THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

ESTATE OF AMY MARJORIE PATNAUDE

320-2016-ET-00024

CONSERVATORSHIP OF AMY M. PATNAUDE

320-2014-GI-00323

ORDER

A final hearing on the merits of several disputes in these two matters, see Order dated March 15, 2017 at 4-5 (Index #51)[1]; Order dated April 17, 2017 at 2 (Index #58), was held on June 6-7, 2017. The central controversy concerns the validity of a codicil to a 2010 Will executed by Amy Patnaude ("Amy")[2] on December 11, 2014 (the "2014 Codicil"), roughly one year before she died at age 93. See Index #5. Doreen Demers, pro se ("Doreen"), as co-executrix of the 2010 Will and her sister, Barbara Fleeman ("Barbara"), as executrix under a 2014 codicil to Amy's 2010 Will, filed competing *Petition(s) for Estate Administration*. See Index ##1, 6. Also at issue is the *First and Final Accounting* in the Conservatorship filed by conservator Lisa Richmond ("Lisa"),

[1] Unless otherwise indicated, the Court will reference index numbers in the Estate of Patnaude, No. 320-2016-ET-00024 ("Estate Matter"). Documents in the Conservatorship of Amy Patnaude, No. 320-2014-GI-00323 ("Conservatorship"), will be referenced separately as applicable. A related small claims matter, In the Matter of Amy Patnaude v. James Demers and Doreen Demers, No. 320-2016-SC-0038 transferred to the Trust Docket with the Estate matter and Conservatorship in November 2016, was resolved by this Court in December 2016. See Order dated December 23, 2016 (Index #37).

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

37

see Conservatorship Index #8, daughter of Barbara. See Order dated March 15, 2017 at 4-5 (Index #51). Doreen also objected to certain entries in an inventory submitted by Attorney James G. Feleen, Esq. as Special Administrator of the Estate of Amy Patnaude. See Index ##21. Finally, Attorney Feleen, as Special Administrator, see Index #13, did not attend the trial, but has submitted an *Amended and Restated Motion for Payment of Legal Fees for Estate*, see Index #72; see also Order dated February 3, 2017 (Index #40), which the Court will address in this Order. Attending the final hearing were: Attorney R. Peter Decato on behalf of Barbara and Lisa; and Doreen, pro se, with the assistance of her husband James Demers. See Cir. Ct. – Prob. Div. R. 14.

After consideration of the pleadings, exhibits and testimony at trial, and applicable law, the Court **ORDERS** as follows:

- The *Petition for Estate Administration* (Index #1) filed by Doreen is **GRANTED IN PART**; the *Petition for Estate Administration* (Index #6) filed by Barbara is **DENIED**. The Court concludes that the 2014 Codicil is invalid as Barbara has not carried her burden of demonstrating that it was executed in the absence of undue influence. See infra. The Court also concludes that when she executed it, Amy was not sufficiently aware of the nature of her assets, such that the Court cannot, with confidence, conclude that it was validly executed.[3]
- The Court **ALLOWS IN PART** the Conservator's *First and Final Accounting*. See Conservatorship Index #8. Barbara is **DIRECTED** to reimburse the estate **$408.20** for her flight from Texas to New Hampshire in June 2015.

[3] This Petition is granted in part as the Court will not appoint Doreen and Barbara as co-executors. Rather, given the contentious nature of this estate, it is in the best interest that the neutral administrator remain in place until the estate is closed.

- The Court **GRANTS IN PART** Doreen's *Objection to Inventory of Fiduciary Dated June 28, 2016* alleging five objections to the Special Administrator's Inventory. See Index ##21 & 23. In light of the Court's rulings today, and granting a *Motion for Summary Judgment*, see Order dated December 23, 2016 at 9 (Index #37), the Court agrees reference to the note receivable from Doreen and her husband James ("Jim") Demers is improper. It also agrees that the estate should reimburse Doreen for her out-of-pocket expense to file the *Petition for Estate Administration*. See Index #1. The remaining objections are denied.
- An *Interim Accounting*, see Index #22, filed in June 2016, is **READ AND NOTED**, but otherwise **DISALLOWED AS MOOT**.
- The Court **GRANTS** the Special Administrator's *Amended and Restated Motion for Payment of Legal Fees for Estate*, without objection (Index #72).

I. Procedural Background

The Court begins its analysis by briefly outlining the extensive and unusual procedural history of this matter.[4] The testatrix, Amy Patnaude, executed a codicil to a 2010 Will on December 11, 2014, roughly one year before she died at age 93. Amy's original will was executed in 2010 and provided for small bequests to two children and a stepson, and that the residuary would be split between two daughters, Doreen and Barbara. It also provided that Barbara and Doreen would be co-executors of the estate. The 2014 Codicil, however, expressly disinherited Doreen because, according

[4] The Court pauses to observe that this matter was extensively litigated despite the limited nature of the assets at issue. Mediation was ordered twice and was unsuccessful. See Index ##18 & 37. The Court, in its initial status/scheduling conference was surprised and concerned at the disproportionate number of attorneys attending, and resources spent, on this matter. See Order dated December 23, 2016 at 2 n. 4 (Index #37).

to a statement in it, she "has taken money from me and not repaid any money I have loaned her." See Index #5.

Both Doreen and Barbara filed *Petition(s) for Estate Administration*. See Index ##1, 6. Notably, there was no petition requesting that the will (or codicil) be proved in solemn form, see RSA 551:2-a; RSA 552:7, as both Doreen and Barbara instead filed petitions for administration. See Index ##1, 6.[5] It further observes that the Court endeavored to make certain that both Doreen and Barbara understood, since nearly the inception of this case, that the issue to be decided by the Court was the validity of the Codicil on the basis of asserted lack of capacity and/or undue influence, as the case was somewhat less than artfully pled. See Index ##10 & 11 (summary statements); Order dated March 9, 2016 (Index #13).[6]

As a result of a motion by Doreen, see Index #4, and upon agreement of the parties, see Order dated March 9, 2016 (Index #13), an independent administrator, Attorney James Feleen, was appointed in March 2016. See Id. The Special Administrator filed an *Inventory* (Index #21) and *Interim Accounting* (Index #22). Doreen objected to the *Inventory*. See Index #23. Although she appeared by extension to object to the *Interim Accounting* as well, Id., no timely objection has been entered to the Special Administrator's *First Accounting* filed on June 23, 2017. See Index #71. The Court earlier deferred consideration of an interim request for fees, see Order dated February 3, 2017 (Index #40), pending submission of a first account. The

[5] The Court reminded the parties of this fact at the start of trial, and made clear that since no request for proof in solemn form was made, it considered the burden to be on the party propounding the codicil, Barbara, aided by certain statutory presumptions. See Infra. Although Attorney Decato, representing Barbara and Lisa, called the witnesses to the codicil's execution and its drafting attorney to testify, he did so for purposes of proving capacity.

[6] Indeed, as the matter proceeded to trial, this Court made clear in its orders the nature of the disputes before it. See Index ##45; 51.

Special Administrator, having submitted his *First Accounting*, see Index #71, has filed an *Amended and Restated Motion for Payment of Legal Fees for Estate*. See Index #72.

Amy filed for conservatorship in December 2014, see Conservatorship of Amy Patnaude, No. 320-2014-GI-00323, naming Barbara's daughter, Lisa, as proposed conservator. See Conservatorship Index #1. After a hearing in January 2014, Lisa was appointed on February 4, 2015. See Conservatorship Index #3. Shortly thereafter, both Doreen and Amy's other children, Melvin, Harry and Beverley, sent letters to the Court objecting. Lisa filed a responsive letter. See Conservatorship Index ## 4-6. The presiding judge read and noted the letters and responses, however, no action was taken to terminate the Conservatorship. In March 2015, Lisa filed an inventory showing assets $267,972.51 (including real estate valued at $108,000). See Conservatorship Index #7. In February 2016, Lisa filed a *First and Final Accounting*. See Conservatorship Index #8. An *Objection* to it was filed by Doreen in July 2016, alleging multiple errors. Conservatorship Index #10. It was late filed as Doreen alleged that a copy of the *Accounting* was not sent to her and she had to retrieve one from the Court herself. Id. Multiple responses and further objections to the *Accounting* were filed by the parties. See Conservatorship Index ##12-14. In September 2016, Judge Moran ruled that issues associated with the accounting would be addressed as part of a global resolution of all matters after a final hearing. See Index #11. Yet another *Objection* was filed by Doreen in October 2016. Conservatorship Index #25.

On December 1st, Lisa filed two pleadings, a *Motion to Dismiss the Objection to the Accounting*, Conservatorship Index #17, and a *Motion to Strike Attachment*. See

Conservatorship Index #18. These were denied by Order of this Court after a hearing in December 2016. See Order dated December 23, 2016 at 9-11 (Conservatorship Index #19).

Finally, the Court notes that a separate small claim action, see In the Matter of Amy Patnaude v. James Demers and Doreen Demers, No. 320-2016-SC-0038, filed by Lisa, was initially transferred to the Trust Docket with the Estate Matter and Conservatorship. See Index #30. The Court concluded, after a hearing, that the matter was barred by the applicable statute of limitations, and granted summary judgment in favor of the defendants, Doreen and Jim. See Order dated December 23, 2016 at 4-9 (Index #37).

As the matter progressed, Doreen's counsel withdrew, and she elected to continue pro se with the assistance of her husband, Jim. See Cir. Ct. – Prob. Div. R. 14; Order dated March 15, 2017 (Index #51). Upon prior orders of Judge Moran, Order dated September 12, 2016 (Index #28), and this Court, see Order dated March 15, 2017 (Index #51), the following matters were scheduled for the final hearing[7]:

- In the Conservatorship of Amy M. Patnaude, No. 320-2014-GI-00323, there remains for consideration the *First and Final Accounting*, see Conservatorship Index #8, and all objections and responses thereto, see Conservatorship Index ##10, 12-14, 25;
- In the Estate of Amy Patnaude, No. 320-2016-ET-00024, there remains outstanding a dispute as to the validity of the 2014 Codicil to the 2010 Will

[7] The Court observes that throughout this matter, the pleadings were generally not extensive. As such, it endeavored to clarify as often as possible what it considered to be the issues properly before it. These clarifications as to the issues to be decided at trial were not objected to by any party.

executed by Amy Patnaude on December 11, 2014, see Index #4, premised upon allegations of undue influence and lack of capacity; and

- In the Estate of Amy Patnaude, No. 320-2016-ET-00024, there remains to be considered the objections filed by Doreen Demers concerning the *Inventory*. See Index ##21, 23.

In addition, the Court will consider Special Administrator's *Amended and Restated Motion for Payment of Legal Fees for Estate* (Index #72) filed after the hearing by the Special Administrator on June 23, 2017, see Index #72, as no objections have been filed and it is ripe for consideration. See Cir. Ct. – Prob. Div. R. 58 & 108-A.

II. Applicable Law

A. Validity of the Codicil

The concluding language of the 2010 Will and 2014 Codicil indicates that they are self-proving. See RSA 551:2-a.; Index #5. The witnesses to the Will and Codicil specifically attest, in the document, that they signed the will "in the presence of one another," Id., and it is notarized. Id. Self-proved wills, although commonly allowed in common form, see RSA 552:5-b, :6, are subject to re-examination in solemn form. See RSA 552:7; :8. In that case, the proponent must demonstrate proper execution. See, e.g., In re Estate of Washburn, 141 N.H. 658, 661-664 (1997)(in probate of will in solemn form, proponent of will has burden of proving due execution); Ross v. Carlino, 119 N.H. 126, 129-30 (1979). Thus, "the propounding party has the ultimate burden of proof as to every fact which is necessary to the validity of the will," including production and examination of attesting witnesses. Ross, 119 N.H. at 130 (quotations omitted); relying on Perkins v. Perkins, 39 N.H. 163, 167 (1859).

Although as noted infra, analysis of undue influence and testamentary capacity are often closely intertwined, absence of capacity can itself be an independent basis for invalidating a testamentary instrument. See, e.g., Perkins, 39 N.H. at 167. The standard for establishing testamentary capacity is that the testator at the time of making a will:

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

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

Thus, this Court, when determining whether Amy possessed sufficient capacity to execute the 2014 Codicil, must inquire: "1) whether [she] possessed testamentary capacity to execute a will; and 2) if [she] had such capacity, whether the will is the

offspring of a delusion or was created during a lucid interval." In re Estate of Washburn, 141 N.H. at 662. As noted in a prior order, see Order dated May 8, 2017 at 3 (Index #66), courts are permitted to consider lay witness testimony concerning the mental capacity of a testator/settlor and susceptibility to undue influence by those who knew and actually observed the individual. See, e.g., Pattee v. Whitcomb, 72 N.H. 249, 252 (1903); relying on Hardy, 56 N.H. at 241, 244, 248.

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

B. Undue Influence

A court's evaluation of any matter involving an allegation of undue influence involves sorting through sometimes inconsistent documentary and testimonial evidence and careful assessment of the credibility of witnesses — many of whom enter the

courtroom having a personal stake in the outcome of the case. "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 [hers], 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)(quotations omitted). 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, . . . a testator may properly receive the advice, opinions, and arguments of others, and if, after all such advice, opinions, and arguments, the testator is not controlled by them to the extent of surrendering [her] free agency and yielding [her] own judgment or will, then there is no such undue influence as is required to be proved to avoid the will.

Id. (quotations omitted). The influence exerted must amount "to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion." Bartlett v. McKay, 80 N.H. 574, 574-75 (1923)(quotations omitted). Mere kindness and/or affection, id., or desire to gratify another, Albee, 79 N.H. at 92, whatever the motives of the influencer, cf. In re Estate of West, 522 A.2d 1256, 1265 (Del. 1987), is not sufficient to support a finding of undue influence. Id. However, "importunity that could not be resisted," Albee, 79 N.H. at 92 (quotations omitted), 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. 678, 680 (Conn. 1900).

Although the established test to prove undue influence appears rigorous, New Hampshire case law recognizes that undue influence, by its nature, is fact dependent. See In re Estate of Cass, 143 N.H. 57, 61 (1998). "Generally, a court considers all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties." Id. (quotations omitted). While a finding of incapacity is not required to conclude that distributions were the product of undue influence, cf. Gaffney v. Coffey, 81 N.H. 300, 306 (1924), it has been long recognized that "manifestly less influence is required to dominate a weak mind than to control a strong one." Harvey v. Provandie, 83 N.H. 236, 240 (1928); cf. Patten v. Cilley, 67 N.H. 520, 528 (1894)(quality of mind a material fact). The extent of dependency on the influencer is a factor to consider; as "[e]xperience has shown that in the great majority of cases transactions are not fair and honest in which a person procures a gift from one who is dependent upon him or in some way under his control." Edgerly v. Edgerly, 73 N.H. 407, 408 (1905).

As such, undue influence may be shown where "there is substantial evidence not only of opportunity and ability, but of design and accomplishment." Harvey, 83 N.H. at 240; Loveren v. Eaton, 80 N.H. 62, 64 (1921)(evidence showed opportunity and ability, but not accomplishment); Albee, 79 N.H. at 92 (opportunity does not equate with accomplishment); 36 Am. Jur. Proof of Facts 2d Undue Influence in Execution of Will §2

(elements of undue influence); cf. O'Rourke v. Hunter, 848 N.E.2d 382, 392-93 (Mass. 2006)("Four considerations are usually present in a case of undue influence: that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means." (quotations omitted)).

Determination of whether a codicil executed later in life is the product of undue influence is in the best of circumstances a challenging task for courts as the testator's circumstances, health, and intent is rendered uncertain by his or her decease. It also challenges the Court to determine facts and apply the law in a setting clouded by competing possibilities, namely whether an individual's modification of long held estate plans are motivated by an independent decision to favor one beneficiary or heir over other potential ones, or is the product of the undue influence of the benefitted party. On the one hand, courts understand that a testatrix has the right to prefer one child over another as a:

> testatrix ha[s] the right to prefer one of the children. That she was induced to do so by superior affection for or more intimate association with that one, or even by her suggestion or request, does not affect the will in the absence of evidence of fraud or imposition or coercion so strong as to substitute the daughter's will for the mother's.

Bartlett v. McKay, 80 N.H. 574, 576-77 (1923). On the other hand, undue influence, as one court has observed: "may be inferred from the nature of the testamentary provisions accompanied by questionable conditions . . . . When the donor is enfeebled by age or disease, . . . and the relation between the parties is fiduciary or intimate, the transaction

ordinarily is subject to careful scrutiny. . . ." Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920). As such, courts recognize that:

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

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

Given this uncertainty and that direct evidence is typically unavailable or not entirely useful, the New Hampshire Supreme Court has 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, 72 N.H. at 251 (1903); relying on Hardy v. Merrill, 56 N.H. at 241, 244, 248.

The Court now turns to the evidentiary burdens, and "whether [and, if so, when they lie] with the proponent of the will or the allegator of undue influence." Albee, 79 N.H. at 91. In New Hampshire, "the law presumes the absence of undue influence upon proof of the voluntary, formal execution of the will by a competent testator and that, *in the absence of circumstances arousing suspicion*, the proponent of the will 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 testator'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 testator, she has "the burden of proving an absence of undue influence. This [rule is] based upon the inference of undue influence which arises in cases in which the beneficiary of a transfer holds a position of trust and confidence with the party making the transfer." Archer v. Dow, 126 N.H. 24, 28 (1985)(inter vivos transfer); relying on Edgerly, 73 N.H. at 408-09 ("[W]henever it appears that the donor was dependent upon or under the control of the donee, and that the latter took an active part in procuring the gift, it may be inferred that the gift was procured by undue influence." (will contest)); see, e.g., Patten, 67 N.H. at 528-29; In re Estate of Sharis, 990 N.E.2d 98, 102 (Mass. App. Ct. 2013)(grandson with power of attorney had "burden to prove that the will was not the product of his undue influence").

"The term 'fiduciary or confidential relation' is a comprehensive one and exists wherever influence has been acquired and abused or confidence has been reposed and betrayed." Cornwell v. Cornwell, 116 N.H. 205, 209 (1976)(quotations omitted). A "confidential relationship" is found where "between two persons . . . one has gained the confidence of the other and purports to act or advise with the other's interest in mind. It is particularly likely to exist where there is a family relationship or one of friendship." Id. (quotations, brackets, and ellipses omitted).

It remains unclear in this jurisdiction, however, the nature of the quantum of proof necessary to demonstrate an absence of undue influence. See generally 25 Am. Jur. 2d Duress and Undue Influence Weight and Sufficiency of Evidence §42 (noting split in jurisdictions over whether standard is preponderance, clear and convincing, or beyond a reasonable doubt). In this instance,[8] the Court will apply New Hampshire's generally accepted quantum of proof in civil matters, preponderance of the evidence, see also RSA 464-A:26-a,V (burden for testamentary gifts of ward); Estate of Washburn, 141 N.H. at 660 (after presumption of competency rebutted, respondent must prove capacity by a preponderance), to the burden to prove the absence of undue influence where a contestant has demonstrated: (1) a confidential relationship; and (2) a benefit conferred. Cf. In re Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 2, 6 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016).[9] In an effort to be of assistance to the parties, in particular Ms. Demers, the Court provided the electronic cite to the Webber case in a pretrial order. See Order dated March 15, 2017 at 5 (Index #51).

C. Fiduciary Accountings

Doreen has also challenged the Conservator's *First and Final Accounting*. See Conservatorship Index ##8, 10, 12-14, 25. Conservators are "subject to all provisions of law now in force as to guardians as they apply to the estates of their wards," RSA 464-

[8] The Court adopts the analysis set forth by Judge Gary Cassavechia in recent Trust Docket cases addressing the quantum of proof conundrum. See Geraldine W. Webber, No. 318-2013-EQ-00694 (N.H. Cir. Ct. August 20, 2015) available at http://www.courts.state.nh.us/caseinfo/index.htm; cf. In re: Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 6 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016) (noting use of preponderance standard to quantum of proof necessary to demonstrate absence of undue influence as that standard had been advocated by both parties).

[9] The Court observes that in at least one state, if the fiduciary or confidential relation is a child of the donor, the burden does not shift as children are viewed as the natural recipients of a parent's bounty. See, e.g., Berkowitz v. Berkowitz, 162 A.2d 709, 711 (Conn. 1960). This exception has not been adopted in New Hampshire, cf. In re: Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 2 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016), and, as no argument was made that it should be, the Court will not now consider whether such exception should apply. See In re: Alice Stedman 1989 2013 Restatement, No. 2015-0717 at 6 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016).

A:15, and as such, are required, inter alia, to take marshal and protect the ward's assets, RSA 464-A:26, I, and account for them "faithfully." Id.; RSA 464-A:26, V; see also RSA 464-A:36. They are therefore also subject to statutes and court rules governing accounting standards, see Cir. Ct. – Prob. Div. R. 108, and fees. See RSA 464-A:23; Cir. Ct. – Prob. Div. R. 88 (compensation/fees must be reasonable). In addition, it is well-established at common law that "a conservator is under a fiduciary duty to collect and honestly account for all the assets of his ward," In re Guardianship of Richard A., 124 N.H. 474, 477 (1984)(quotations and brackets omitted), and they are "also under a positive duty not to use the ward's assets for his private profit." Massachusetts Bonding & Ins. Co. v. Keefe, 100 N.H. 361, 364 (1956). As such, conservators may be held liable for breach. See, e.g., Yeaton v. Skillings, 103 N.H. 352, 355 (1961).

D. Fiduciary Fees

This Court elucidated the applicable law in a prior order in this matter, see Order dated February 3, 2017 (Index #40), deferring consideration of payment of the Special Administrator's fees until an account was filed. See id. The standard courts apply to reimbursement of fiduciary and attorney's fees is well-established. Pursuant to Circuit Court - Probate Division Rule 88, fees and expenses charged by fiduciaries and attorneys are subject to court approval. Indeed the Court has a duty to examine all attorney's fees sought to be recovered from an estate for their reasonableness. See Cir. Ct.-Prob. Div. R. 88 (fees "shall" be subject to court approval and "shall be reasonable"); cf. Terzis v. Estate of Whalen, 126 N.H. 88, 94 (1985) ("Courts have a stake in

attorney's fees contracts; the fairness of the terms reflects directly on the court and its bar."(quotations omitted)). Fiduciary and attorney's fees

> shall be reasonable for the work, responsibility, and risk. Factors used to determine the reasonableness of a fee may include the time and labor required, the size of the estate, the requisite skill, the customary fee, a fee agreement, the results obtained, time limitations, and the length of the professional relationship.

Cir. Ct. – Prob. Div. R. 88. The Supreme Court has directed that "an executor is entitled to a 'commission,' . . . with the amount dependent upon the labor, risk, responsibility and trouble of each particular case." In re Estate of Rolfe, 136 N.H. 294, 298 (1992)(quotations and citations omitted). The Court notes that the above quoted list, as it applies to attorneys, is grounded in the applicable New Hampshire Rules of Professional Conduct, see id. at 299; see generally N.H. R. Prof. Conduct 1.5(a), is not a comprehensive one, and therefore courts look to not only these factors, but "any other appropriate circumstances" to formulate the proper fee to be awarded. In re Estate of Rolfe, 136 N.H. at 299. "Due to its skill, knowledge and expertise in the field, the probate court has broad discretion to determine what compensation is fair and reasonable in each case . . . [and] the trial court may rely on its own experience and knowledge as well as submissions [as] . . . it deems fit." In re Estate of Breen, No. 1-10-2077, 2011 WL 10069514 at *2 (Ill. Ct. App. June 1, 2011)(Probate Court in Cook County Illinois found on appeal to have properly reduced compensation rate of executor from $485 per hour to $50 per hour).

III. Facts

The Court, after consideration of the documents and testimony at trial, finds the following facts.[10] It incorporates by reference findings based upon undisputed facts in its prior orders.

A. Will and Codicil

As noted supra, the central issue in this matter is the 2014 codicil to Amy's 2010 Will, executed by her on December 11, 2014. See R's Exh. A; P's Exh. 1.[11] Amy executed her 2010 Will on September 28, 2010. R's Exh. A. The 2010 Will provided for small bequests to two children, Beverly Smith and Harry George, Jr., and a stepson, Melvin George, and that the residuary would be split between Amy's other daughters, Doreen and Barbara. It also provided that Barbara and Doreen would be co-executors of the estate. Id. Testimony at trial indicated that this will was prepared by Attorney Jon Auten and none have challenged its efficacy. The 2014 Codicil expressly disinherited Doreen because, according to a statement in it, Amy believed that Doreen "has taken money from me and not repaid any of the money I have loaned her." See P's Exh. 1. The 2014 Codicil also removed Doreen as co-executor. Id. Amy died on December

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[10] As is often the case in Will disputes, the Court finds much of the testimony of family members and allies less than credible as much of it was self-serving. Two "neutral" witnesses, Dr. John L. West and Mary Thomas from the New Hampshire Bureau of Elderly and Adult Services were the most credible.

In addition, the Court observes in advance that certain statements by Amy, although hearsay, fall under the exception to the hearsay bar under former New Hampshire Rule of Evidence 804(b)(5). That rule, repealed effective July 1, 2017, see Order dated April 20, 2017 (N.H. Supreme Court), was in effect during the trial and provides that statements of deceased persons are admissible "[i]n actions by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written . . . ."

[11] As noted supra, there was no specific pleading to prove the will in solemn form. Instead, Barbara and Doreen each submitted *Petition(s) for Estate Administration*. At trial, Doreen submitted trial exhibits marked as "respondent", while Barbara/Lisa's exhibits were marked as being offered by the "petitioner's". Although the Court is concerned that the parties confused their petitioner/respondent status, it will, for clarity's sake, adopt their designations of the exhibits, keeping in mind the relative burdens of proof as set forth infra.

23, 2015. See Index #2. Her death certificate indicates that the causes of death were kidney failure, lymphadenopathy, and "altered mental status (dementia)." Id.

The Court's determination of the efficacy of the 2014 Codicil is largely dependent on its determination, based on the testimony and record before it, of Amy's mental health and susceptibility to influence during the Fall and Winter 2014. Although the parties presented conflicting evidence on this point, it is clear to the Court that Amy was in failing mentation such that she became a human ping pong ball, alternatively the subject of attempted, and sometimes successful, influence of BOTH Doreen and Barbara (who acted in concert with Lisa). It is the Court's view that at times after September 1, 2014, Doreen, Barbara, and Lisa all attempted to take advantage of Amy in order to control both her financial assets and her person. Barbara and Doreen were both obviously motivated in large part by a desire to maximize their respective inheritance from their mother and, to a lesser extent, by their disdain for each other.

As noted earlier, there is no dispute that the 2010 Will was validly executed in September 2010. Nearly eight months later, however, Doreen, with the approval of her sisters, filed a petition for guardianship over Amy, see 320-2011-GI-142, alleging that it was necessary to protect her from physical harm and financial exploitation by Amy's new boyfriend "Bob" as "her cognitive reasoning skills have diminished." See P's Exh. 11. The petition was subsequently withdrawn by Doreen. See 320-2011-GI-142.

Two years later, medical testimony and records[12] indicate that Amy began to show concerning signs of mental decline. It is notable that she maintained enviable

[12] Amy's entire medical file was eventually entered without objection. See R's Exh. P.

physical capabilities into her nineties,[13] however, it is clear that her cognitive abilities were in decline. Dr. John West, whose testimony the Court found to be credible, was Amy's treating physician between November 2008 and August 2014. Dr. West testified that his notes indicated multiple signs of early dementia at least by September 27, 2013. See R's Exh. P. A subsequent note dated October 18, 2013 indicated that Dr. West opined that "Amy herself is beginning to show serious signs of dementia and is not really aware of things like the date, the president, etc. . . . [She] [i]s convinced that her eldest daughter is a thief." Id. He counseled that given Amy's declining mentation, she and her family should begin to consider drafting a medical power of attorney and durable power of attorney and tour facilities with a dementia unit. Id. In notes from Dr. West's final appointment on August 28, 2014, he opined that "[t]he only problem is that her memory is so poor" that she remembers "very little of what transpires." Her mood was noted to be "fine but [Amy] is her usual stubborn self. At the same time [she] has problems with simple orientation mentally as to date and other factors." The notes indicate a belief that if he administered a "mini-mental status exam" it "would be approx. 16." Id. At trial, Dr. West explained that this score is indicative of moderate dementia. The notes from this last visit include a diagnosis of dementia. Id. At trial, he testified that although his only formal mini-mental status exam was performed in May 2011,[14] this was the beginning of her mental decline. He stated that in 2011 he saw the

[13] It was apparent from the testimony and Amy's medical records that to nearly the end of her life, Amy maintained an active physical and romantic life. As noted infra, however, even though she could sufficiently take care of her daily physical needs, medical providers remained concerned about Amy's susceptibility to financial exploitation. See P's Exh. 10 (Letter from Nurse Practitioner Cameron Spivey dated Nov. 12, 2014).

[14] The score of this exam was 27 out of 30. See R.'s Exh. P (medical note dated May 31, 2011). In the medical records, Dr. West includes in his assessment "DEMENTIA W BEHAVIOR DIST." Id.

beginnings of dementia, and that Amy's mentation slowly declined for the next two years, when her dementia became more severe.

Beginning in September 2014, Amy began regularly seeing Nurse Practitioner Cameron Spivey. See R's Exh. P. In a note dated September 9, 2014, Nurse Spivey observes Amy has "some memory loss," but a dementia diagnosis is not listed. At this time, she is reportedly taking 0.5mg of Lorazapam for anxiety.[15] Although none of Nurse Practitioner Spivey's notes between September 2014 and September 2015 indicate dementia, see R's Exh. P, in a letter to the Bureau of Elderly and Adult Services dated November 12, 2014, she states that:

> [m]y assessment of her functioning and cognitive status, based upon my brief appointments with her, has been that she has some mild memory impairment that is most likely related to her age, and that when experiencing emotional stress, becomes flustered and has difficulty expressing herself in a clear, concise manner. Recent stressors stemming from family conflicts seem to have exacerbated these symptoms. Although my findings do not constitute a formal evaluation for mental competency, I have not seen any behaviors or actions . . . that would suggest that she is not able to take care of herself independently as far as performing activities of daily living in her own home. However, her memory impairment is to the extent that it would be advisable for a relative or caregiver to check on her on a daily basis, in order to ensure safe medication usage, safe use of appliances, and **to monitor her financial transactions to protect her from fraud.**

P's Exh. 10 (emphasis added).

[15] The Court observes that counsel for Barbara and Lisa before trial indicated that they would argue that any dementia diagnosis prior to October 2014 was the result of her reaction to Lorazapam and that when she executed the 2014 Codicil she was no longer taking the drug and therefore was clear thinking. However, no expert testimony was presented on the effects of that drug and that dosage on an elderly person, and therefore the Court cannot give this argument substantial weight.

Other credible evidence indicates to the Court that during the last fifteen months of her life, Amy was particularly susceptible to the influence of others.[16] BEAS was contacted not only by officials at Mount Sunapee Bank, see Infra, but Barbara and Doreen.[17] Notes of BEAS interviews of Amy, and testimony by Mary Thomas from BEAS, include notations that a mini-mental status exam performed by Ms. Thomas in November 2014, less than one month from when she would sign her codicil, showed that Amy suffered from "severe cognitive impairment." See P.'s Exh. 9. It also includes an observation that Barbara appeared to be suggesting answers to Mary's questions to Amy. Id. A December 18, 2014 report by BEAS finds Amy to be physically fit, but confused about her relationship to Barbara and Lisa. See P.'s Exh. 9. She also accuses Doreen of drugging her.[18] Id. Another interview conducted on January 6, 2015, observes that Amy appears to suffer from memory loss and she is unable to name the banks she has done business with for decades, "even with prompts from daughter." The interviewer notes that Amy cannot answer direct questions in detail. Id. Ten days later, another BEAS report concludes Amy is incapacitated. Id.

It is undisputed that although Amy was physically very spry, see supra, during the latter years of her life, family members often "checked in on her" and assisted with dispensing medication. Her daughter, Beverly Smith, testified credibly that for

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[16] The Court observes that each side presented conflicting testimony of witnesses sympathetic to their cause. For example, Doreen called a cousin, Susan Swan, who testified that on November 4, 2014 she took Amy to the local town hall to vote. Amy was unable to recite her own name, and had to redo her ballot. Barbara and Lisa called Barbara's daughter Julie, a home health aide they hired, Meena Cote, and Amy's boyfriend Peter Purick, all who highlighted her physical acuity, and testified that although sometimes confused, she was mentally sharp. Given the starkly different and one-sided nature of the testimony, the Court gives it little weight and instead relies more heavily on contemporaneous notes or testimony of neutral witnesses.

[17] None of these complaints resulted in a finding of elder abuse.

[18] Ironically, Doreen accused Amy's former boyfriend "Bob" of drugging Amy with sleeping pills. See R's Exh. P (notes of Dr. West dated September 27, 2013).

approximately eleven years, until Doreen returned to New Hampshire from Alaska, she primarily assisted her mother. After Doreen returned to New Hampshire from Alaska in 2007, she assumed the caregiver role through October 2014 – bringing Amy to appointments and assisting with daily medications. Beginning in 2011, she began helping her mother "pay the bills."

Barbara, who lived in Texas, did not undertake regular contact with Amy until the final fifteen months of Amy's life. The circumstances of the dramatic increase in Barbara's regular physical contact beginning October 2014 are notable.[19] Shortly after Amy's final appointment with Dr. West, Barbara's daughter, Lisa, went to Amy's home to style her hair in early September 2014.[20] Lisa testified that during this visit, she "noticed" a bank statement indicating that Amy owned an approximately $97,000 certificate of deposit held at Lake Sunapee Bank. She also observed that it was held "in trust for" Doreen, and, because she had worked previously for Claremont Savings Bank, she understood that designation to mean that the money would be payable to Doreen upon Amy's death.[21]

Shortly after this discovery, Barbara arrived unannounced from Texas on October 1, 2014. Ostensibly her visit was to "surprise" Amy for her birthday on October 5th. Notably, on October 3, 2014, Amy, Lisa, and Barbara went to Lake Sunapee Bank.

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[19] Although Barbara testified that her increased contact grew after she was unable to contact Amy by phone – she alleged because Doreen had unplugged it – the Court is not convinced that it arose from an unplugged phone, but instead the discovery of a $97,000 CD by her daughter.

[20] There was testimony that Lisa visited Amy approximately every month to five weeks to style her hair in the years leading up to September 2014. After the visit described infra, her involvement in Amy's life became more frequent, as did Barbara's.

[21] Testimony provided at trial indicates that a substantial CD was purchased at Lake Sunapee Bank in April 1991. By September 2014, the balance in this CD was $97,689.73. R's Exh. H. Two withdrawals were made on October 3, 2014 of $20,119.23 and $88,794.89 respectively. Id. In addition, an $18,483 CD was purchased on December 2, 2011. Id. It was held by Doreen and Amy as joint tenants with rights of survivorship. The latter CD had an ending balance of $18,675.66, was closed on October 3, 2014. R's Exh. H.

The customer service representative on duty that day, Nikole Howlett, testified that they came to the bank to change the composition of Amy's CDs. See generally Footnote 16, supra.; R's Exhs. G & H. Although Ms. Howlett did note that Amy was, at times, confused, she believed that Amy wanted her two CDs held at the bank (totaling approximately $116,365.39), see id., split into three roughly equal CDs held in trust for Doreen, Barbara, and Harry George. Although she testified that she did not notice direct coercion, it is also apparent that she never met alone with Amy. Ms. Howlett also agreed that Amy did not provide for, or mention, her daughter Beverly during their visit.

Barbara returned to Texas in mid-October. Doreen brought Amy back to Lake Sunapee Bank to ask about the changes to the CDs at the bank.[22] They sought to "change back" the beneficial interests of the CDs to Doreen. A bank manager, Mindy Turgeon, who was not involved in the earlier changes, was alerted by a customer service representative to intervene. Ms. Turgeon stated that she became involved because Doreen was directing the conversation concerning the CDs and was adamant that the change was what Amy wanted. Ms. Turgeon testified that the customer service representative was concerned because Amy appeared slightly confused and that Doreen did most of the speaking. Consequently, Ms. Turgeon insisted that she meet alone with Amy. She stated that because Amy was confused, she spoke with her as if she were a "five-year-old." However, she found that Amy consistently stated that she wanted the CDs split three ways. After her conversation with Amy, she spoke to Doreen who was insistent that Amy wanted the recent changes to the CDs reversed.

Ms. Turgeon testified that she ordered that the accounts be frozen until the bank received legal documentation that either: (1) demonstrated that Amy had sufficient

[22] Doreen testified that this occurred on October 21st.

mental capability to manage her own affairs; or (2) a guardianship or conservatorship was imposed. See also P's Exh. 7. She testified that she also contacted BEAS to report possible financial exploitation. Ms. Howlett testified that sometime later, Doreen, Amy, and possibly Harry George returned on a Saturday to attempt to close the accounts and were refused because the accounts had been restricted/frozen.[23]

On October 20, 2014, a very contentious "family meeting" was held ostensibly to discuss the fact that Amy was growing older. Approximately four days later, Doreen contacted Attorney Brackett L. Scheffy requesting that he draft a power of attorney for Amy naming Doreen as agent. He did so, and forwarded a blank document to her on October 31, 2014. On November 6, 2014, Doreen, Harry George, and Amy went to the town clerk's office to have the document witnessed and executed. Barbara returned from Texas November 7th. Using her authority as agent under the power of attorney, Doreen withdrew $1,000 from a bank account ostensibly to pay Attorney Scheffey's bill, and some related expenses. The power of attorney was revoked on November 14th. Doreen testified that that same day, Amy executed a "no trespass order"[24] restricting her contact with her mother. Testimony at trial indicated that Amy came to believe that Doreen had stolen the $1,000 from her.

The 2014 Codicil, see P's Exh. 1, was drafted by Attorney Bruce Jasper, a partner of Attorney Auten who drafted the 2010 Will. His employees, Rebecca Hackett and Holly Tenney were the witnesses. Id. Attorney Jasper testified that he first learned from Attorney Auten that Amy wanted to amend her will. According to Attorney Jasper,

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[23] Doreen testified that this occurred on October 25th.
[24] Lisa testified that they had tried to get a restraining order against Doreen, however, after meeting with a county attorney, they felt they could not satisfy the statutory requirements so they had Amy execute a "no trespass order."

his partner Attorney Auten had become frustrated with Amy for unexplained reasons and did not want to prepare the codicil. Attorney Jasper first met her on December 10, 2014 when she came to his office with Lisa. He met briefly with both (approximately twenty minutes), then met alone with Amy for another twenty minutes to discuss the codicil. He testified that Amy indicated that she wanted to disinherit Doreen because she believed that Doreen was a thief and had failed to repay any of the loans made by Amy to Doreen. While at first he seemed to indicate that the discussion about Doreen occurred when they were alone, on cross-examination he revised his account, after having his memory refreshed by his own notes indicating that both Amy and Lisa were present when they discussed disinheriting Doreen. In addition he testified that although Amy referred to Lisa as her "daughter" and then later as her granddaughter, he did not believe it indicated confusion, but was a simple mistake. He indicated that he was satisfied that she knew her children, knew her assets, and was acting of her own free will.

Attorney Jasper testified that he used those notes to draft a codicil disinheriting Doreen and noting that it was because she "has taken money from me and not repaid any money I have loaned her." See P's Exh. 1. Amy and Lisa returned the next day, and Amy executed the codicil. Lisa was in the room at execution. Holly Tenney, a legal assistant and bookkeeper at Attorney Jasper's firm testified that she had met Amy when she was executing her 2010 Will, and in December 2014 appeared not to have changed. She testified that although she was with Amy for only ten minutes, she did not appear under duress. Rebecca Hackett similarly testified that Amy appeared free from coercion and was determined to execute the codicil.

The Court is troubled by Attorney Jasper's testimony that Amy believed that Doreen had not paid back any of the money she loaned Doreen. As testimony and documentation at trial indicated, see R's Exh. 9 (cancelled checks dated between 12/1/08 – 5/4/11), and this Court found in its Order dated December 23, 2016 on the *Motion for Summary Judgment* in the small claims action, see Index #37,[25] Doreen and Jim borrowed a total of $11,200 from Amy in a series of two loans in 2008 and 2010. Payments were made on these loans between 2008-2011, such that all but approximately $2,750 were paid off. Id. Consequently, Amy's reasons for disinheriting Doreen appears mistaken, indicating that she did not understand her assets. In addition, based upon Attorney Jasper's contemporaneous notes, the Court is dubious that Amy was not confused about her relationship to Lisa, but simply made a mistake.

B. Conservatorship

As noted supra, Lake Sunapee Bank froze/restricted access to Amy's CDs absent proof of her ability to independently manage her financial affairs and/or an order creating a conservatorship or guardianship. Shortly after the codicil was executed, "Amy" petitioned for a conservatorship on December 16, 2014, nominating Lisa as conservator. See Conservatorship Index #1. After a hearing on January 14, 2015, Judge Leonard granted the *Petition* on February 4th. Id. The very next day, Lisa, acting as conservator, cashed in the CD held in trust for Doreen.[26] Proceeds from that CD were then transferred to an account in Amy's name at Sugar River Bank.

Lisa filed a *First and Final Accounting* for the period beginning February 4, 2016 through December 23, 2016. Conservatorship Index # 8. An *Objection* to it was filed by

[25] Indeed, in its order, the Court observed that the following facts were undisputed. Id. at 4 (Index #37).
[26] She left untouched that day, however, the CDs held in trust for Harry George and Barbara.

Doreen in July 2016, alleging twelve errors. Conservatorship Index #10. Lisa responded to each objection in a pleading submitted on October 3, 2016. Conservatorship Index #12. Doreen filed an *Objection; Motion to Reconsider, After Response* narrowing her objections to six items, Conservatorship Index #13, to which Lisa addressed only one. Conservatorship Index #14. Doreen filed another final *Objection* in March 2017, see Index #25, alleging that "Barbara Fleeman extracted at least $51,234.08 between December 23, 2015 and January 13, 2016" – essentially alleging that Barbara stole from the conservatorship/estate after Amy's death Id. ¶f. Lisa did not file a response.

Consequently, the Court will consider the six items alleged in Doreen's second Objection and the allegation of post-death mismanagement alleged in her final *Objection* infra.

C. Special Administrator Inventory; First Accounting; Request for Fees

As noted supra, the Special Administrator filed an Inventory (Index #21) and interim accounting (Index #22). Doreen objected to the inventory. See Index #23. Although she appeared by extension to object to the interim accounting as well, id., no timely objection has been entered to the Special Administrator's *First Accounting* filed on June 23, 2017. See Index #71.

Doreen's objection to the *Inventory* challenged primarily the listed value of the real estate and "notes receivable" from Doreen and Jim based upon the unpaid portion of Amy's loan to them. See Index #23. She also vaguely objected to the failure to list additional accounts she believed her mother held at Ledyard National Bank and Mascoma Savings Bank. See Index #23.

Finally, the Special Administrator filed having submitted his first accounting, see Index #71, has filed an *Amended and Restated Motion for Payment of Legal Fees for Estate*, see Index #72, addressing some of the concerns about his fees expressed by the Court in its Order dated February 3, 2017 (Index #40). In particular, the Court expressed concern about a number of entries in his invoices that were billed at his full rate (or that or his paralegal) that appeared to be of an administrative nature. See id. at 3-5. It also expressed concern that "charging $13,670.83 for nine months of work on an estate worth, at transfer from the conservator, only $154,018.04, at first blush appears unduly high on its face. However, the Court also observes that settlement of this estate has been unusually contentious, and thus many hours have been spent engaging in litigation that may not normally occur in such a small estate." Id. at 5. He asserts that his fees were reasonable given the acrimonious nature of this litigation.[27]

IV. Analysis

A. Undue Influence

The Court begins with a determination of whether the 2014 Codicil must be deemed invalid as the product of undue influence. Analysis of the viability of a document where there are claims of undue influence often presents with contradictory medical evidence, and conflicting testimony of witnesses with inherent biases that diminishes the weight of their testimony. In addition, given the nature of testamentary disputes in general, and undue influence matters in particular, a decision must be reached upon mostly circumstantial evidence. See, e.g., Patten, 67 N.H. at 528;

[27] He also asserts that he shared his standard contract with counsel(s) with the parties. Regardless, Courts have an independent duty to review the reasonableness of fees, and indeed, this Court has often reduced a fee award where the rate charged was not reasonable for the size of the estate or requisite skill required to complete a task. Attorney Feleen also asserted that by reducing fee awards, attorneys will not be willing to act as a special administrator. The Court has not experienced such difficulty to date.

Hobbes, 47 A. at 680. In this matter, however, it is clear to the Court that the 2014 Codicil is invalid.

The Court's analysis begins with a presumption of the absence of undue influence. See, e.g., Albee, 79 N.H. at 91. This presumption arises only "upon proof of the voluntary, formal execution of the [document] by a competent testator and . . . *in the absence of circumstances arousing suspicion* . . . ." Id. It is suspended, however, when contestants of an estate plan show there is "substantial evidence" of undue influence. Gaffney, 81 N.H. at 307.

Here, the Court finds that Doreen demonstrated that circumstances arousing a suspicion of undue influence exist. As noted supra, during the period in question, approximately August 2014 through December 2014, and likely even before, Amy became a human ping pong ball, subjected to attempts to control and influence her person and finances by two daughters, each trying to maximize their inheritance. And, Amy was a vulnerable target. Indeed, the parties in this dispute had been concerned about the influence of "Bob" and possible financial exploitation. Dr. West expresses concern about her mentation and susceptibility to exploitation. Nurse Practitioner Spivey opined that given her memory problems, "a relative or caregiver" needed to monitor her activities to protect her from fraud. Lake Sunapee Bank security officials become concerned and froze her accounts. Doreen, after unsuccessfully attempting to undo the changes to the Lake Sunapee Cd(s), was able to procure execution of a power of attorney naming herself agent. These all demonstrate at least a susceptibility to undue influence, and at worst that Amy became an "easy target" of it in the Fall and Winter of 2014-2015.

Most important, after Lisa discovered the $97,000 CD, Barbara suddenly began taking a heightened interest in Amy's circumstances and finances. Within two days after Barbara's arrival, a long held plan in place for decades to hold the CD in trust for Doreen is changed and Barbara partially benefits. Finally, in December, a codicil, reversing a four-year old estate plan, is executed. Moreover, it is apparent that with respect to these two transactions, Barbara or Lisa or both, knew of them and played an active role in their accomplishment. This presence in the process has been held to arise suspicion in other contexts, see generally, Albee, 79 N.H. at 93-94 (comparing cases where benefitted party was present in the process and others where they were not), and as such, the Court concludes that Doreen has sufficiently established that circumstances arousing suspicion exist.

The Court next finds that Barbara and Lisa stood in a confidential relationship with Amy at the time of execution of the 2014 Codicil. A "confidential relationship" is found where "between two persons , . . one has gained the confidence of the other and purports to act or advise with the other's interest in mind. It is particularly likely to exist where there is a family relationship or one of friendship." Cornwell, 116 N.H. at 209 (quotations, brackets, and ellipses omitted). Here, it is undisputed that although Barbara and Lisa did not have frequent contact with Amy prior to October 2014, after Barbara's arrival on October 1, 2014, both took an active role in her life. Not only did they isolate Amy from her previous long-time caregiver, Doreen, and indeed assisted in procuring a "no-trespass order" against her, but the trial testimony and the record demonstrates that they: (1) brought Amy to medical appointments; (2) were involved in decisions concerning Amy's medication; (3) hired home health aides and home

maintenance workers; and, even before the Conservatorship, (4) assisted Amy with her finances.

Barbara, who stood in a confidential relationship with Amy, not only benefitted from the 2014 Codicil, but was the only person to benefit from it, as it removed Doreen as a residuary distributee, rendering Barbara as Amy's only child to receive a large share of her probate estate. Consequently, an inference arises that the 2014 Codicil was the product of undue influence. Edgerly, 73 N.H. at 408-409; Archer, 126 N.H. at 28.

As discussed supra, in order for the codicil in question to be declared valid, Barbara must now demonstrate an absence of undue influence, see Archer, 126 N.H. at 28, by a preponderance of the evidence. After considering "all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of [Amy], the reasonableness and nature of the disposition, and the personalities of the parties," In re Estate of Cass, 143 N.H. at 61 (quotations omitted), the Court concludes that in this matter, Barbara has failed to prove an absence of undue influence. The Court observes that many matters involving claims of undue influence are not straightforward or easy to adjudicate, however here, the Court notes that it is apparent to it that in the Fall and Winter of 2014, Amy was in a state of diminished mental capacity that rendered her easily influenced by those around her. Indeed, it concludes that not only did Barbara, with the assistance of her daughter, Lisa, unduly influence Amy, but Doreen certainly tried, unsuccessfully, as well. It need not linger on the legal affect, if any, of Doreen's attempts, however, as that issue is not

before it.[28] Instead, the Court concludes that Barbara, who stood in a confidential relationship with Amy, did not carry burden of demonstrating an absence of undue influence concerning codicil.

It observes that although Attorney Jasper and his employees who witnessed the 2014 Codicil's execution testified concerning their belief that it was the product of Amy's free will, their meetings with her were very brief, and for the most part in the presence of Lisa. Indeed, he did not endeavor to investigate Amy's financial situation, and was unaware that her very specific representation, included in the 2014 Codicil, that Doreen did not pay back any money, was untrue. Not only did this lack of understanding cast a shadow on the credibility of his observation that the codicil was the product of her free will, but it also imperils the validity of it as well. See infra.

The Court consequently determines that the 2014 Codicil is invalid. The Special Administrator is **DIRECTED** to proceed to administer the estate pursuant to the directives of the 2010 Will.

B. Capacity

Given the Court's decision that the 2014 Codicil must be invalidated as the result of undue influence, it need not decide whether Amy lacked the requisite capacity on December 11, 2014. As noted supra, the law requires: (1) understanding of the nature of the act; (2) a recollection of property and its nature; (3) recollection of the nearest relatives or natural objects of her bounty; and (4) ability to make elections as to disposition. See, e.g., In re Estate of Washburn, 141 N.H. at 661. The Court observes

[28] Had the Court been called upon to determine the validity of the November 6, 2014 Power of Attorney, the Court would most likely reach the same result as it does today with the 2014 Codicil. Ultimately, in this unfortunate game of playing ping pong with their mother, Barbara and Lisa ended the match by getting the no trespass order signed, thus outmaneuvering Doreen.

however, that it remains unconvinced that Amy, given: (1) her diagnosis of dementia and/or memory loss and testified-to rapid decline; (2) documented confusion; (3) family members' concerns about her lack of judgment and susceptibility to exploitation pre-dating this dispute; and (4) her false belief that *none* of the loan extended to Doreen and Jim had been paid back, was able to recollect her property and its nature to the extent the law requires. Doreen, in particular by introduction of Amy's medical records and the testimony of Dr. West and Mary Thomas, raised serious doubts about Amy's mental state such that the common law presumption of capacity was rebutted. In re Estate of Washburn, 141 N.H. at 663. Indeed, given that the 2014 Codicil included an inaccurate statement concerning Doreen's repayment of the loans and her documented confusion about her assets, the Court holds that had it been called upon to render a decision on capacity, concerns about elements two and four of the test set forth in Washburn, see supra, and the evidence presented at trial, would support an alternative ruling that Barbara, as the proponent of the 2014 Codicil, failed to carry her burden of showing, by a preponderance of the evidence, testamentary capacity.

C. Conservatorship & Conservatorship Accounting

As noted supra, Doreen challenged a number of entries in the *First and Final Accounting* filed by Lisa as conservator. Before it addresses Doreen's objections, the Court pauses to note that despite its order today invalidating the 2014 Codicil, it will not disturb Judge Leonard's order granting the *Petition*. See Conservatorship Index #1. Therefore, it will also not disturb any transfers made under such authority unless Doreen demonstrates that they were made in a manner that violates the duties of a conservator as set forth supra.

As discussed infra, Doreen filed three separate objections to the *First and Final Accounting*, see Conservatorship Index ##10,13, 25, to which Lisa responded twice. See Conservatorship Index ##12 & 14. It appears that her initial twelve objections were reduced to six, see Conservatorship Index #13, which the Court will now address. It will reference each objection as designated in Doreen's *Objection; Motion to Reconsider, After Response*. See Conservatorship Index #13.

- Objection # 4(a) – Doreen objects to an allegedly missing check, #554, from Schedule 1 of the Conservatorship. Lisa earlier responded that the check was used to pay for an appraisal of Amy's assets and that it is listed in Schedule 3 of the accounting. The Court has reviewed the accounting and indeed has located an entry for check #554 representing that it was paid to that appraiser. This objection is **DENIED.**
- Objection # 4(c) – Doreen objects to reimbursement of Barbara's flight from Texas in June 2015. Lisa responds that Barbara flew from Texas to assist her mother with the activities of daily living in the latter months of her life, saving the estate the cost of additional caregivers. Doreen objects, noting that other family members live nearby and could have assisted at a lower cost. The Court observes that a number of professional caregivers were hired for Amy. It agrees that absent evidence of direction or preference from Amy, the conservatorship should not be responsible for flying Barbara to New Hampshire. Barbara is **DIRECTED** to reimburse the estate **$408.20** for her flight.
- Objection 4(f) – Doreen objects broadly to the changes to the CDs (presumably made after the appointment of conservator) and their designations as held in

trust. At the trial, evidence was presented that a CD designated as "in trust for" Doreen at Lake Sunapee bank was liquidated and transferred to an account at Sugar River Bank in Amy's name only to help pay for Amy's expenses. See P's Exhs. 12-13; *First and Final Accounting* Schedules 1-5 (Conservatorship Index #8). A review of the schedules shows that more than the value of the CD designated by Doreen was spent for Amy's care, with the bulk of it paid for home repairs, funeral arrangements and nursing care. *First and Final Accounting* Schedules 1-5 (Conservatorship Index #8). Although the Court is somewhat dubious about Lisa's testimony that the CD designated for Doreen was liquidated first because Amy wanted it that way, it cannot conclude that Lisa acted impermissibly by choosing, under her authority as conservator, to liquidate this asset first. The Court has reviewed the schedules of expenses, and although some may be of questionable necessity (gas/car payments for a ward with failing judgment and the purchase of a security camera) it does not find these payments unreasonable.

- Objection 4(g) – This objection is **DENIED** as it lacks specifics upon which the Court may rule.
- Objection 4(h) – Doreen objects to three $9,000 payments alleging they were payments/gifts to Melvin George, Harry George, and Barbara Fleeman on June 15, 2015, at a time when Amy was "in and out of urgent/emergency room care." See Conservatorship Index #13. Lisa responded that these payments were not gifts, not paid by the Conservator, but instead distributions made in January 2016 after Amy's death from CDs in trust for others. Documents in the file support that

the payments were made from a CD after Amy's death. The objection is **DENIED.**

- Objection 4(l) – Doreen asserts that Amy had an extensive stamp collection, and that many stamps are missing from entries in the accounting. See Index ##10, 13. Lisa responds that while she was alive, Amy denied she had a stamp collection and that as conservator, Lisa has accounted for all stamps she recovered from Amy's home. See Index #12. No testimony was presented that by which the Court can find that an extensive collection exists, and therefore this objection is **DENIED.**

Finally, Doreen filed an *Objection* claiming that Barbara "extracted at least $51,234.08 between December 23, 2015 (after mother's death) and January 13, 2016. See Index #25. The Court observes that Doreen did not inquire into, or present evidence supporting, this claim at trial. Therefore, the objection is **DENIED.**

Consequently, the Conservator's *First and Final Accounting* (Index #8) is **ALLOWED IN PART.** The Court **DIRECTS** Barbara to reimburse the estate for the cost of her flight in the amount of $408.20.

D. Special Administrator Fees and Inventory

As discussed supra, the Court deferred consideration of the Special Administrator's fees until he filed an accounting. See Order dated February 3, 2017 (Index #40). The Special Administrator submitted his *First Accounting*, see Index #71, and contemporaneously filed an *Amended and Restated Motion for Payment of Legal Fees for Estate*, see Index #72, addressing some of the concerns about his fees expressed by the Court. No one objected to this motion. In sum, he primarily objects to

the Court's admonition that it appeared that he charged his full rate for tasks that appeared ministerial in nature, asserting that given the contentious nature of this matter, many usually administrative tasks required additional skill (and patience) to accomplish. He seeks a total of $14,185.53 in fees for the period April 6, 2016 through May 19, 2017.[29]

In considering his *Amended and Restated Motion*, the Court incorporates by reference its Order dated February 3, 2017 (Index #40). While it is sympathetic to Attorney's Feleen's assertion that this matter was unusually contentious and accepts his representation that certain matters were unusually so, it does not agree that all tasks would warrant a $200 per hour fee. Indeed, in the Court's twenty-seven years on the probate bench, having presided in all 10 counties, many experienced (and expensive) probate practitioners understand that non-legal tasks should be billed at a reduced rate and that attorneys who serve as fiduciaries do not automatically get to charge their hourly rate as an attorney to perform tasks performed by administrators. It is the Court's experience that the administrative rate in central and southern New Hampshire can vary between $25-$50 per hour.

The Court has reviewed the invoices, and although it will credit Attorney Feleen's assertion of the increased need for legal skill in administration of the estate due to the complete breakdown of trust and civility between the parties,[30] it still notices many entries billed at $200 per hour that do not require any special legal skill. For example, but not as an exhaustive list, Attorney Feleen has charged $200 to pay bills and make

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[29] In his first *Motion to Allow Payment of Legal Fees for Estate*, see Index #39, he sought $13,670.83 in fees for the period between April 6, 2016 and December 6, 2016.

[30] The Court appreciates his adjustment of the rate charged to attend the second mediation as he stated that after arriving, he did not constructively contribute to the mediation.

phone calls/emails concerning scheduling (11/9/2016 & 11/14/2016) and to work on "forms to cancel homeowner's insurance" (1/11/2017). As such, on its face, the invoices do not easily allow a court to conclude that all fees requested are reasonable under Circuit Court – Probate Division Rule 88.

The Court is also somewhat perplexed that Attorney Feleen, in his capacity of administrator, hired his own law firm (he is a solo practitioner) to represent the estate, at standard hourly rates, and a second law firm was engaged to represent the estate in the small claims litigation for the hearing that was held on December 19, 2016. Mr. Feleen appeared for that hearing apparently only in his capacity of administrator, at a cost of $900.00 for the day.

All of that said, however, after trial, the Court has a more nuanced understanding of the uniquely contentious nature of this dispute, and is less likely to reduce the Special Administrator's fees based upon the small size of this estate. In addition, Attorney Feleen has represented that all parties agreed to his fee structure in advance, including presumably Doreen and Barbara who stand to share equally in payment of these fees as the residuary legatees under the will, neither of whom object to the motion before the Court. As such, the *Amended and Restated Motion* is **GRANTED.**

Finally, Doreen challenged an opening inventory submitted by the Special Administrator. See Index ## 21 & 23. She objected to: (1) inclusion, as a note receivable an alleged outstanding balance on a loan from Amy to Doreen and Jim; (2) the valuation of Amy's home; (3) the absence of accounts she alleged she believed Amy held at Ledyard National Bank or Mascoma Savings Bank. See Index #23. She

also asserts that rent should have been paid by Barbara when she lived at Amy's home and that she should be repaid the filing fee for opening the estate.

Although the Court need not "allow" the inventory, it agrees with Doreen that the notes receivable are not an estate asset, see Order dated December 23, 2016 at 9 (Index #37)(granting the *Motion for Summary Judgment* in the small claims matter), and thus the Special Administrator's accounts should be adjusted to reflect this change. In addition, it agrees that as co-executor of the 2010 Will, she is entitled to repayment of a filing fee she personally paid to file the *Petition for Estate Administration*. As such, the Court **GRANTS** her *Objection* to the extent she seeks recognition that the notes receivable are not an asset of the estate and her request for reimbursement.

She did not, however, at the hearing present any competent evidence to support her objection to the listing of the value of the real estate, the existence of any additional bank accounts, and information sufficient to support a holding that Barbara owes the estate rent. The Court therefore **DENIES** these objections.

V. Requests for Findings and Rulings

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: 8/1/2017

David D. King, Judge