THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

GERALDINE W. WEBBER REVOCABLE LIVING TRUST

318-2013-EQ-00694

IN RE: ESTATE OF GERALDINE W. WEBBER

318-2012-ET-01509

ORDER ON PETITION TO SET ASIDE THE GERALDINE W. WEBBER REVOCABLE TRUST DATED MAY 2, 2012; MOTION TO RE-EXAMINE PROBATE WILL; AND ORAL MOTION TO ADMIT AUDIO RECORDING

In this consolidated action, see No. 318-2013-EQ-00694 (Index #1) (Order granting Prayer B); No. 318-2012-ET-01509 (Index #29) (Order granting Prayer A),[1] Memorial Sloan-Kettering Cancer Center and Shriners' Hospital for Children (the "Hospitals") has filed a *Petition to Set Aside the Geraldine W. Webber Revocable Trust Dated May 2, 2012* (Index #1)("Petition"), seeking invalidation of the trust (the "2012 Trust"), and a *Motion to Re-Examine Probate Will* (Estate Case Index #29)("Motion to Re-Examine"), asking for disallowance of the Will of Geraldine W. Webber dated May 2, 2012 (the "2012 Will"), and allowance of her February 5, 2009 Will (the "2009 Will"), together with a codicil to it dated February 19, 2009 and a "Bequest List" dated November 19, 2009.

[1]When necessary to refer to one matter alone, the Court will denote case number 318-2013-EQ-00694 as the "Equity Case" and case number 318-2012-ET-01509 as the "Estate Case." However, for simplicity's sake in this Order, it will refer to the index numbers in the equity case only unless otherwise indicated.

See *Statement in Support of Motion to Re-Examine Probate Will In Solemn Form* at 14 (Estate Case Index #29).

Petitioners Barbara L. Wardwell, Betsy A. Lodge, Renee Currie, and Joanne B. Peterson (the "Wardwell Petitioners"), later joined the *Petition* and *Motion*, see Equity Case Index #2; Estate Case Index #34, as have Brett W. Webber, see Equity Case Index #15; Estate Case Index #41, and Michael Williams, see Equity Case Index #9; Estate Case Index #35 (collectively, with the Hospitals, the "Petitioners"). Both the *Petition* and *Motion* seek to set aside the 2012 Trust and 2012 Will (collectively the "2012 Estate Planning Documents") claiming that: (1) Geraldine W. Webber ("Ms. Webber") lacked capacity to execute the 2012 Estate Planning Documents; and/or (2) they were the product of undue influence exerted on her by then Portsmouth Police Officer Aaron Goodwin ("Officer Goodwin").[2] Those concerns were tried before this Court over a period of ten-days, during which the Hospitals sought admission of an audio-recording taken during the course of a purported Portsmouth Police Department investigation. See *Memorandum of Law Concerning RSA 516:36, II* (Index #101). Admission was seasonably objected to by: (1) Officer Goodwin, see *Memorandum re: Admissibility of Portsmouth Police Department's Internal Affairs Investigation Recording* (Index #102); (2) Gary W. Holmes, Trustee of the 2012 Trust and Executor of the 2012 Will (the "Fiduciary"); and (3) the City of Portsmouth Police Department.

For the reasons set forth below, the Court GRANTS the *Petition* having determined that the 2012 Estate Planning Documents are rendered invalid as the product of undue influence. Petitions alleging undue influence almost universally present difficult and

[2] For convenience, the Court will refer to Aaron Goodwin generically as "Officer Goodwin" because his official position at the Portsmouth Police Department changed during the pendency of this case.

close cases for adjudication. This application is no different. Officer Goodwin, the primary distributee of the 2012 Estate Planning Documents, stood in a confidential relationship with Ms. Webber. That so, the Fiduciary and Aaron Goodwin, as proponents of the Estate Planning Documents (collectively, the "Proponents"), bear the burden of demonstrating that they were not the fruit of undue influence. The Court rules that they have not satisfied their burden. Thus, the 2012 Estate Planning Documents are declared void.

The *Motion to Re-Examine* (Estate Case Index #29) is GRANTED IN PART. The request to disallow the 2012 Will on the basis of undue influence is GRANTED, id. Prayer D, and the request to order proof in solemn form is DENIED AS MOOT. See id. Prayer B. The Court DEFERS ruling on Prayer E of the *Motion to Re-Examine* pending further proceedings in relation to: (1) appointment of a successor to Attorney Gary Holmes given invalidation of the 2012 Will nominating him executor; and (2) consideration of whether another alternative testamentary instrument may be admitted into probate in its stead. Finally, because it grants the relief requested regarding the invalidity of the 2012 Estate Planning Documents owing to undue influence, the Court DENIES AS MOOT, the Petitioners' request to set them aside on the basis of lack of capacity[3] and the oral motion to admit the audio-recording.

I. Applicable Law

A. *Undue Influence*

As mentioned earlier, the Petitioners maintain that the 2012 Estate Planning Documents should be set aside by this Court because they resulted from undue

[3] As discussed infra, lack of capacity, under long established standards for legal capacity, poses an even closer question.

influence exerted on Ms. Webber by Officer Goodwin over the last two years of her life. See generally, Bartis v. Bartis, 107 N.H. 34, 37 (1966)(will); RSA 564-B:4-406 (trusts). "Undue influence" has repeatedly been described in this jurisdiction as:

> the use of such appliances and influences as take away the free will of the testator, and substitute another's will for his, so that in effect the instrument is not the expression of the wishes of the testator in the disposition of the property, but of the wishes of another. But, where no fraud or deception is practiced, mere persuasion will not invalidate a will on the ground of undue influence. On the contrary, 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 his free agency and yielding his own judgment or will, then there is no such undue influence as is required to be proved to avoid the will.

Albee v. Osgood, 79 N.H. 89, 92 (1918). The influence exerted must amount "to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion." Bartlett v. McKay, 80 N.H. 574, 574-75 (1923)(quotations omitted). Mere kindness and/or affection, id., or desire to gratify another, Albee, 79 N.H. at 92, whatever the motives of the influencer, cf. In re Estate of West, 522 A.2d 1256, 1265 (Del. 1987), is not sufficient to support a finding of undue influence. Id. However, "importunity that could not be resisted," Albee, 79 N.H. at 92, or documents procured "for the sake of peace," 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 testatrix or settlor. Bartis, 107 N.H. at 37. Consistent with these guideposts, Connecticut courts have explained that "pressure" in the context of undue influence is "[p]ressure, of whatever character, whether acting on the fears or

hopes, if so exerted as to overpower volition without convincing the judgment, is a species of constraint under which no will can be made . . . . though no force was either used or threatened." In re Hobbes, 47 A. 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). Although a finding of incapacity is also not required to conclude that dispositions were the product of undue influence, cf. Gaffney, 81 N.H. at 301, 306, it has been long recognized that "manifestly less influence is required to dominate a weak mind than to control a strong one." Harvey v. Provandie, 83 N.H. 236, 240 (1928); cf. Patten v. Cilley, 67 N.H. 520, 528 (1894)(quality of mind a material fact). The level 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 one court observed (and many others have quoted) undue influence:

> may result from more subtle conduct designed to create irresistible ascendency by imperceptible means. . . . The nature of . . . undue influence is such that [it] often work[s] in veiled and secret ways. The power of a strong will over an irresolute character or one weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities. Undue influence may be inferred from the nature of the testamentary provisions

> accompanied by questionable conditions . . . . When the donor is enfeebled by age or disease, although not reaching to unsoundness of mind, and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny. . . . Age, weakness and disease are always important factors. Relations of intimacy, confidence and affection in combination with other circumstances are entitled to weight.

Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920). 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)). In conducting this analysis, courts have long been entitled to rely on the testimony of lay witnesses concerning the mental capacity of a testator/settlor who knew and actually observed the individual's susceptibility to another's influence. See, e.g., Pattee v. Whitcomb, 72 N.H. 249, 251 (1903); relying on Hardy, 56 N.H. at 241, 244, 248. Further, undue influence may be demonstrated by circumstantial evidence. See, e.g., Patten, 67 N.H. at 558.

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 (emphasis added).

Where a distributee/beneficiary is acting in a "fiduciary capacity" or is in a "confidential relationship" with the testatrix/grantor, he has "the burden of proving an absence of undue influence. This [rule is] based upon the inference of undue influence which arises in cases in which the beneficiary of a transfer holds a position of trust and confidence with the party making the transfer." Archer v. Dow, 126 N.H. 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 ("*inferences of fact* may be drawn against a confidential agent in cases like this; but there is no *presumption of law* against the agent")(emphasis added); In re Estate of

Sharis, 990 N.E.2d 98, 102 (Mass. App. Ct. 2013)(grandson with power of attorney had "burden to prove that the will was not the product of his undue influence").[4]

"The term 'fiduciary or confidential relation' is a comprehensive one and exists wherever influence has been acquired and abused or confidence has been reposed and betrayed." Cornwell v. Cornwell, 116 N.H. 205, 209 (1976)(quotations omitted). A "confidential relationship" is found where "between two persons . . . one has gained the confidence of the other and purports to act or advise with the other's interest in mind. It is particularly likely to exist where there is a family relationship or one of friendship." Id. (quotations, brackets, and ellipses omitted). A confidential relationship has been found supported where an individual "was dependent upon [another] for transportation, banking services, the preparation of checks, and the payment of bills." Archer, 126 N.H. at 28.

It remains unclear to this Court, however, whether, in the instance of a confidential relationship, benefit, and resulting inference of undue influence, the quantum of proof necessary to demonstrate an absence of undue influence is elevated.[5] See generally 25 Am. Jur. 2d Duress and Undue Influence Weight and Sufficiency of Evidence §42 (noting split in jurisdictions over whether standard is preponderance, clear and convincing, or beyond a reasonable doubt). The law in New Hampshire is ambiguous at best. The New Hampshire Supreme Court, in a case whose facts could have supported a finding of confidential relationship, but did not include such a ruling, Gaffney, 81 N.H.

[4] Interestingly, some jurisdictions, unlike it seems New Hampshire, distinguish between inter-vivos transfers and will contests. See Matter of Estate of Todd, 585 N.W. 2d 273, 277 (Iowa 1998) overruled in part by Jackson v. Schrader, 676 N.W. 2d 599, 605 (2003); but cf. Burkhalter v. Burkhalter, 841 N.W. 2d 93, 100 (Iowa 2013)("if a confidential relationship existed between the testator and the putative beneficiary, the burden shifted to the recipient to establish by clear and convincing proof that the advantage was procured without undue influence")(quotations omitted).

[5] The Court requested briefing from the parties, but only the Fiduciary, see Index #103, and Hospitals, see Index #104, responded.

at 303-04 (observing that testatrix was dependent upon the influencer and he was her "advisor and counselor"), noted, inter alia, "if the jury should find upon a consideration of the conflicting testimony upon this issue that a condition of even balance of the evidence has been reached, the proponent of the will has failed to maintain the ultimate burden of proof which is his from the beginning to the end of the trial." Id. at 307; cf. Estate of Washburn, 141 N.H. at 663 (where testamentary capacity is contested, proponent maintains burden to demonstrate capacity throughout the proceeding, he is aided, however, by presumption of capacity, if contestant rebuts presumption, then proponent must persuade court, by a preponderance, of requisite capacity). This would appear to support a determination that the evidentiary measure of persuasiveness required of the will/trust proponent where there is a confidential relation is by a preponderance. It is uncertain, however, whether the Gaffney court even considered the inference of undue influence specifically arising from a confidential relation described by the Archer/ Edgerly courts, as the court first required the will contestant to offer "substantial evidence of undue influence." Gaffney, 81 N.H. at 303. Archer, 126 N.H. at 28, appears to indicate that in order to generate an inference of undue influence, the contestant need only show that the individual was: (1) a beneficiary and (2) "holds a position of trust and confidence."[6]

The Hospitals, parties potentially benefiting from an elevated quantum of proof, state that where there is a confidential relationship, the absence of undue influence merely must be shown by a preponderance of the evidence. *Memorandum of Law Concerning*

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

Burden of Proof at 4 (Index #104). A review of case law from other jurisdictions reveals a deep split.[7] See generally In re Last Will and Testament of Melson, 711 A.2d 783, 786-88 (Del. 1998)(in a case where beneficiary drafted the will, discussing split across jurisdictions regarding the application of burdens, and, by a divided court, adopts preponderance standard); cf. Burkhalter, 841 N.W. 2d at 101-106 (evaluating split over quantum of proof where no fiduciary relationship is involved). As one court noted in a case involving the applicable standard of proof in the absence of a fiduciary relationship:

> the courts have never been consistent in their definitions of the term, nor in the judicial tests used to evaluate proof of undue influence. The difficulty with the notion of undue influence in the context of a will is illustrated by the question of the appropriate standard of proof required to prevail on a claim. On the one hand, undue influence seems like a relative of fraud, which generally requires a heightened standard of proof. On the other hand, undue influence can occur without a material misrepresentation or omission, which makes it analogous to ordinary civil causes of action at law where a preponderance-of-the-evidence standard prevails.

Burkhalter, 841 N.W. 2d at 97 (quotations, brackets, and citations omitted).

Some jurisdictions impose a higher "clear and convincing" standard where there is a confidential or fiduciary relationship, noting that this standard "ensures that the law will protect those who cannot protect themselves." In re Jane Tiffany Living Trust 2001, U/A/D Nov. 5, 2001, 177 P.3d 1060, 1063 (Nev. 2008); see generally In re Estate of Bethurem, 313 P.3d 237 (Nev. 2013)(discussing quantum of proof to rebut undue influence where confidential relationship shown and lower standard to demonstrate

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

undue influence in the absence of a presumption); Berkowitz v. Berkowitz, 162 A.2d 709, 711 (Conn. 1960)("clear preponderance"). Others have determined that where a beneficiary assists in drafting *or procuring* a will, a presumption of undue influence arises and this presumption must be rebutted beyond a reasonable doubt. See, e.g., Looney v. Estate of Wade, 839 S.W. 2d 531, 533-34 (Ark. 1992). Still others put a finer point on the issue, and recognize that while ordinarily the quantum of proof needed to rebut the presumption of undue influence where a non-family member is in a position of confidence is elevated, the law will not create a presumption where the confidential relationship involves children who are recognized to be the natural object of one's bounty. See, e.g., Berkowitz, 162 A.2d at 711.

The Court has considered the issue and is inclined to agree with those courts that impose a clear and convincing standard. This Court has presided over many cases involving claims of undue influence. Of them, numerous, if not the majority, have concerned influence exerted over individuals rendered vulnerable by age or physical decline, living in the shadows of society. By its nature undue influence by a confidante is often unseen and nearly undetectable to the outside world. See generally Neill, 126 N.E. at 94. This concern must be balanced against recognition of the right of each person to determine the objects of their bounty free from community comment and/or judgment. As such, it strikes this Court that the best rule is one imposing a higher level of proof to rebut an inference of undue influence after a challenger first demonstrates a confidential relation and benefit conferred. In the matter at hand, however, given the uncertainty of New Hampshire law, the deep split across jurisdictions, and, perhaps most importantly, the apparent concession by the Hospitals that where an inference of

undue influence arises, the absence of undue influence must be demonstrated by a preponderance of the evidence, the Court has decided to follow the wise path tread by a sister Florida court. In Hack v. Janes, 878 So.2d 440 (Dist. Ct. App. Fla. 2004), the District Court of Appeal of Florida, was confronted with uncertainty concerning the "question of the quantum of proof the proponent of a will must produce to overcome the presumption of undue influence." Id. at 444. The Hack court rightly observed that while sound policy arguments could be made for imposing a clear and convincing standard, in the absence of clear direction by the Legislature (or presumably here, New Hampshire judicial precedent), it is best to apply the "generally accepted burden of proof in civil matters." Id. In this instance, the Court will apply New Hampshire's generally accepted quantum of proof in civil matters, preponderance of the evidence, see also RSA 464-A:26-a,V (burden for testamentary gifts of ward); Estate of Washburn, 141 N.H. at 660 (after presumption of competency rebutted, respondent must prove capacity by a preponderance), to the burden to disprove the absence of undue influence where a contestant has demonstrated: (1) a confidential relationship and (2) a benefit conferred.

B. *Capacity*

Although as noted supra, analysis of undue influence and testamentary capacity are often closely intertwined, absence of capacity can itself be an independent basis for invalidating a testamentary instrument. See, e.g., Perkins v. Perkins, 39 N.H. 163 (1859). 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. By statute, the standard for determining capacity to execute a trust is the same as a will. See RSA 564-B:6-601. Thus, this Court, when determining whether Ms. Webber possessed sufficient capacity to execute the 2012 Estate Planning Documents, 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. Again, courts are permitted to consider lay witness testimony concerning the mental capacity of a testator/settlor 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.

Important to this case is the distinction between legal incapacity, medical incapacity and, in ancient parlance, "moral [incapacity]". See, e.g., Boardman, 47 N.H. at 138-39. Legal incapacity occurs when a testatrix is unable to understand the nature of the act undertaken, recollect her assets and their nature, know her relations, and elect to whom and how her property should be distributed. Id. at 122, 140; In re Estate of Washburn, 141 N.H. at 661. Medical incapacity includes both legal incapacity and an inability to make judgments about whether certain choices are "sensible" under certain societal norms. Boardman, 47 N.H. at 138-39. "Moral" incapacity was long ago defined as a "disordered state of the affections, or moral powers of the mind." Id. at 139. The law, however, has long recognized that "it is difficult to see how in a will case it would be practicable to administer the law or do justice according to law if moral [incapacity] were held sufficient to avoid a will." Id. Hence, lack of testamentary capacity will not be used by courts to "disturb those numerous testamentary dispositions of property which are made by those whose . . . affections may not run in the same channel with those of their neighbors."[8] Id. Rather, this Court chooses to follow the long recognized thesis that

> [w]e all have likes and dislikes among our acquaintances and even among our relatives, and, it may be, among the members of our own families, for which we might not be able to give an intelligible reason, or one that would be satisfactory to another person, who did not see with our eyes

[8] Therefore, this Court's ruling is not colored by the May-December nature of Ms. Webber's friendship with Officer Goodwin. Although it believes that our community lives in a more enlightened and less judgmental era than the Boardman Court in 1866, it has decided to discuss and reflect on legal versus moral incapacity given the sometimes judgmental undertones it perceived from certain witnesses in this case. Put another way, the law of testamentary capacity both in 1866 and 2015 does not take into account whether Mrs. Webber's affections or habits ran "in the same channel with those of the [community]." Rather, courts must discern whether, under the legal standards set forth supra, the 2012 Estate Planning Documents are valid. That said, this Court was impressed with the respectful nature of the presentations of *counsel* for all litigants in this matter and their exhibited respect for the dignity of Ms. Webber.

> and hear with our ears, and the operation of whose mind might not be like ours in every essential particular, and yet are we all insane because we dislike somebody that some one else likes, and because we make a will according to these peculiarities of our views, must it be set aside? . . . But so long as the law allows a man to do what he will with his own, he may exercise his individual privilege of having preferences and prejudices as between friends and relatives and even children, without his being called on to give any reason further.

Id.

"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.

II. Facts

The Court now proceeds with its findings of the pertinent facts based on the evidence adduced over the course of the ten-day trial. First, however, mention must be made that all parties of record assented to a procedural stipulation by the Hospitals that,

with respect to the 2012 Will, independent proof in solemn form pursuant to RSA 552:7 of the technical requirements for will execution established under RSA 551:2:[9] is waived as unnecessary given the alternative consolidated proof within the context of the substantive will challenge on grounds of undue influence and lack of testamentary capacity under the *Motion to Re-Examine* and *Petition*. See *Assented –To Motion Regarding Pretrial Procedure* (Index #94).

A. *Geraldine Webber*

The Court's recitation of facts begins, most appropriately, with Ms. Webber and her physical, mental, and environmental conditions between 2010 and 2012. By all accounts of those who knew her for many years, and those who met her during the waning years of her life, she was a rather eccentric, outspoken, "unfiltered" and funny person who sometimes expressed herself with rather colorful, and often overtly sexual, language and mannerisms. She was born in Portsmouth in 1918, see Pet.'s Exh. 76, returned to Portsmouth later in life and lived alone for many years in a sizeable home with river frontage at 36 Shaw Road. It is undisputed that by the end of her life on December 11, 2012, just short of her 94th birthday, id., she was a wealthy woman with liquid assets, personal investments, and real estate worth over two million dollars. She had been married twice (widowed once and divorced once) and had earlier lost her only child, Bruce Webber, to cancer. She had only one grandchild, Brett Webber, who apparently suffers from one or more disabilities and lives in Massachusetts.

[9] RSA 551:2 provides: "To be valid, a will or codicil to a will shall: I. Be made by a testator qualifying under RSA 551:1; and II. Be in writing; and III. Be signed by the testator, or by some person at his or her express direction in his or her presence; and IV. Be signed by 2 or more credible witnesses, who shall, at the request of the testator and in the testator's presence, attest to the testator's signature."

Many witnesses whose testimony the Court found credible,[10] and had occasion to observe Ms. Webber's behavior in her last years, testified to a noticeable cognitive decline. Her longtime landscaper, Jeremy L. Bernier stated that he provided services to her for fifteen years and that during the last two years of her life, he noted that she was "slipping." She would miss paying bills and repeat herself in conversation. He noticed that after conversing with her for ten-to-fifteen minutes, he would sense that she did not recognize him although he had been regularly providing landscaping and handyman work for her for well over a decade. Mr. Bernier began requiring payment by check so that he would have a record to show her when she disputed whether a bill had been paid. One time, during 2010 or 2011, Ms. Webber called Mr. Bernier and asked him to remove a tree. The following day, he followed her instruction, after which he received

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[10] Due to its often contentious nature, cases involving undue influence are particularly difficult, and as such, the credibility of witnesses is a very important component of any court's determination. In this matter, the Court found the testimony of Dr. Ira Schwartz, her longtime physician, Jeremy Bernier, her long-time landscaper, Ray Pasquale, who rented a boat slip from Ms. Webber for several years, and Joanne Gile and Jay Gibson, long-time bank employees of the Piscataqua Savings Bank, particularly credible on facts they testified to and to their observations regarding her mental state. The Court also credits, to a lesser extent, given what it perceives as their profession-driven inquiries of more finite dimension into the circumstances and mental state of Ms. Webber during their respective engagements, the testimony of Dr. John Hopkins, Nancy Euchner, and Attorney David Mulhern. While it has no cause to question the truthfulness of the testimony of Attorneys Boesch and McGee, their even more abbreviated exposure to Ms. Webber further diminishes the import of their testimony.

The Court also finds that various aides hired after January 2011 largely testified credibly, however, their lack of familiarity with her medical history diminishes the weight given to their testimony. It does not place great confidence in the testimony of the witnesses to the document signings, because of their at times selective testimony, in some instances professed non-recall of highly unusual, indeed conspicuously irregular to the norm, commentary and gestures of Ms. Webber, or lack of preparatory knowledge of her medical history. Due to their often evasive and contradictory statements, it gives little credence to the testimony of various present and former non-party employees of the Portsmouth Police Department. It found the testimony of Attorney James Ritzo, Officer Goodwin, and Attorney Gary Holmes to be often defensively self-serving and at most critical points implausible. As such, it has accorded weight only in those instances when independently corroborated by credible testimony of others or documentary evidence. Similarly, the Court found the testimony of Dr. David Bourne to be remarkably one-sided. He never met Ms. Webber and only interviewed the will/trust proponents. Little weight is allocated to his testimony. Cf. Fenlon v. Thayer, 127 N.H. 702, 708 (1986)("Whether an expert is a 'hired gun' or one whose opinions have greater foundation of objectivity is an issue to be . . . considered by the [fact-finder]"). The remaining witness testimony is accorded no special weight, although the Court is grateful for their time and service in testifying to the best of their abilities and knowledge.

an angry call from Ms. Webber accusing him of removing the tree without her authority. Although he agreed that she had some "good days," toward the final days of her life there were more "bad days" (i.e.: days when she was clearly impaired). However, even those "good days" were far worse in terms of apparent impairment than his observations of her mental state during the 2004 to 2006 timeframe.

Ray Pasquale, a boater who rented a slip on Ms. Webber's dock every summer from April/May 2007 to September 2012, testified to significant deterioration in her mental faculties in 2011 and 2012. He stated that her memory in 2011 was "really bad" and by the summer of 2012 she was "even worse." Near the end of her life, he began mailing rental payments to her out of concern that if he handed them to her they would be misplaced and he would be accused of failing to make payment.[11]

Finally, Joanne Gile, an employee for over twenty-nine years at Piscataqua Savings Bank who had known Ms. Webber since 1987/1988, offered that towards the end of her life, Gile became concerned about certain inappropriate or random comments Ms. Webber would make. Although for many years Ms. Webber was "sharp" and cognizant of many details of her finances,[12] noticeably beginning in 2011, she became less concerned and thoughtful. She lost the keys to her safe deposit box and would hide significant amounts of money in her home. The banker testified to instances of confusion and stated she observed that Ms. Webber appeared lonely and would call her during work hours just to "chit-chat." Finally, Ms. Gile, joined by a customer service

[11] He further testified that if Ms. Webber was his mother, he would have admitted her to a nursing home for full-time care. Although the Court does not credit this statement as evidence that full-time care was appropriate, it is reflective of Mr. Pasquale's observations regarding Ms. Webber's cognitive health at the time.

[12] Indeed, before her mental faculties started to fail, Ms. Webber carefully managed her money at the bank and aggressively sought the best rates available.

representative at the bank, contacted the state Bureau of Elderly and Adult Services ("BEAS") in November 2012 to voice her concerns about Ms. Webber's vulnerability to financial exploitation due to her advancing mental and physical decline.[13] Ms. Gile reported that in her many years at the bank, this was her first call to BEAS regarding a bank customer.

The documentary medical evidence and the testimony of Ms. Webber's long-time physician, Dr. Ira Schwartz, comport with the view that her cognitive abilities had been in decline for a number of years before her death. He was also concerned about her ability to properly care for herself. Dr. Schwartz was Ms. Webber's primary physician for over twenty years. His records and testimony indicate that she suffered from cognitive impairment beginning at least by 2008 – four years prior to execution of the 2012 Estate Planning Documents. That year, he administered a "mini-mental status exam", the results of which indicated mild cognitive impairment. He represented that the exam was administered after Ms. Webber expressed her own concerns about her cognitive abilities and visiting nurses had noted confusion during their visits. He also discerned that her cognitive issues did not later improve over-time.

Dr. Schwartz further testified that in February 2011, a psychiatric evaluation was ordered after Ms. Webber was admitted to the hospital but did not demonstrate an understanding of the nature of her physical issues. Pet.'s Exh. 44. His discharge notes dated February 26, 2011 reflect that although she lived alone and engaged in social activities with friends, "[w]e have known for quite some time that she has cognitive

[13] The Court similarly credits testimony presented by Jay Gibson, former president of Piscataqua Savings Bank, who had less frequent contact with her than Joanne Gile. He detected, based on those encounters, that while he found Ms. Webber "pretty sharp" in February 2011, he also had concerns about her vulnerability to exploitation by her former Attorney James Ritzo and, "perhaps anyone."

impairment." Pet.'s Exh. 46. The psychological evaluation was conducted by Dr. Simon Eisen on February 24, 2011. Pet.'s Exh. 44. Dr. Eisen opined that Ms. Webber did not understand the nature of her condition; she required constant prompting, displayed mild paranoia and very poor judgment regarding management of her medical condition. He diagnosed her with "[d]ementia, mild, most likely Alzheimer's type," and recommended that "a guardian be applied for to help with both her financial and medical affairs." Id. Although Dr. Schwartz testified that he did not agree that a guardianship was necessary at that point, he did agree that she could not make informed medical decisions and he remembered that at the time, she had significant cognitive deficits and dementia. His memory is bolstered by records inclusive of: (1) his written note of March 8, 2011, reflecting his observation that Ms. Webber has "memory issues" and is able to remain living at home "with the help of a power of attorney, someone who transports her, and someone who comes in and cleans and cooks for her"; Pet.'s Exh. 49, and (2) observations made by a wound care doctor on March 10, 2011 "questioning her cognitive abilities." Pet.'s Exh. 50.[14]

In August 2011, Dr. Schwartz directed that his staff place a call to BEAS to express his concerns about Ms. Webber's ability to manage and understand her medical conditions and that she was refusing to allow visits from social workers. Pet.'s Exh. 53. He contacted "protective services" again in February 2012 expressing his opinion that Ms. Webber "needs protection" as she appeared to forget what she had been told

[14] Although on cross examination, the will proponents tried to press the point that Ms. Webber's mental health may have been compromised as a result of some temporary medical issues surrounding her hospital admission in February 2011, the Court notes that Dr. Schwartz testified very consistently about his concerns regarding her mental state in 2011 and his growing concern as time went on. Indeed, what is clear from her medical records is that at least by February 2011, a full fourteen months before the 2012 Estate Planning Documents were executed, Ms. Webber displayed significant cognitive issues.

regarding the nature of injuries that had sent her to the emergency room just prior to their meeting. Id. He called "protective services" again in March 2012 expressing concern about whether her in-home care was properly supervised and opining that at this time, she had "severe dementia." Id. He phoned yet again in late April 2012 to express concern. Id. He gave unchallenged testimony that in his forty-one years as a physician, he contacted BEAS less than ten times in total. He became frustrated by the failure of BEAS to satisfactorily respond to his entreaties concerning Ms. Webber.

Finally, the Court credits Dr. Schwartz's testimony about inquiries made by Attorney David Mulhern in April 2011, see generally Pet.'s Exh. 51, regarding Ms. Webber's capacity to execute a will. Dr. Schwartz testified that he made two calls to Attorney Mulhern, each time indicating that he could not attest to her competency. Similarly, he testified that during a February 2012 meeting with Attorney Gary Holmes, see Pet.'s Exh. 54, in which they discussed Ms. Webber's mental status and ability to sign legal documents, he declared her incapable of having sufficient insight to sign such documentation.

Although there were other notes in the record by medical providers who did not see Ms. Webber regularly indicating less severe cognitive issues, Dr. Schwartz testified consistently and credibly about his serious concerns about her ability to understand legal documents at the end of her life, in particular shortly before or at the time of the execution of the 2012 Estate Planning Documents. After acknowledging that he is not a lawyer and may have a different understanding of legal capacity, he expressed that this belief was premised on his examinations of her and that he had seen her as unable to understand complex issues, her own medical problems, and her ever-declining

cognitive impairment. He testified that if Attorney Gary Holmes had asked him if Ms. Webber was capable of understanding a will signing, or put another way, if she was mentally capable of executing a will, he would have replied, "no."

A March 2012 report filed by Dr. John Hopkins, engaged at the behest of BEAS to undertake a "consultation on [her] mental status and . . . her capacity to take care of her personal and estate affairs." Pet.'s Exh. 55. Although the Court gives less weight to this report than those of her long term caregivers because Dr. Hopkins met Ms. Webber only once, it is noted for its consistency with them. He spoke of having conducted assessments for BEAS five-to-six times a year for between twenty and thirty years. He reported that Mrs. Webber was friendly and had "seemingly good recall of people, places and things in general." Id. However, he also observed her to be "professionally suspicious," noted that "her recall of recent events and her time frame for injuries, hospitalization and rehab care at home are definitely off" and her memory lapses were "apparent." Id. He reported that she made accusations of "things being stolen," financial exploitation, the commission of other nefarious acts or of being essentially up to no good, against individuals he identified as being her former attorney James Ritzo and Officer Goodwin. He further expressed that although "[i]t is not my place to suggest . . . that this is an old woman with dementia and paranoia," he could

> confidently report to BEAS that Geraldine Webber has cognitive impairment, significant medical challenges and, in the current living situation, is very much at risk for self harm by neglect and unintentional errors in judgment about how to take care of herself.
>
> On a related dimension, her need for help along many dimensions makes her a very vulnerable target for exploitation of several types.

Id. He concluded his report by noting that: "she deserves even more combined security of the protection of her person as well as her estate." Id.

The Court divines from the trial record and testimony that because of her physical and mental decline, the naturally spirited Ms. Webber became increasingly dependent upon friends, neighbors, and hired professionals in the final years of her life before meeting Officer Goodwin. Mrs. Wardwell, for many years before Ms. Webber befriended Officer Goodwin, drove her weekly to medical appointments, lunch, and shopping. Landscaper Bernier testified that Ms. Webber would often call seeking assistance with in-home plumbing and heating concerns, even assistance finding her television remote control. Neighbor John C. Connors testified she would call for assistance with small tasks, likewise among them retrieval of her remote control. Both Mr. Connors and Ms. Wardwell testified to a near stable-full of friends and a housekeeper who maintained weekly contact with Ms. Webber, giving her assistance with daily tasks and affording socialization. Worthy of note, by 2011, Ms. Webber maintained a flip double-paged date calendar in which she commonly recorded meaningful daily visits and/or events. See Fid.'s Exhs. DDD & EEE. When friends or assistants would call, she would typically record the contact on her calendar. One housekeeper testified that she would record the time of a following week's visit in the calendar to help Ms. Webber remember the time and date of the next housekeeping appointment.

There was also credible testimony elicited that Ms. Webber became more suspicious and fearful during her waning years. Dr. Eisner found evidence of mild paranoia; however, Dr. Schwartz disputed whether she was paranoid. As such, the Court finds

that at the very least she was suspicious and fearful. Her longtime friend, petitioner Barbara Wardwell told that she would not enter Ms. Webber's home for fear of being accused of stealing. Neighbor John Connors testified that beginning in early 2010 Ms. Webber reported to him on multiple occasions that she thought there were prowlers in the neighborhood, though none of her other neighbors noticed anything amiss. There also was testimony by more than one witness that Ms. Webber appeared particularly concerned about what she suspected was gang activity, led by a relative of her last husband, targeting her home for a possible home invasion. It was never clear to the Court, however, whether that fear was real or imagined.

After Ms. Webber lost her ability to drive, her long-time attorney, James Ritzo, began assisting with her banking and testified at trial that he visited her home at least twice weekly to attend to minor household, as well as official legal tasks, and bill paying. This was inferentially supported by banker Gile who testified that she was aware Attorney Ritzo provided both legal and non-legal support to Ms. Webber and that she was dependent and relied upon him.

Attorney Ritzo had provided legal services to Ms. Webber for many years and had drafted, or at times arranged for another attorney to prepare, a series of simple wills and codicils for her beginning as early as 2004. See Pet.'s Exh. 1. In the February 2004 will, he was nominated to serve as a co-executor, there were small legacies to a few close friends and one to establish a scholarship at Braintree High School. Conditioned on his survival of her, Ms. Webber's former husband was given a forfeitable right under an included testamentary trust to life use and occupancy of her home and some income, in addition to her tangible personal property and some stock, outright. It further

specified that on her former husband's death or forfeiture of his rights to receipt of the trust income and use and occupancy of the home, the testamentary trust would terminate, with its remaining assets distributable among three charities, as well as the Portsmouth Police and Fire Departments for use in the purchase of safety equipment. Her grandson, Brett Webber, was not named, though her late son and Brett's father, Bruce Webber, was referenced in the provision establishing a scholarship at Braintree High. See Pet.'s Exh. 1(A).

Ms. Webber's former husband was removed as an object of her bounty in a subsequent 2006 will. See Pet.'s Exh. 1(B). Instead, small to modest legacies were made to friends and for funding the Braintree High School scholarship; her assets were directed to be liquidated, with the residue distributable to five charities, again in addition to the Portsmouth Police and Fire Departments for use in purchasing safety equipment, in what is incongruously stated to be one-fifth shares each. Attorney Ritzo was once more nominated executor, but this time also bestowed "five (5%) per cent of [her] gross estate for services as [her] Executor."[15] Id. As with the 2004 will, grandson, Brett Webber, was not mentioned in the 2006 will iteration, while his father was anew in the provision establishing the scholarship at Braintree High. Id.

[15] The Court makes no ruling regarding the ethical propriety of this, and subsequent provisions for Attorney Ritzo in later wills, as it is beyond the scope of this case. However, it pauses to mention that it has grave concerns based on the quality of the wills and the propriety of the provisions giving Attorney Ritzo an ever-greater share of the gross value of the estate. It is also deeply concerned about other possible ethical lapses as well, including: (1) testimony of John Connors indicating a possible violation of the attorney-client privilege between Ms. Webber and Attorney Ritzo; (2) a letter/"bill" sent to Ms. Webber on August 10, 2012 containing overt threats; (3) his eventual admission that he had conversations with Attorney Gary Holmes and Attorney Ralph Holmes that failure to pay this "bill" would result in litigation to set aside the 2012 Estate Planning Documents; and (4) signing checks purporting to be the act of Ms. Webber, without indication that it was done pursuant to a power of attorney until questioned by bank employees. The Court is without jurisdiction, however, and it would be inappropriate in the context of this matter, to make substantive rulings in address of its concerns.

In June 2007, a similar will was executed, including a provision for liquidation of all her assets, but this time naming Brett Webber as a legatee, and including new legacies to her former husband and others. A list of charitable organizations and the Portsmouth Police and Fire Departments were designated to split the residue of the estate.[16] See Pet.'s Exh. 1(C). In this will, Attorney Ritzo and another co-executor, each were slated to receive 2.5% of the gross value of the estate "for serving as Co-Executors." In addition, Attorney Ritzo was to be given 5% of the gross value of the estate "for services as [Ms. Webber's] [a]ttorney." Id. Another will was executed two months later in August 2007, substantially akin in form to the last, but with a slightly different clause for gifted legacies, among them one distributable to Brett Webber. Pet.'s Exh. 1(D). Compensation for Attorney Ritzo remained the same as the provisions in the former June 2007 will. Id.

Another comparable will, with a further slight modification of the gifting of legacies not omitting one to Brett Webber, was executed in January 2008. See Pet.'s Exh. 1(E). In this version, inter alia, Attorney Ritzo was directed, for services as co-executor, to "set [his] own fees for this service." In addition, he was granted 5% of the value of the gross estate for other services rendered. The will further directed that only Attorney Ritzo "shall serve[] [a]s my attorney and administrator, and probate [sic] my Estate . . ." Id.

Yet another will was executed in July 2008, with another changed recital of legacies to individuals including Brett Webber, but the same compensation provisions for Attorney Ritzo set out in the previous January 2008 will. See Pet.'s Exh. 1(F). A

[16] The Court notes that it is not clear from the exhibit whether five or six charities each receive 1/5 of the residue, because while six are recited each is allotted a 1/5 share. Id.

substantially similar will was executed in October 2008 with still an additional altered gifting of legacies, inclusive of a legacy to Brett Webber. See Pet.'s Exh. 1(G). It recites once again that Attorney Ritzo was allowed to "set [his] own fees" for serving as co-executor, but was now granted a supplemental 5% of the gross estate "for his past services." Id.

On February 5, 2009, a further will was executed. See Pet.'s Exh. 1(H); Pet.'s Exh. 2. In this instrument, the residuary distributees remained the same as the prior October 2008 instrument, but a listing of legacies to individuals was separately appended under a document bearing the same date and purported signature of Ms. Webber alone, captioned: "BEQUEST LIST TO BE INCORPORATED INTO MY LAST WILL AND TESTAMENT." Again, Brett Webber is among those to receive a legacy. Id. While Attorney Ritzo was to be to be compensated by the same self-determined fee set out in the wills of January, July and October 2008 for acting as co-executor, his fee for past services rose to 5% of the gross estate plus Ms. Webber's automobile. Id. A codicil executed some 14 days later, on February 19, 2009, amended the February 5th version to direct that her automobile be sold with the proceeds derived added to her "gross estate". See Pet.'s Exh. 2.

After the February codicil, any changes to the will were apparently designed and/or intended to be made by what might be seen as endeavored codicils including a substantially similar, but still distinct, "BEQUEST LIST TO BE INCORPORATED INTO MY LAST WILL AND TESTAMENT." See Pet.'s Exh. 2.[17] The "Bequest List," bearing a date of November 17, 2009 and the signature of Ms. Webber only — thus possibly

[17] The Court notes that the legacy list appended to the February 2009 Will in Petitioners' Exhibit 1(H) is unsigned and differs from the one appended to the copy of the February 2009 Will in Petitioners' Exhibit 2. That legacy list bears the same date as the will, February 5, 2009, and signature of Ms. Webber.

failing as a proper amendment to her will, see RSA 551:2, or as incorporated into it by reference given its presumptive non-existence on the date of the will's execution, see Hastings v. Bridge, 86 N.H. 247, 249 (1933) — bore some altered legacies, but still included a legacy to Brett Webber. See Pet.'s Exh. 2. Another slightly different "Bequest List" represented at trial by the parties to have been dated April 14, 2010,[18] Fid.'s Exh. PP(7), also bearing only by Ms. Webber's signature, and still another unsigned list with handwritten adjustments, Fid.'s Exh. PP(8), prepared in December, 2010, were introduced into evidence; however, owing to the noted deficiencies of execution and/or recited dates, appear never to have gained legal efficacy.

By 2010, Ms. Webber began to voice distrust of Attorney Ritzo. She accused him of failing to pay for a couch he may or may not have "purchased" from her. As far as the Court can discern, this accusation was never substantiated. In July 2010, Attorney Ritzo, as part of his practice to conduct banking services for Ms. Webber, arrived at her bank and presented a number of checks totaling $7,953.60. See Pet.'s Exh. 8. He sought to deposit $3,187.50 and take cash totaling $4,766.10. Id. Bank employees noticed that two checks were presented purporting to be signed by Ms. Webber, but were in fact signed by Attorney Ritzo. The Bank did not have authorizations on file from Ms. Webber allowing Attorney Ritzo to "cash checks and withdraw funds." Id. Bank employees called Ms. Webber, who at first denied signing any power of attorney form; however, Attorney Ritzo returned to the bank with such a document signed four years earlier. Id. The bank president, Jay Gibson, spoke with Ms. Webber, who confirmed that while the attorney returned with the proper amount of cash and that she was aware of the transaction, she was very insistent that she did not want any person to act under

[18] The date is illegible on the submitted exhibit.

a power of attorney, including Attorney Ritzo. Mr. Gibson testified that he understood that in the end, Ritzo had acted according to Ms. Webber's instructions.

Ms. Webber seemingly perseverated about the July 2010 bank incident and continued to increasingly accuse Attorney Ritzo of criminal acts through execution of the 2012 Estate Planning Documents. The video of the document execution reveals an almost obsessive distrust of, indeed even disdain for, him. As discussed more fully infra, the BEAS, with assistance from the Portsmouth Police Department, investigated Attorney Ritzo. He was ordered not to have further contact with Ms. Webber beginning in February 2011, see Pet.'s Exh. 69, and he appears to have complied. An August 2012 letter from the Attorney General's Office later cleared him of any criminal wrongdoing. Pet.'s Exh. 70.

B. *Ms. Webber and Aaron Goodwin*

Within months of the banking incident involving Attorney Ritzo, Ms. Webber met Officer Goodwin. In October 2010, Officer Goodwin arrived at Ms. Webber's home as part of an investigation into suspicious activity in the area. She invited him into her home and engaged in conversation. Officer Goodwin very quickly became a regular visitor at her home, and soon was "stopping by" multiple times a week. His cell phone records, which do not include calls placed from landlines at the police department, document 832 calls between them during an approximately 24 month period from October 25, 2010 to November 4, 2012.[19] See Pet.'s Exh. 3.

It is safe to say that Ms. Webber became very fond of, and perhaps even likely smitten with, Officer Goodwin. Attorney Ritzo testified that by November of 2010, she had informed him of her desire to leave everything to Officer Goodwin in her will. Her

[19] The majority of these calls were placed by Officer Goodwin.

personal calendars/diaries for 2011 and 2012, see Fid.'s Exhs. DDD & EEE, are full of references attesting to her "love" – Aaron Goodwin – and reflecting a certain excitement when documenting the fact that he had called, visited or was planning a visit.[20] There was also testimony that she stated he was sent by God as she was despairing over perceived threats from potential robbers and/or Attorney Ritzo. Shortly after meeting him, she confided in long-time friends and neighbors that she found Officer Goodwin attractive and was "in love."[21]

Officer Goodwin very quickly became a central figure in Ms. Webber's life. He arranged for her to meet with Chief David (Lou) Ferland[22] and Captain Michael Schwartz of the Portsmouth Police Department to facilitate an investigation into her allegations of financial exploitation by Attorney Ritzo. Joan Gile testified that she first met Officer Goodwin when he brought Ms. Webber to the bank in January 2011 to make a deposit. She also testified that in July 2011 he assisted Ms. Webber to have her safe deposit box drilled and replaced, and entered the vault with her as she inspected the contents of the box. He was given a key to her house. He became increasingly in charge of her medical care, by at least early 2011. Medical records indicate that by January 2011, he became the "contact person" for her care. See Fid.'s Exh. CCC(A).

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[20] The Court briefly notes that it rejects claims by Officer Goodwin and some others that she loved Officer Goodwin "like a son." Without going into detail, there are enough highly sexual or romantic notations in the diaries and sexual references about Officer Goodwin in the videotape to dispossess the Court of the notion that the genesis of her affection was predominantly of a parental nature. Although many testified that she was known to use crude and often inappropriate language, sometimes for attention-getting purposes, the sheer volume of her romantic/sexual comments, along with the fact that some of them were kept in a personal diary, suggests that they were not written for attention and that she did not view Officer Goodwin as solely a "second son."

[21] The Court also notes that when one neighbor told Attorney John P. McGee that Ms. Webber stated Officer Goodwin was going to leave his wife for her, Attorney McGee concluded, after spending time with Ms. Webber, that this comment was in jest.

[22] For convenience, the Court refers to the police department witnesses by their titles at the time of the events in question.

One entry in her medical records seems to indicate that he was assisting with dispensing her medication as early as February 24, 2011. Pet.'s Exh. 45.

As discussed more fully infra, he sought out, and actively procured either personally or through his attorney, Justin Nadeau, a series of attorneys to draft her 2012 Estate Planning Documents naming him primary recipient of Ms. Webber's assets. Finally, as some members of her former support system became estranged from her, Officer Goodwin arranged for replacement assistance through various service providers. He also took her out for cocktails and meals and at least once to a casino in Connecticut to gamble. Toward the very end of her life, he arranged for a friend having a background in "wholesale vintage clothing and antiques," as well as hospice care, to visit twice weekly with Ms. Webber.

In December 2010, Ms. Webber gave Officer Goodwin some small gifts for his children in appreciation for his attention. Officer Goodwin testified that he called her on Christmas Eve 2010, roughly two months after first meeting her, and during the ensuing conversation she told him she wanted to leave her home to him when she died. Over time, the breadth of her generosity expanded, so that by the time she met with the first attorney procured for her by Officer Goodwin in February 2011, he was also going to receive the contents of her home; later that year her generosity toward him was further increased to include grants of stock and her car. The Fiduciary's notes from April 16, 2012, made in preparation of a meeting with her shortly before the final documents were drafted, pegs an approximate value of her estate at $2,250,000; of that figure, Officer Goodwin was to receive assets valued at approximately $2,000,000, astonishingly after only knowing Ms. Webber for eighteen (18) months. See Fid.'s Exh. JJ. It is also of

import that in all the prior wills offered as evidence in this case, no other beneficiary, including long-time friends who had themselves provided companionship and support, her grandson, and even a former husband with whom she briefly reconciled, were to receive such generous beneficence. See Fid.'s Exh. PP. That said, the Court is mindful that from December 2010 when she first offered to leave her home to Officer Goodwin until May 2012 when the 2012 Estate Planning Documents were executed, Ms. Webber consistently voiced a desire to benefit Officer Goodwin in her will.

C. *Portsmouth Police Department*

The Court pauses briefly to make certain findings concerning both Officer Goodwin's interaction with, and the "investigation" conducted by, the Portsmouth Police Department with respect to his relationship with Ms. Webber. It makes these findings only to the extent relevant to determination of the issues before it.

There was significant conflicting and sometimes vague testimony regarding what was known, and when, within the Portsmouth Police Department about the nature of Ms. Webber's testamentary plans for Officer Goodwin, how often he was visiting with her, the extent to which he was telephoning or visiting her during work hours, and the nature of the directives given to him regarding his continued relationship with her. For example, Officer Goodwin testified that he told Chief Lou Ferland about a potential post-mortem gifting to him of Ms. Webber's house on January 4th, a claim Chief Ferland denied on the witness stand. Officer Goodwin claims, rather vaguely, that he informed Captain Corey MacDonald about the potential gifting in early-or-mid January. However, Captain MacDonald's January 17, 2011 report, Pet.'s Exh. 62, makes no mention of it and Captain MacDonald testified at trial that as of January 17th he had no knowledge of

it. Although some of this testimony was ancillary to the questions before the Court, it does impact the Court's assessment of the credibility of witnesses, including, Officer Goodwin.

The Court was impressed, though not in a positive fashion, by the apparent lack of concern within the department about the potential for exploitation of Ms. Webber by department employees.[23] Concern appeared only to center on: (1) a financial exploitation investigation of Attorney Ritzo; and (2) making sure that Officer Goodwin was not observed visiting Ms. Webber during work hours.[24] The Court was struck by an email sent to Officer Goodwin by Captain MacDonald, in December 2011 after Ms. Webber sent a box of chocolates to the department as a thank you for police assistance when she fell down at her home. In that email, Captain MacDonald writes to Officer Goodwin: "How come you get the house and we just get chocolates?" Pet.'s Exh. 68. This is striking given that the department, including Captain Michael Schwartz and Police Chief Ferland specifically, had been involved in investigating concerns about financial exploitation of Ms. Webber by Attorney Ritzo. Indeed, all agree that Chief Ferland met with Ms. Webber in January 2011 to discuss a potential investigation of the attorney. Department personnel testifying at trial each appeared aware of the Ritzo investigation. It is not apparent from the record, therefore, that any concern regarding the potential vulnerability of Ms. Webber to exploitation by one of their own was ever seriously considered, let alone truly investigated by the department.[25] Whether this

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[23] The Court notes that Officer Michael Schwartz was named as a beneficiary of a $25,000 distribution from the 2012 Trust. Fid.'s Exh. B, §5.13. He has since disclaimed it.

[24] It did not appear to extend to personal phone calls during work hours, as cell phone records show numerous calls made by Officer Goodwin to Ms. Webber during this time. Pet.'s Exh. 3. As such, a reasonable inference can be made that official concern extended to appearances only.

[25] Based upon documents before this Court, Ms. Webber's home was worth approximately $750,000. By comparison, the department was concerned that Attorney Ritzo was to take 11.5% of what they estimated

amounted to acts of omission or commission is not before this Court, and will not be decided by it. However, it does cast a shadow on department officials' credibility and reduces the evidentiary weight given to police witnesses.

The Court was presented evidence of, and is cognizant that, an "internal investigation" was conducted by Detective Frank Warchol in response to allegations proffered by Attorney Ritzo and possibly others[26] against Officer Goodwin concerning his potential financial exploitation of Ms. Webber. Detective Warchol testified he was told by Chief Ferland to ask, and indeed asked, Officer Goodwin only one question during that February 14, 2011 interview – essentially whether a written report by Goodwin to the Chief dated January 10, 2011, see Pet.'s Exh. 59, was complete or should be amended and/or supplemented. Both Detective Warchol and Officer Goodwin[27] admitted that Detective Warchol's inquiry was limited to whether the earlier report was complete, and that Officer Goodwin indicated, in some fashion, that it was. Remarkably, this January 10th memorandum, while mentioning gifts of limited value, completely omits any mention that Ms. Webber, by the date of the memo, wanted to leave her house to Officer Goodwin.[28] Neither Officer Goodwin nor Detective Warchol

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to be a $2,000,000 estate. See Pet.'s Exhs. 60 & 62. By the Court's modest calculation, as of January 2011, Officer Goodwin's potential gift from a woman he had only known a few months was over three times as large as the feared excessive compensation to Attorney Ritzo.

[26] An email from Captain Schwartz dated the same day as the internal investigation interview indicates that Detective Warchol was briefed, prior to the interview, that Ms. Webber's former daughter-in-law was alleging financial exploitation against "a detective." See Pet.'s Exh. 66.

[27] Although Officer Goodwin initially had a relatively selective memory of these events, he did finally admit that he told Detective Warchol that his January 10th memo was complete and he had nothing to add.

[28] This document, see Pet.'s Exh. 59, which is the only independently verifiable record standing in the face of contradictory testimony across the Portsmouth Police Department's "chain of command", however, states on page one that it is "a summary of mostly phone and some person-to-person conversations with Ms. Webber in the weeks and months following my first meeting with her." Entries dated December 29, 2010 and January 3, 2011 completely omit any mention of the potential home gifting first mentioned by Ms. Webber on December 24th. Id. Similarly, a January 17, 2011 memo written by Captain MacDonald to Captain Schwartz likewise only mentions small gifts from Ms. Webber to Officer Goodwin's children and omits her offer to leave him her home. Pet.'s Exh. 62. Captain MacDonald testified that at that time, he

ever supplemented, or asked to supplement, the memorandum. The former testified unconvincingly that no mention was made because he was told that the subject of the memo was Attorney Ritzo and that valuable gifts were being brought up a separate "chain of command." The Court has a very difficult time with this explanation as Officer Goodwin testified that he was given notice about the internal investigation concerning a complaint involving a proposed will/bequest by Ms. Webber.

Here, the Court again pauses to reflect, albeit not in a positive light, on the apparent lack of concern within the department that Officer Goodwin was actively procuring legal counsel for Ms. Webber. Any concern appears centered on ensuring that Captain Corey MacDonald, a member of the New Hampshire Bar, not provide legal services in this matter. The Court disbelieves the claim by more than one police witness, including Goodwin, that Officer Goodwin was actively procuring counsel at the *direction* of the Attorney General's Office. There is no independent documentary evidence to support this explanation. Although it is true that the Attorney General's Office advised Ms. Webber, during a February 1, 2011 meeting that she should hire a lawyer to redraft the Ritzo generated wills, see Exh. ZZ(1), it discerns no specific direction that Officer Goodwin take the lead. See id. Also, it appears from that same transcript that Ms. Webber states at least three separate times that Officer Goodwin had already begun efforts to procure a lawyer for Ms. Webber before the February 1, 2011 meeting. Finally, Joan Gile testified that in January 2011, Officer Goodwin asked her if she could recommend an attorney for Ms. Webber.

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did not know about this potential gifting. As noted supra Officer Goodwin testified, rather vaguely, that he informed Captain MacDonald in early-to-mid January, whereas Captain MacDonald states he was informed after the 17th. This rather self-serving memorandum was likewise never supplemented with information regarding the potential gift to Officer Goodwin.

The Court, after due consideration, could write pages of observations regarding the sometimes self-serving and dubious, often contradictory, testimony by Detective Warchol, Officer Goodwin, Chief Ferland, Captain MacDonald, and Captain Schwartz. These witnesses also displayed an unusual measure of selective memory regarding the events at hand. As such, it finds much of the testimony unhelpful to the matter decided today and indeed reflects adversely on this Court's assessment of the overall credibility of Officer Goodwin.

D. *Ms. Webber's 2012 Estate Planning Documents*

Beginning in early 2011, Officer Goodwin began to seek out counsel to draft a new set of estate planning documents for Ms. Webber. As mentioned supra he approached Joan Gile for advice on new counsel in January. Captain MacDonald testified that in late February/early March, he advised Officer Goodwin to contact Attorney Sally Mulhern.

Attorney David Mulhern, a law partner with Sally Mulhern, disclosed that he was contacted by Officer Goodwin about drafting an estate plan sometime prior to his first visit with Ms. Webber at her home on February 8, 2011. See Pet.'s Exh. 14. During his first meeting with Ms. Webber, he particularly remembers her professed anger with, and repeated derogatory commentary regarding, Attorney Ritzo. This perseveration on her long-standing attorney gave him pause.

When he met with her again on February 17, 2011, with her accountant Bill MacDonald, he became concerned about her capacity as she wildly inflated the value of her home. So much so, that he declined to be agent on a power of attorney because of it. He also was alarmed by her statement that she was not going to provide for Brett

Webber in her estate because she had arranged to make him a beneficiary of a certificate of deposit (CD) at her bank. Mulhern contacted the bank, and learned that Brett was not a beneficiary of the CD.[29]

Attorney Mulhern testified that after his two meetings with Ms. Webber, he concluded that he needed to conduct a deeper inquiry into her mental health and the circumstances surrounding her proposed estate plans. His concern was driven by a number of factors, including: (1) Officer Goodwin had initiated the referral; (2) Ms. Webber, although he described her as a forceful eccentric old woman, was elderly and in poor health; (3) her new plan included large dispositions to a police officer she had only recently met; (4) she was cavalier about not providing for her sole heir whom he knew to have disabilities and/or special needs; and (5) she did not understand the value of her assets.

Attorney Mulhern met with Officer Goodwin and accountant MacDonald on March 1, 2011 to discuss his concerns. He later sought out Ms. Webber's medical records and learned, for the first time, of her dementia diagnosis. He sent a letter to Dr. Schwartz, see Pet.'s Exh. 16, setting forth his interpretation of New Hampshire's law on testamentary capacity, and requesting "your professional judgment regarding Ms. Webber's capacity to execute a will." Id. As discussed supra, Dr. Schwartz replied via voicemail on April 8, 2011. A transcription of that voicemail, states: "I cannot attest to her competency. I can give you more details why, plus other information you may find relevant. There is no way in the world I am going to be able to say this eccentric woman is competent." Pet.'s Exh. 17.

[29] This comports with testimony by Joan Gile.

By May 2011, Attorney Mulhern decided that he could not move forward with drafting a traditional estate plan for Ms. Webber. He was careful to state at trial that his reticence was not a judgment about capacity, but rather reflected a concern about drafting an enforceable plan. In a letter to her dated May 9, 2011, he opined that "it is clear to me that serious professional questions have arisen about your testamentary capacity . . . [and] any Will you signed would be highly subject to legal challenge, . . . [that] might well be successful." Pet.'s Exh. 20. This letter also notified Ms. Webber of her mistaken belief that Brett Webber was a beneficiary of a CD at the bank. Id. Attorney Mulhern's letter suggested initiating a process to allow for court oversight and have a "guardian-initiated estate plan prepared" on her behalf. Id. The lawyer testified that Ms. Webber was not happy with his plan,[30] and he later learned she had hired or was planning to hire new counsel.

On May 3, 2011, Ms. Webber contacted Attorney William S. Boesch. Pet.'s Exh 25. She informed him that she had obtained his number from Officer Goodwin. In their first conversation, she seemed to indicate that she was calling about problems with buoys on her dock. He informed her that buoys were not his specialty. She called back on May 9th, indicating for the first time that she would like to draft a new estate plan. Id. At their first meeting on May 23rd, Ms. Webber at first was focused on buoys, but later turned her attention to estate plans. She gave him a copy of a prior will, spoke of her affection for Officer Goodwin and her displeasure with Attorney Ritzo. She shared her letter from Attorney Mulhern, of which Attorney Boesch took note.

[30] Ms. Webber later referred to Attorney Mulhern as a "thief and a robber" when meeting with a third lawyer, Attorney John P. McGee.

Attorney Boesch eventually spoke with Attorney Mulhern about his concerns. Attorney Boesch offered that after that discussion, he concluded that his concerns were not as acute and though Ms. Webber was lonely, she was lucid, articulate and clear about wanting to benefit Officer Goodwin. He did concede, however, that at that point he had not seen her medical records and had only met with her one time. Attorney Boesch's relationship with Ms. Webber abruptly ended when, after returning from a two week vacation, he learned she had hired Attorney Gary Holmes.

Before Ms. Webber hired Attorney Gary Holmes, she met with one more lawyer, Attorney John P. McGee, who reached out to Ms. Webber after being contacted by Officer Goodwin's attorney, Justin Nadeau. Attorney McGee met with Ms. Webber on August 18th. He testified that she showed him a copy of a 2008 will, but seemed uninterested in reviewing it, instead, stating she just wanted to give Officer Goodwin her house, car, and "things." As he went through the list, he noticed that Ms. Webber was confused about her former daughter-in-law, Joanne Peterson, whom she repeatedly called "Shirley." She expressed unhappiness with Attorney Ritzo, called Attorney Mulhern a "thief" and "robber", and did not recall Attorney Boesch by name. She voiced suspicions about her long-time accountant, Bill MacDonald. At first, when discussing her family, she appeared to initially forget about grandson Brett Webber. He also noted that although Ms. Webber appeared relatively "with-it" at first, she began to "fade" after a half-hour. Her understanding about the value of her assets was not clear. See Pet.'s Exh. 33

His notes about that meeting drafted a day later, see id., indicate that "[a]ll in all, I have to say I was thinking of Probate Court intervention before she could do a Will."

Attorney McGee decided not to work on the case after discovering, upon leaving her home, that his friend and client, John Connors, allegedly had been reported by Ms. Webber to the Portsmouth Police Department. He sent a letter to Ms. Webber declining representation on the basis of that conflict. Pet.'s Exh. 34. He testified that he spoke with Attorney Nadeau, advising him to "be careful" and declined to refer other attorneys to Attorney Nadeau as possible counsel to Ms. Webber.

Finally, Ms. Webber engaged the Fiduciary to draft what eventually became the 2012 Estate Planning Documents. The Fiduciary was contacted by Attorney Nadeau on August 25, 2011, and the documents were not executed until almost nine months later. The Fiduciary held between eight and ten meetings with Ms. Webber in her home prior to execution of the documents. See Fid.'s Exhs. G (summary prepared for trial); & H (calendar entries). The Fiduciary's notes indicate that although certain individual post-mortem gifts changed over this time, those to Officer Goodwin of her home and contents remained a constant, her car and "1/3 Aaron" for the residue were added in February 2012, see Fid's Exh. CC, and by March 2012, valuable stocks "that Aaron wanted" were entered. See Fid.'s Exh. HH-1.

Before the Court discusses in greater detail the factual background of this relationship, it halts to underscore the Fiduciary's consistent emphasis in his testimony that he took a "slow, cautious, approach," see Fid.'s Exh. G (summary of meetings prepared for litigation), and did not decide to draft an estate plan for final execution until the end, or nearly the end, of his "process." He also testified that while engaging in an on-going evaluation of Ms. Webber's cognitive abilities, he never questioned her

capacity.[31] After careful consideration and review of the documentary evidence, trial testimony and importantly a video of the execution of the Estate Planning Documents, the Court reluctantly discerns, from the totality of the evidence presented at trial, that the "cautious approach" was as much, if not more, an endeavor to bolster sustainability of the documents under uncertain or problematic circumstances than a bona fide probe or search for confirmation pertaining to the propriety or impropriety of their execution and efficacy. In a similar vein, the "process" might well have reflected as much his reluctance to finalize documents as an ongoing attempt to uncover or document facts supportive of their ultimate validity, while turning a blind eye to information that might have shed further enlightenment. It reaches that conclusion after considering, inter alia, as discussed in greater detail infra: (1) that the Fiduciary, despite concerns voiced by Dr. Schwartz[32] and his own hired expert, Nurse Practitioner Nancy Euchner ("N.P. Euchner"), calling Ms. Webber's mental state into question, personally administered his own mini-mental status exam from a form taken from the internet, rather than engaging an independent expert; (2) he never reviewed her medical records before the

[31] At the end of the Fiduciary's testimony, the Court queried the Fiduciary about his statement at trial that he never questioned Ms. Webber's capacity between September 2011 and May 2012. In light of his confidence, the Court asked something to the effect of whether those documents might have been signed well prior to May 2, 2012. Though he answered by appearing to stand firm on his employment of "the process", when more narrowly asked whether he would have proceeded without delay to have the documents executed if he received word that Ms. Webber had been diagnosed by her doctor as having stage 4 cancer and only days to two weeks to live, he unhesitatingly and unequivocally stated that he would have done so. Given the risks of delay given Ms. Webber's age and precarious health condition, this reinforces, by logical and rationale inference, the Court's perception that "the process" was engaged largely, if not solely, to aid sustainability of the documents if later attacked, via a veneer of calculated and deliberate process. The Court further takes note that in earlier testimony, the Fiduciary stated he did not make a final decision about capacity until May 2, 2012, even though he had her execute powers of attorney in October 2011. As such, it remains at best unclear when or if he actually attained full confidence in her capacity and whether the powers of attorney were valid.

[32] The Court in particular notes as remarkable the Fiduciary's testimony that when he met with Dr. Schwartz in February 2012 he did not remember asking Dr. Schwartz directly whether Ms. Webber was competent to sign legal documents. Nor did he prepare for this meeting by reviewing Dr. Schwartz's medical records or the file of a prior attorney made available to him, who had concluded that Ms. Webber should not execute documents without a guardian.

documents were executed; (3) he took the unusual step of engaging lawyers as witnesses, but did not share key medical/psychological information of which he was aware with those witnesses before the documents' execution; (4) a review of the videotape of the 2012 Estate Planning Documents' execution demonstrates that he acted in a manner that discouraged, or with relative ease deflected, Ms. Webber's attention away from certain changes requested or responding to certain questions she posed during the signing, evincing a purposeful desire, if not design, that day to have the documents signed as prepared[33]; (5) that with regard to the assets in particular, he asked numerous, and at times a series of, leading questions to Ms. Webber at the May 2nd document execution -- to which she merely concurred without manifesting any substantive or self-initiated thoughtful engagement or response; (6) he did not follow-up after learning that Dr. Hopkins, the gerontologist hired by the BEAS, visited Ms. Webber weeks before execution of the documents and was concerned about the potential for, or her vulnerability to, exploitation; and (7) he did not obtain and review copies of a psychological evaluation of Ms. Webber conducted on February 24, 2011 that raised serious concerns about her mental state.[34] In addition, he did not, despite a process of considerable and uncommon duration, execute an engagement letter until the Estate Planning Documents were signed in May 2012, despite his own claim that she became his client in September 2011. Finally, the documented fact that the 2012 Will states that "I have no children" and fails to name Brett Webber, see Fid.'s Exh. A, provoking a

[33] In point of fact, the relative ease apparent from the video with which the Fiduciary was able to keep Ms. Webber on task and dissuade her from making such changes in the Estate Planning Documents as she voiced wanting, strikes the Court as markedly inconsistent with his testimonial description of her as a decisive person, clear on what she wanted, hard to take advantage of and strong-willed, as well as his expressed disbelief that "anyone could persuade her to do what she did not want to do."

[34] Indeed, the Court is unsettled as much by what he did not do, in terms of serious investigation into her capacity and failure at signing to honor Ms. Webber's wishes, as what he in fact did.

potential pretermitted heir assertion, see generally RSA 551:10; In re Estate of Treloar, 151 N.H. 460 (2004), belies the avowed aim of the slow and *cautious* approach advanced by the Fiduciary.

The Court's view of the "process" is further colored by Fiduciary's Exhibit OO, which is labelled as "Undated – Gary Holmes' notes" and appears to be a "to do" list. Although undated, it can be reasonably inferred as drafted toward the beginning of the process as one notation indicates that the Fiduciary contemplates "[m]aybe" using Nancy Euchner, having Ms. Webber sign releases, and obtaining originals of the will and medical reports. Supportive of the Court's assessment of the purpose of the "process" advanced by the Fiduciary are notations on the "to-do" list to: "keep Aaron away," "do [a] video," "do a preliminary oral test for video," and "use knowledg[e]able volunteers." Id.

As noted supra, the Fiduciary was contacted by Attorney Nadeau on August 25, 2011, looking to make a referral of the Webber estate planning concerns. The Fiduciary's notes indicate he was told that the matter involved Ms. Webber and a Portsmouth police officer. He was made aware that Attorney Mulhern believed "she is not competent" but that Officer Goodwin "says she is very competent." Fid.'s Exh. K. This phone call was not Attorney Nadeau's only contact on behalf of Officer Goodwin. The Fiduciary's records indicate follow-up calls from Attorney Nadeau in February 2012. See Fid.'s Exhs. EE & FF. Attorney Nadeau also sent letter on October 18, 2011,[35] stating that he "represents Mr. Aaron Goodwin" and seeking information about Ms.

[35]Although the letter is dated October 18, 2012, testimony at trial indicated that this was a typo, as the letter was actually sent in 2011.

Webber's estate planning "so that I may update my client as to the current status of this matter." Fid.'s Exh. T.

The Fiduciary met with Ms. Webber on September 9, 2011. See Fid.'s Exh. M. He testified that he found her engaged and interested and that she discussed her desire to give Officer Goodwin her home. He added that they discussed, in general terms, the structure of an estate plan. Over the course of his two-day testimony, each time the Fiduciary testified about his interactions with Ms. Webber, he stated that she was engaged, demonstrated little or no confusion, knew her assets and family,[36] and expressed a desire to benefit Officer Goodwin.

Three days after meeting Ms. Webber for the first time, the Fiduciary called Officer Goodwin. Fid.'s Exh. N. During this call, he recorded Officer Goodwin's recitation of his history with Ms. Webber, her conflicts with Attorney Ritzo, Ms. Webber's mental state, and attempts to procure counsel. The Fiduciary's notes of that telephone call are striking to the extent that Officer Goodwin shades unfavorable information, for example, claiming Attorney Mulhern was fired for taking too long and lack of attentiveness. There appears to be no mention of Attorney Mulhern's suggestion that they seek court oversight. Officer Goodwin apparently told the Fiduciary that Ms. Webber was "very competent"[37] and was only confused when she was outside her home, a proposition to some degree contradicted by the fact that competency concerns voiced by Attorney Mulhern arose from in-home meetings with Ms. Webber. Medical records indicating concerns of Dr. Schwartz and Dr. Eisen were dismissed as the product of unusual upset

[36] The Court notes the contrast between this claimed complete clarity and the testimony of her former lawyers.
[37] It is unclear from the notes and the fiduciary's testimony whether this was Officer Goodwin's impression or that of his father.

caused by hospitalization. He did not inform the Fiduciary of the dementia diagnosis. The Fiduciary testified that during this conversation, he found Officer Goodwin to be trustworthy. The Fiduciary, however, never sought to confirm the allegations against Attorney Ritzo, nor himself ever obtained and read the medical records referenced by Officer Goodwin.

He met again with Ms. Webber on September 15th, and after a conversation about her fear that Attorney Ritzo would use the 2006 power of attorney, she signed a revocation of that document. See Fid.'s Exh. O.

The Fiduciary engaged the services of N.P. Euchner, a geriatric nurse practitioner with thirty-seven-years-experience, to evaluate Ms. Webber and offer an opinion on Ms. Webber's competency. The Fiduciary and N.P. Euchner met with Ms. Webber on September 19, 2011 and then N.P. Euchner had a follow-up visit alone. See Fid.'s Exhs. P, Q & S. After the first visit, she reported that Ms. Webber seemed alert, engaged, and "fiercely independent." N.P. Euchner noted a particular fondness for Officer Goodwin. See Fid.'s Exh. Q. The Fiduciary's notes of a telephone call with N.P. Euchner reflect the following comments: "Presents a difficult case! Aaron may be on thin ice!" Fid.'s Exh. P.[38] It also indicates that there were concerns about Ms. Webber's short term memory and "process/perception of information." Id.

N.P. Euchner's notes after a second visit indicate that at she had some difficulty obtaining a medical records release because Ms. Webber was "unwilling to sign a form authorizing me to speak with . . . her doctor without giving it more thought and possibly speaking with Aaron." Fid.'s Exh. S. After finally obtaining some medical records, N.P.

[38] N.P. Euchner has no memory of saying this, but agreed it sounded like something she could have said.

Euchner observed that "[t]he records indicate that there has been cognitive impairment for some time, but the clinicians still feel she can live at home alone with the help she has." Id. She also noted that:

> Dr. Schwartz knows his client well. I am not in a position to really make a recommendation on her capacity to sign new documents since she won't let me assess her fully. I recommend that Gary speak with Dr. Schwartz directly about the questions at hand.

Id. She shared this information with the Fiduciary during a phone call on October 26th. Fid.'s Exh. U. By letter dated December 22, 2011 and phone call that same day, N.P. Euchner terminated her engagement with the Fiduciary, again suggesting that he contact Dr. Schwartz. Fid.'s Exhs. Y & Z. At trial, N.P. Euchner stated that Dr. Schwartz, having had a long-term relationship with Ms. Webber was in the best position to assess her cognitive ability and that she knew him to be fair and balanced.

The Fiduciary met with Dr. Schwartz in February 2012. Before the meeting, he prepared a list of possible subjects to discuss, see Fid.'s Exh. BB, and then filled it in later. The Fiduciary testified that he did not, however, despite having releases from Ms. Webber, see Fid.'s Exh. X(2), read either Dr. Schwartz's medical files or Dr. Eisen's report prior to meeting with Dr. Schwartz. (Indeed, he testified that he never read them before execution of the documents.)

Dr. Schwartz testified that he told the Fiduciary that Ms. Webber lacked the insight to sign legal documents based on his observations that she was unable to understand complex issues and medical issues, she lacked insight and that medically she was impaired to an extent that she could not make appropriate decisions. The Fiduciary's notes reflect only "poor" next to line item "awareness" and "poor" next to line item

"memory." Next to line item "capability"[39] it appears to note: "not adequate evaluation." He also makes note that a "psychiatrist determined her to be incompetent to go home . . . she didn't want to go 'that moment'." See Fid.'s Exh. BB. At trial, the Fiduciary claimed that he discounted the "psychiatrist's" evaluation as pertaining only to "that moment" and it applied only to her ability to make medical decisions. Remarkably, the Fiduciary testified that he did not remember if he asked Dr. Schwartz directly whether, in the doctor's opinion, Ms. Webber had testamentary capacity.[40] He also testified that he decided to continue his "slow, cautious approach" because he had yet to decide if Ms. Webber had capacity.[41] As earlier noted, however, he later also testified that at no time did he perceive her as lacking capacity.

Instead of obtaining and reading medical records and/or hiring an independent expert who would opine on Ms. Webber's mental capacity given that N. P. Euchner had declined to do so, the Fiduciary administered, himself, a form of a mini-mental exam,[42] a "competency questionnaire" and a "close your eyes" diagram, see Fid.'s Exhs. HH(2)-(3), on March 27, 2012. He brought his paralegal, Irene Ray, with him to make notes of the results. See Fid.'s Exh. HH(1).

The Fiduciary's records indicate that a few weeks later, on April 9, 2012, he had a series of phone conversations with Deborah Gendron of BEAS. In the first conversation, see Fid.'s Exh. II, Ms. Gendron indicated that she and a BEAS

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[39] Notably, the Fiduciary's line items do not include "competent" or "capacity."

[40] Medical evidence discussed supra shows that within the next month, Dr. Schwartz either authorized, or directly called, protective services at least three times with concerns about exploitation of Ms. Webber and that she suffered from "severe dementia." As such, the Court is inclined to believe Dr. Schwartz's version of what transpired at the meeting.

[41] However, he did prepare, and present for execution on December 8, 2011, powers of attorney, indicating he had previously made some sort of decision regarding capacity. See Fid.'s Exh. X(1).

[42] The source of this exam is unclear. The Fiduciary testified to both having gotten it from the internet and then having no memory of where he obtained it. The form notes that it is "[p]rovided by the Alzheimer's Drug Therapy Initiative for physician use." See Fid.'s Exh. HH(3).

gerontologist[43] had visited Ms. Webber as part of an investigation of whether Ms. Webber was the victim of financial exploitation. She stated that Dr. Schwartz had opined that Ms. Webber suffered from "significant dementia." He was told that the gerontologist's report noted concerns that she was vulnerable, had cognitive impairment, and was isolated. The Fiduciary never reviewed the report or reached out to the gerontologist because he did not consider it something he needed to do as part of his "cautious, careful process."

Ms. Ray's notes indicate that at the March 27th meeting, the Fiduciary and she sought to confirm a list of distributions. See Fid.'s Exh. HH(1). This confirmation followed a pattern employed by the Fiduciary in that he would prepare a chart or list of assets and distributions for Ms. Webber to review before meeting her at her home. See Fid.'s Exh. HH(3). Upon inquiry by the Court, the Fiduciary clarified that these lists were based on prior wills as a template, to which Ms. Webber made changes. The Fiduciary testified that on April 16, 2012, he brought a detailed list of assets and distributions to Ms. Webber for review. See Fid.'s Exh. JJ. He first testified that he felt that he was impressed by her continuing knowledge of the value of her assets. However, upon further inquiry of the Court, it became apparent that he prepared the value designations in advance and presented them to her. He did not ask her if they were accurate, but rather, reviewed them and she agreed. Similarly, he testified that after he presented her with a chart outlining the estate plan he had developed over time, see Fid.'s Exh. KK(2), on April 26, 2012, he observed that she did not express or demonstrate confusion about her assets and distributions. He then concluded that he had completed his "careful, cautious process" and scheduled the appointment for executing the Estate Planning

[43] Dr. John Hopkins. See supra.

Documents. It is not apparent, however, to the Court how much of this final plan was organically derived from Ms. Webber, or instead involved a process of presentation and assent based on a pre-existing template and prepared asset values.[44] Significantly, during a February 1, 2011 meeting with representatives of the Attorney General's Office, Ms. Webber states that she is reluctant to immediately revoke (i.e.: "rip up") a prior will, despite her desire to remove the provisions granting fees to Attorney Ritzo, because she did not remember the details of her other gifting and "need[s] [a prior will] to see to whom I've left money". Fid.'s Exh. ZZ(1) at 103.

On May 2, 2012, the Fiduciary, his paralegal, Irene Ray, and two former paralegals, now Attorney Jesse Krall, and Attorney Jennifer Hoover, arrived at Ms. Webber's home for the document signing. The Fiduciary also brought along a videographer. See Fid.'s Exh. D. Officer Goodwin did not attend the signing. The Court has reviewed the video taken on May 2, 2012 and makes the following observations about the documents' execution:

- Ms. Webber appears happy and sociable. She makes a number of sexual gestures and comments regarding Officer Goodwin despite his claim that she loved him like a son. Ms. Webber also flirts with the Fiduciary; however, because there was extensive testimony that this was her manner, this behavior does not cause concern about her capacity. It does, however, call into question the general credibility of any witnesses claiming that Ms. Webber's affection for Officer Goodwin was purely maternal.

[44] This distinction did not concern the Court until after it viewed the video of the Estate Planning Documents' execution, see Fid.'s Exh. D, and noted the leading nature of the Fiduciary's questions and dismissal of Ms. Webber's attempts to make changes.

- Ms. Webber claims that she was offered $3 million for an unremarkable decorative painting hanging on a wall.

- The Fiduciary appears dismissive of certain requests, either ignoring them or telling Ms. Webber it can be dealt with at another time including: (1) a distribution to a kind gentleman whom she wished to favor; and (2) multiple requests that both Officer Goodwin and the Fiduciary be joint agents on the power of attorney documents. In one instance, that related to a residuary distribution to a charitable organization affording residence for children, Ms. Webber instructs the Fiduciary that the distribution was not to be for the general benefit of the organization itself or a girl, but for a "worthy young man" or "boy" only, which the Fiduciary wrongly confirms he had done but had not.[45]. Trial testimony and documentary evidence on file indicates that Ms. Webber's estate plans were never amended to honor these requests, despite assurances given of follow-up by the Fiduciary.

- Despite Ms. Webber's attempts to insist that a distribution be made to a kind gentleman, including the reasonable request that it be added to the 2012 Trust by hand, she acquiesces to Attorney Holmes after his insistence that it would be against his practice, calling into question whether the distribution list accurately or truly reflected Ms. Webber's intentions.

- She does not mention Brett Webber at all during the proceeding.

- Late in the video, after execution of the 2012 Trust, Ms. Webber displays confusion and a lack of understanding of the documents she just executed and needs prompting by Attorney Holmes.

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[45] In Article Five, Section 5.06 of the 2012 Trust a non-residuary $25,000 is given to the charity, Chase Home for Children, "to be used for a Scholarship Fund for a deserving young man"; however, the residuary distribution of concern is recited in Article Six, Section 6.06 and reflects that it is "to be used for [the charity's] general charitable purposes." See Fid.'s Exh. B.

- She makes fairly irrational and disturbing statements that she wanted to suffer physical pain during the death process.

- She makes statements that Attorney Ritzo had stolen from her and he should be shot.

- The interview is riddled with leading questions, and this, combined with the document preparation discussed supra, calls into question whether Ms. Webber reasonably knew how much or what she was leaving whom and the value of her assets, rendering her actual unprompted self-awareness of dubious prospect.

The witnesses to the signing, Attorneys Hoover and Krall and Ms. Ray, all testified that in their opinion, Ms. Webber had the requisite capacity to sign the documents. Ms. Ray, who had met Ms. Webber in March 2012, agreed that questions asked regarding Ms. Webber's assets were leading, and that the documents were signed without changes requested by Ms. Webber. Attorney Hoover, who had worked as a paralegal for the Fiduciary for eleven years, testified as well that she felt Ms. Webber possessed the requisite capacity to execute the documents. Unlike Ms. Ray, however, she did not have a clear memory of the red flags noted supra. She also admitted that she was not aware of concerns voiced by Ms. Webber's physician or her medical history. Finally, Attorney Krall, who also had worked for the Fiduciary as a paralegal before entering private practice, similarly testified that she had no concerns on May 2nd about Ms. Webber's capacity. She was not aware, however, that Ms. Webber had been diagnosed with cognitive impairment and/or dementia. She also displayed a rather selective memory of events that day.

Ms. Webber's health began to decline precipitously in the fall of 2012. No further changes were made to the 2012 Estate Planning Documents. She passed away in her home on December 11, 2012.

III. Analysis

A. *Undue Influence*

The Court, for the reasons set forth more fully below, concludes that the 2012 Estate Planning Documents must be invalidated as the product of undue influence exerted by Officer Goodwin. As stated earlier, evaluation of a claim of undue influence is by its very nature a difficult task. This Court reaches its decision only after careful consideration of: the totality of the trial testimony; extensive documentary evidence; Ms. Webber's medical history; the video of her executing the 2012 Estate Planning Documents; Officer Goodwin's standing as a police officer and the control he exercised over most details of Ms. Webber's life; the "process" engaged in by the Fiduciary resulting in execution of the documents; and the common law governing undue influence, as well as all applicable inferences when there is a confidential relationship.

In sum, as has been found, it is uncontroverted that Officer Goodwin stood in a confidential relationship with Ms. Webber, procured legal counsel for her for the purposes preparation and execution of the Estate Planning Documents, and was the beneficiary of the vast majority of lifetime assets accumulated by a ninety (93) year-old woman he had only known the final twenty-six (26) months of her life. Because of these undisputed facts, Officer Goodwin and the Fiduciary, as Proponents of the 2012 Estate Planning Documents, had the minimal burden of demonstrating by a preponderance of the evidence that those documents were not the product of undue influence. The Court

concludes, given Ms. Webber's age and weakened mental condition, Officer Goodwin's standing as a police officer, the nature of extraordinary gifting to someone relatively new to her life, and her dependence upon Officer Goodwin for love, attention and valuable life supports, that the Proponents have failed to rebut the inference of undue influence rendering the Estate Planning Documents invalid. To put it another way, the Proponents have failed to demonstrate the absence "not only of opportunity and ability, but of design and accomplishment." Harvey, 83 N.H. at 240.

The analysis begins with a presumption of the absence of undue influence. See, e.g., Albee, 79 N.H. at 91. This presumption arises only "upon proof of the voluntary, formal execution of the will 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 contestants offered substantial proof of Ms. Webber's failing mental capacity and growing fear and paranoia, cf. Harvey, 83 N.H. at 240, her dependence upon Officer Goodwin and the control he exerted over her life, Edgerly, 73 N.H. at 408, and the unusual circumstance of her largesse in conferring a lifetime of assets to a relatively new, unrelated person in her life. Neill, 126 N.E. at 94.

Put another way, the Petitioners offered substantial proof of "opportunity and ability" as well as "design and accomplishment[,]" Harvey, 83 N.H. at 240, and thus are seen as having sufficiently rebutted the presumption of validity. As more than one medical professional, long-time acquaintances and banker Gile testified, Ms. Webber was vulnerable given her growing confusion, inability to make sound judgments, and tendency toward fear and suspicion. Officer Goodwin, by his initial introduction as a

police officer,[46] and rapid installation as her close friend, confidante, quasi-protector, and point-person for medical care, had the ability to exert influence, even if not overt in the nature of force or threats, but by acting upon her fears and hopes. See In re Hobbes, 47 A. at 680. Certainly, the contestants offered proof of design as Officer Goodwin, as early as January 2011, actively sought to procure legal counsel for Ms. Webber either directly or through his surrogate, Attorney Justin Nadeau. Finally, the contestants offered substantial proof of accomplishment as the estate plans were drawn up, serious medical/mental health concerns were seemingly ignored, and a process was implemented to a pre-determined end by the Fiduciary.

As has been found, Officer Goodwin was in a confidential relationship with Ms. Webber. A confidential relationship exists where one has "gained the confidence of the other and purports to act or advise with the other's interest in mind." Cornwell, 116 N.H. at 209. Although it could be argued that Officer Goodwin's official status is sufficient to support a finding of confidential relation, the record also shows that Ms. Webber relied upon "her friend" Officer Goodwin to arrange medical and life supports, in addition to obtaining legal counsel. Officer Goodwin presented himself as acting in the best interests of Ms. Webber by calling her multiple times per week, taking her to restaurants and at least one casino, acting as her contact person for medical care, and arranging for in-home services when Ms. Webber's former support system no longer was available. Ms. Webber gave him a key to her home. When procuring counsel for Ms. Webber, he presented himself as a friend who was assisting her to replace estate documents

[46] During trial, Officer Goodwin and members of the Portsmouth Police Department offered testimony that after January 2011, his relationship was one of a friend instead of a police officer. Even assuming that this bifurcation of roles was clear in Ms. Webber's mind, by the time he began acting as her "friend" he had already begun to exert significant control over, and become a central figure in, her life.

drafted by Attorney Ritzo. Indeed, with the one exception of her expressed distrust of Officer Goodwin to Dr. Hopkins, referenced earlier, there was overwhelming evidence that to Ms. Webber, Officer Goodwin was her "love," a trusted companion, and even perhaps sent by God to protect her from outside threats.

It cannot be disputed that Officer Goodwin was a beneficiary, indeed the primary distributee, of the 2012 Estate Planning Documents; and having found that he stood in a confidential relationship with Ms. Webber, and actively assisted in procuring the documents, an inference arises that they were the product of undue influence. Edgerly, 73 N.H. at 408-09; Archer, 126 N.H. at 28. The documents can only be declared valid, therefore, if the proponents prove an absence of undue influence. Archer, 126 N.H. at 28. As discussed at length supra, proof must be established by a preponderance of the evidence.

After considering "all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties," In re Estate of Cass, 143 N.H. at 61 (quotations omitted), the Court concludes that the Proponents have failed to rebut the inference of undue influence. This case is difficult because, like many such cases, undue influence is "not shown by gross or palpable instrumentalities" such as overt threats, rather, evaluation of the presence or absence of undue influence must be derived from the circumstances of the devise or grant. Neill, 126 N.E. at 94. The Court's task is made immeasurably more formidable given that the precise point or moment that one's free will is destroyed or subjugated to another's

control or coercion is rarely, if ever, discernable to the judicial eye owing to its imperceptible progression to full maturity.

In addition to the common law inference of undue influence, several facts elicited at trial provide substantial evidence of opportunity, ability, design and accomplishment and thus independently favor a determination of undue influence. Importantly, Dr. Schwartz testified that her age, cognitive deficits, and poor judgment made her vulnerable or susceptible to undue influence despite her feisty and unfiltered demeanor. Others voiced this concern as well. Ms. Webber had become particularly suspicious, fearful of being robbed, lived alone, and despite many hired and friendly helpers, was lonely, -- in particular it appears to the Court, for male companionship. Officer Goodwin provided security and very quickly after they met, became a critical lifeline to medical and other life supports. Although she, before meeting Officer Goodwin, had a long, and often shifting, list of intended post-mortem gifts to friends and helpers, there is no evidence that she ever desired to benefit another in such a generous manner. Indeed, even her former husband, Douglas Miller, received only a life estate in her home (subject to conditions including that it could be revoked if he lived with another woman or his children), some stock, and some monthly income from her investments. See Pet.'s Exh. 1(A). No provision ultimately was made for Brett Webber. Simply put, the uncharacteristic generosity to a relatively new friend to whom she became emotionally and physically dependent made the devise/grants to Officer Goodwin strikingly unnatural, in particular when compared to prior planned dispositions when Ms. Webber was in stronger mental and physical health, and less dependent or under the control of

any one person. It is these special circumstances that lead the Court to conclude that the common law inference of undue influence has not been disproved.[47]

In addition, the Court holds that the Proponents of the 2012 Estate Planning Documents' have not overcome the inference that Officer Goodwin, by design, carried out through the Fiduciary, accomplished execution of documents reflecting his will and not the free unfettered agency of Ms. Webber. Officer Goodwin actively sought out counsel for Ms. Webber. Although it was Attorney Nadeau who ultimately contacted the Fiduciary, the Court cannot ignore the hand of Officer Goodwin, in particular given Attorney Nadeau's letters to the fiduciary seeking updates on behalf of his client, and thus applying subtle pressure on the Fiduciary to complete the "process." Design can also be inferred by Officer Goodwin's failure to update his January 10, 2011 memo during Detective Warchol's investigation to reflect that: (1) Ms. Webber had informed him that she would be leaving him her home and contents; and (2) he had begun a process to procure legal counsel to draft documents including such a generous devise. Finally, it is curious that Attorney Mulhern was dismissed after suggesting court intervention, which naturally would have increased independent scrutiny on whether the intended gifting to Officer Goodwin might be indeed the product of an unfettered will. The Court is not at all persuaded that he was dismissed for lack of attentiveness or diligence and it specifically does not credit Officer Goodwin's testimony that Ms. Webber of her own volition initiated his dismissal.

[47] The Court is not unmindful of the difficulty that the common law may place on proponents advocating the validity of legal documents where there is a confidential relationship, however, that onus could have been avoided had they acted on the advice of Attorney Mulhern and sought probate court oversight given the unusual circumstances of this case.

Accomplishment was effected through choice of counsel who ever-so-slowly marched toward final execution without reading key medical reports, and, in the face of experts who could not (N. P. Euchner) or would not (Dr. Schwartz) attest to Ms. Webber's competency, administered his own mental status exam.[48] As noted supra, the Court is particularly unsettled by the Fiduciary's offhand dismissal of requests by Ms. Webber during the videoed document execution, casting further shade on the question of whether Ms. Webber's independent will was being effectuated. Again, Officer Goodwin's participation in the choice of counsel and then oversight through his lawyer is indicative of accomplishment and casts doubt on whose will was driving execution of an estate plan with such generosity bestowed on him.

In rebuttal, the Proponents offered testimony of Officer Goodwin that he was only helping Ms. Webber accomplish what she wanted and that he only agreed to accept millions of dollars of assets to make her happy. Again, given his often evasive, sometimes dubious testimony and often selective memory, the Court cannot give credit to Officer Goodwin's recounting of facts without independent verification.[49] Similarly, the Court does not give substantial weight to the Fiduciary's testimony on this matter in light of his own clouded credibility borne of the process he effected and his own often selective and sometimes self-serving memory.

Although all agree, and the video demonstrates, that Ms. Webber possessed a vivacious, funny, irreverent, and lively personality, those traits do not logically offer *sufficient* support to overcome an inference of undue influence, particularly in the face of

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[48] The Court does not intend to create a requirement that counsel hire expert evaluators in every case, however, where there are serious concerns about capacity, practitioners should tread with great care.
[49] There was testimony that Ms. Webber consistently voiced a desire to benefit Officer Goodwin. Though the Court does not doubt the truth that she made such declarations, it is suspect, however, that the idea and insistence was truly autonomous and not that of Officer Goodwin.

those facts indicative of undue influence discussed supra. Moreover, viewing the video, the Court was struck by how easily she submitted to Attorney Holmes' rejection of her desire, stated multiple times, to have co-agents on the power of attorney and add a distribution to a man whom she wished to favor with a gift. In that regard one might reasonably deduce that her will was also subjugated to the desire/convenience of Attorney Holmes.

Finally, the Court rejects the Fiduciary's contention, without citation or other support, that "[n]either case law not public policy supports shifting the burden of proof to a neutral trustee representing the interests of innocent beneficiaries to prove that a challenged trust was established without undue influence." *Trustee's Memorandum on the Burden of Proof* at 1 (Index #103). Case law has always been clear – the burden of proving the validity of either a will or trust is *always on the proponent* of that document, although in most circumstances a presumption of validity assists with this burden. See e.g. Estate of Washburn, 141 N.H. at 663; Gaffney, 81 N.H. at 306-07. A confidential relationship and beneficial grant or devise simply creates an inference of undue influence which must be overcome before a document can be deemed valid. See, e.g., Edgerly, 73 N.H. at 406-09. In the case of both the presumption of validity or inference of undue influence, the focus of the law is, appropriately, on *due execution* as without it, a document is void *ab initio*. The alleged neutrality of a proponent, or composition of the other members of a beneficiary pool, is simply not the foundation of inquiry. The Court is empathetic to those entities and/or persons who, through invalidation of the 2012 Estate Planning Documents, will have their distributions invalidated.[50] However, it has

[50] The Court observes that in other contexts, courts have not hesitated to invalidate will and trusts improperly executed without accounting for "innocent beneficiaries."

long been the law that a party who is a proponent of a legal document carries the ultimate burden to demonstrate its validity.

Moreover, there are also strong policy arguments against adoption of the Fiduciary's view. Namely, such a policy would allow an improper influencer to insulate nefarious acts by ensuring that there are one or more gift provisions made to innocent parties.[51]

B. *Capacity*

Given the Court's decision that the 2012 Estate Planning Documents must be invalidated as the result of undue influence, it need not decide whether Ms. Webber lacked the requisite capacity on May 2, 2012. 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. Although the Court has deep concern about her overall mental health, even pre-dating her introduction to Officer Goodwin, though often seemingly confused, Ms. Webber does indeed appear in the video, at the time of execution, to understand that she is signing a testamentary document and trust that include post-mortem gifting. See Boardman, 47 N.H. at 140 (even if testator is under a delusion, if it clears at the time of execution, a will is valid).

The Court observes however, that it remains unconvinced that Ms. Webber, given her dementia, confusion, and lack of judgment, history of exaggerated statements about the value of her home, and a claim of value of a painting, was able to recollect her

[51] The Fiduciary also asserts that the case should be dismissed as it should have been brought as a petition for constructive trust. That vehicle, however, is a remedy when there has been an asset transfer. Cf. Hopwood v. Pickett 145 N.H. 207, 208-09 (2000). It is "based upon principles of restitution, to prevent unjust enrichment of one person at the expense of another. Cornwell, 116 N.H. at 208-09. That is not this case.

property and its nature to the extent the law requires. In addition, evidence presented at trial suggests that without prompting by the Fiduciary and copies of prior wills, she was largely unable to independently and accurately self-recall and rationally understand the requisite nature of her property.

Similarly, it is unclear to the Court whether, or the extent to which, Ms. Webber had the contemporary capacity to bear in mind Brett Webber and the nature of her gifts, or lack thereof, for his benefit. As Attorney Mulhern testified, she was consistently mistaken about the existence of a certificate of deposit held for his benefit.

Finally, as it concerns the fourth element requiring the ability to make an election and bestow property, the Court is particularly troubled by actions in the video where the Fiduciary effectively ignores Ms. Webber's direction, on multiple occasions, to include a distribution to a certain helpful young man and honor her insistence that the one distribution to a charity benefit only a worthy young man or boy. Thus, although her ability to bestow property may not be the product of a delusion, her inability to prevail upon the Fiduciary to amend her distributions may well reflect some level of incapacity.

Determination of capacity presents a closer question for this Court. The Petitioners, in particular by introduction of Ms. Webber's medical records, the testimony of Dr. Schwartz, Joan Gile, Jeremy Bernier, Raymond Pasquale and N.P. Euchner, raised serious doubts about Ms. Webber's mental state such that the common law presumption of capacity was rebutted. In re Estate of Washburn, 141 N.H. at 663. Had the Court been called upon to render a decision on capacity, concerns about elements three through four, however, may have been sufficient to support a ruling that the

Proponents of the 2012 Will and 2012 Trust failed to carry their burden of showing, by a preponderance of the evidence, testamentary capacity. Id.

IV. Orders

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).

In accordance with the above findings and rulings, the Court enters the following orders:

- The *Petition to Set Aside the Geraldine W. Webber Revocable Trust Dated May 2, 2012* (Index #1) is GRANTED.
- The Court GRANTS Prayer D of the *Motion to Re-Examine* (Estate Case Index #29), and the request to order proof in solemn form is DENIED AS MOOT. See id. Prayer B.
- The Court DEFERS ruling on Prayer E of the *Motion to Re-Examine* pending further proceedings in relation to: (1) appointment of a successor fiduciary to Attorney Gary Holmes given the invalidation of the 2012 Will nominating him; and (2) consideration of another prior testamentary instrument to be submitted for admission into probate.

- The Clerk is DIRECTED to assign a post-trial status conference for **September 21, 2015** at **9:30 a.m.** and parties and/or counsel (with authority to act on behalf of their client(s) in their absence) are ORDERED to attend.
- The Court DENIES AS MOOT the Hospital's request to set aside the 2012 Estate Planning Documents on the basis of lack of capacity.
- The oral motion to admit an audio-recording of Captain Warchol's interview with Officer Goodwin is DENIED AS MOOT.

SO ORDERED

Dated: August 20, 2015

Gary R. Cassavechia, Judge