment which is not at issue in this case, could recover damages from the alleged fraud on

Nancy and Armando, concludes that they have failed to demonstrate their claim. Although as noted earlier, evidence of the scope and nature of any "promise" made by Robert is thin and contradictory,[46] there simply is not sufficient evidence that Nancy and Armando's execution of the Third and Fourth Amendments was *induced* by any promise made by Robert. Instead, what is clear is that Nancy and Armando did not want Joseph M. to take directly from the Bonanno Trust. According to Attorney Masland's contemporaneous notes and testimony, they specifically rejected his advice that a trust be established for Joseph M., and they did not provide, except on a contingent basis, if at all, for their grandchildren.

To the extent there was an understanding that he would share, or take care of Joseph M. and possibly others, there is no evidence that Robert intended to make that promise to convince them to amend the Bonanno Trust.[47]

H. Count VIII - Exemplary/Enhanced Compensatory Damages and Attorney's Fees

In this count, the Petitioning Parties seek attorney's fees and exemplary and/or enhanced compensatory damages. See *First Amended Petition* ¶¶142-145. Count VIII is DENIED since the Petitioning Parties have not prevailed on the underlying claims against Robert.

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[46] Indeed, it may have been that there was a familial expectation of a moral duty to "take care" of family members, but there is no evidence that that Robert induced the amendments intending to defraud his brother.

[47] Indeed, the history of the Second Amendment, in particular the January 2, 2008 phone call from Nancy to Attorney Masland, see R's Exh. 27, appears to indicate that Armando and Nancy, for their own reasons, decided to remove Joseph M. as a distributee of the Bonanno Trust. They appeared to justify it by stating that their act would not leave him destitute since Robert "promised to take care of [Joseph M.] and is already helping him out." R's Exh. 29.

III. Cross Petition

Robert, in his *Answer* to the original *Petition* asserted a *Cross Petition* "notifying" the Court of his intent to seek authorization of payment of fees and expenses incurred to defend the Third and Fourth Amendments from the Bonanno Trust, or in the alternative, Joseph M. directly. See Index #61; see generally, RSA 564-B:7-709 (providing that a trustee "is entitled to be reimbursed out of the trust property, . . . [for] expenses that were properly incurred in the administration of the trust"); RSA 564-B:10-1004 (providing that a "court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust"); Tamposi, 164 N.H. at 502 (2013).

The *Cross Petition*, however, did not seek any affirmative relief, but simply put the Court on "notice" that it may seek a court order authorizing payment of fees. In his *Trial Memorandum of Law*, see Index #74, Robert affirmatively requests an award of fees and costs, and seeks to supplement the *Cross Petition* "at the conclusion of this action." Id. at 34. The Court deems the *Cross Petition* to be READ AND NOTED, and directs that should Robert, having prevailed on his defense of the trust amendments, seek the relief he noticed to the Court, that he file a motion for fees and costs setting forth the basis for, and amount of, his claim **within sixty (60) days of the date of this Order**. The *Petitioning Parties* may then reply or object in the normal course.

IV. Requests for Findings and Rulings

The parties in this matter submitted 491 separate requests for findings of fact, and rulings of law, see Index ##72, 76, and 79. "The purpose of requiring a written decision stating the findings of fact and rulings of law is to provide a basis for presenting

this court the questions of law arising on the facts found by the trial court. This purpose is fulfilled when the trial court files, in narrative form, findings of fact which sufficiently support the decision." Geiss v. Bourassa, 140 N.H. 629, 630-631; 632–33 (1996)(quotations, brackets, and ellipses omitted).

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).

SO ORDERED

Dated: 9/24/2018

David D. King, Judge