COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

HAMPSHIRE DIVISION **DOCKET NO. HS17P0494EA**

IN RE: ESTATE OF
JAMES P. HENDRICKS

FINDINGS OF FACT AND RATIONALE

(On the Petitioner's Petition for Formal Probate and Appointment of a Personal Representative [#1], filed on August 24, 2017)

Trial was held on May 9 and 10, 2019. The Petitioner, Leslie J. Cernak ("Ms. Cernak") appeared and was represented by Attorney Roger P. Lipton. The Objector, Elizabeth Ramon ("Ms. Ramon") appeared and was represented by Attorney James E. Gallagher. Eight witnesses testified: John Discenzak, Esq., Shelley Albano, Michelle Manser, Ms. Cernak, Sara Rossmassler; Richard Evans, Esq., Elizabeth Davis, Michael Brezsnyak, and Ms. Ramon.

After trial and consideration of all credible evidence presented and the reasonable inferences drawn therefrom, the Court hereby enters the following:

RELEVANT PROCEDURAL HISTORY

1. On August 24, 2017, Ms. Cernak filed a Petition for Formal Probate of a Will and Appointment of a Personal Representative [#1], pursuant to G. L. c. 190B, § 3-402. Ms. Cernak requested that she be appointed Personal Representative with unsupervised administration of James P. Hendricks' ("Mr. Hendricks") Estate.
2. On October 3, 2017, Ms. Ramon filed a Notice of Appearance and Objection [#10] to the Petition, and an Affidavit of Objections [#11]. Ms. Ramon alleged that Mr. Hendricks' Will was procured through undue influence and he did not have testamentary capacity when he executed the Will.
3. On December 5, 2017, Ms. Cernak filed a Motion to Strike [#23] Ms. Ramon's Objection. On March 23, 2018, the Court (Dacyczyn, J.) entered an Order [#29] denying Ms. Cernak's Motion to Strike, finding that Ms. Ramon alleged sufficient facts to support the claims in her Objection and was entitled to conduct discovery. The matter was then scheduled for Pre-trial Conference.
4. On May 3, 2019, the Court held hearing to determine whether Michael Brezsnyak, Ph.D. ("Dr. Brezsnyak"), witness for Ms. Cernak, would be qualified to testify as an expert witness, and whether Dr. Brezsnyak could be permitted to testify after Ms. Cernak added

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him to her witness list after the time for notifying the Court and Ms. Ramon of her intended witnesses had expired. The Court (Dacyczyn, J.) ultimately permitted Dr. Brezsnyak's testimony and reserved a determination of Dr. Brezsnyak's qualification to offer expert testimony until the time of trial.

5. On May 9 and 10, 2019, trial was held.

FINDINGS OF FACT

Background information

1. The parties' May 9, 2019 Joint Stipulation of Facts are incorporated herein.
2. On July 26, 2017, Mr. Hendricks died. He was survived by his wife, Ms. Cernak, and twin daughters, who were not a product of the marriage between Mr. Hendricks and Ms. Cernak, Ms. Ramon and Valerie Hendricks.
3. Ms. Cernak is 54 years old and lives at 830 Florence Road, Northampton, Massachusetts.
4. Ms. Cernak is co-owner of Cernak Oil in Easthampton, Massachusetts. The company is family-owned.
5. Ms. Cernak has one daughter from her first marriage, Lochlyn, who was 4 years old when Ms. Cernak and Mr. Hendricks married. Lochlyn resided with Ms. Cernak and Mr. Hendricks while growing up. Lochlyn was in college and studying abroad in Australia when Mr. Hendricks died.
6. Ms. Ramon lives at 10905 Irish Glen Trail, Haslet, Texas.
7. Ms. Ramon has one daughter, Rebecca, who is six years old.
8. Mr. Hendricks executed a Will on July 13, 2017, which named Ms. Cernak as the nominated personal representative. He leaves his entire Estate to Ms. Cernak.

Mr. Hendricks' Estate

9. Mr. Hendricks and Ms. Cernak were married on January 2, 1999. It was Ms. Cernak's second marriage and Mr. Hendrick's third. The parties knew each other and were friends for two decades before marrying.
10. In November 2004, Ms. Cernak and Mr. Hendricks designed and built the marital home in Florence, Massachusetts.
11. Mr. Hendricks was a professor of fine arts at the University of Massachusetts. He was a painter. He retired in 2004. The parties designed their home around his art work–he had pieces as large as 44x10 feet and 12 feet in diameter. They also built an art studio in the home, where Mr. Hendricks spent a lot of time. Many of Mr. Hendricks' art pieces remain in the art studio.

12. Ms. Cernak asserts the estimated value of Mr. Hendrick's personal property, mostly consisting of his art work, to be $500,000.00. No one has conducted an appraisal on the property.

13. Mr. Hendricks does not have any prior wills. In November 2016, Mr. Hendricks and Ms. Cernak discussed and drafted a will with Attorney Richard Evans, but the will was never executed. That draft included a provision for all of Mr. Hendricks' paintings to go to Ms. Ramon and Valerie Hendricks. Attorney Evans is unsure why Mr. Hendricks ultimately declined to execute the will that he drafted.

Mr. Hendricks' June and July 2017 Hospitalizations

14. Mr. Hendricks' health began declining in 2010. He was diagnosed with colon cancer and required surgery for treatment. Within a year, Mr. Hendricks was diagnosed with congestive heart failure. Mr. Hendricks underwent by-pass and a heart valve replacement for that condition. He also underwent a knee replacement, and declined replacing the other knee because the process with the first knee was too painful.

15. In 2016, Mr. Hendricks began experiencing increased medical issues, including swelling in his legs. Ms. Cernak insisted that Mr. Hendricks seek medical attention, but he refused.

16. From June 5, 2017 until June 26, 2017, Mr. Hendricks was hospitalized at Cooley Dickinson Hospital ("CDH") in Northampton, Massachusetts. He then moved to Health South, an acute rehabilitation facility in Ludlow, Massachusetts until June 28, 2017. From June 28, 2017 until July 14, 2017, Mr. Hendricks was hospitalized at Baystate Medical Center ("BMC") in Springfield, Massachusetts. He was then treated at CareOne facility from July 14, 2017 until July 26, 2017 when he died.

17. While hospitalized, Ms. Cernak served as Mr. Hendricks' primary healthcare proxy. Ms. Ramon was an alternate.

18. On June 5, 2017, Ms. Cernak brought Mr. Hendricks to CDH emergency room with an increased heart rate. He was admitted to the intensive care unit after testing revealed atrial fibrillation, swelling in the legs, and damage to the kidneys, liver, lungs and heart. Mr. Hendricks was placed on a ventilator to help with his breathing. [Jt. Ex. 2, p. 229].

19. On June 7, 2017, Mr. Hendricks executed a Massachusetts Medical Orders for Life Sustaining Treatment ("MOLST") form. [Jt. Ex. 3, p. 2185]. Matthew Lawrence signed-off as Mr. Hendricks' practitioner. In the event that he went into cardiac or respiratory arrest, Mr. Hendricks indicated "Do not resuscitate." In the event of respiratory distress, he indicated "Intubate and Ventilate," but only temporarily and noninvasively. Finally, he indicated a desire to be hospitalized if necessary.

20. On June 9, 2017, Dr. Julio Miranda indicated on Mr. Hendricks' medical chart that he was "oriented x3 (to their name, date or time, and place)." [Jt. Ex. 2, p. 318]. However, he elsewhere indicated that Mr. Hendricks disoriented, and it was, "Likely multifactorial: alcohol, encephalopathy." [Jt. Ex. 2, p. 321].

21. Encephalopathy is a broad umbrella term for confusion or injury to the brain. Conditions leading to encephalopathy includes infections and organ failure. Mr. Hendricks' liver disease contributed to his encephalopathy and he experienced delirium due to his body's inability to clear toxins.

22. By June 10, 2017, Mr. Hendricks was delirious, disoriented, and uncooperative, which continued throughout the duration of his hospitalization: "During the next couple of days in the Intensive Care Unit, we managed the patient with lactulose and we added rifaximin given the fact that the patient was deteriorating in terms of the mental status. He became more encephalopathic and also delirious. He required multiple doses of lactulose and rifaximin, but, in spite of that, on June 14th the patient became more somnolent, and on June 16th he required endotracheal intubation for protecting the airway. . . after managing his encephalopathy with lactulose and rifaximin, his mental status improved. . . ." [Jt. Ex. 2, pp. 203, 222, 223, 235, 310, 311].

23. On June 12, 2017, Dr. Julio Miranda indicated in Mr. Hendricks' chart that with regard to his neurological symptoms, he had "worsening encephalopathy likely hepatic encephalopathy." [Jt. Ex. 2, p. 272].

24. On June 13, 2017, Dr. David Serlin indicated on Mr. Hendricks' medical chart that he was "disoriented x2 (date or time and place)." [Jt. Ex. 2, p. 293].

25. On June 13, 2017, Ms. Ramon arrived in Massachusetts after learning that Mr. Hendricks was in the hospital. She took vacation and family medical leave from work in order to care for her father.

26. Mr. Hendricks looked older, thinner, and could not speak by the time Ms. Ramon arrived. Within the next week, however, Mr. Hendricks' condition improved enough to remove the ventilator and allow for eating.

27. On June 16, 2017, Dr. David Serlin performed an emergency intubation of Mr. Hendricks after he began experiencing respiratory failure. He was in critical condition. [Jt. Ex. 2, p. 284]. The tube was removed on June 18, 2017. [Jt. Ex. 2, p. 288].

28. On June 17, 2017, Dr. Tonbira Zaman indicated that with regard to Mr. Hendricks' neurological condition, his "[e]ncephalopathy improved with lactulose and mechanical ventilation. With some agitated delerium [sic] as well." [Jt. Ex. 2, p. 340].

29. On June 25, 2017, Dr. David Serlin indicated that Mr. Hendricks was alert and oriented times 2, "self and CDH," but still confused. [Jt. Ex. 2, p. 285].

30. On June 26, 2017 medical providers at CDH began the discharge process for Mr. Hendricks. [Jt. Ex. 2, p. 234] With regard to his neurological status, Dr. Julio Miranda wrote: "It is very important that the patient continues with lactulose and rifaximin. He has very low threshold to develop again hepatic encephalopathy." [Jt. Ex. 2, p. 236]. However, he further wrote, "His mental status from yesterday has improved significantly, and he is today, conscious, alert, and oriented. He is able to have a conversation with me." [Jt. Ex. 2, p. 236].

31. On June 23, 2017, while Mr. Hendricks was still hospitalized, Ms. Cernak took a trip to Australia to visit Lochlyn. Ms. Cernak believed that Mr. Hendricks was in a more stable condition than before, and there was discussion of moving him to a rehabilitation center for further treatment. Ms. Cernak had been planning the trip since January 2017, which is when Lochlyn informed her of her plans and asked her to visit. Ms. Cernak planned to visit Australia for three weeks from mid-June until July.

32. On June 26, 2017, Mr. Hendricks was transferred to Health South. There, he refused to take medication and participate in rehabilitation exercises. His health further declined, and he was rehospitalized on June 28, 2017 at BMC. Ms. Ramon informed Ms. Cernak of the rehospitalization.

33. On July 8, 2017, after learning of Mr. Hendricks' rehospitalization, Ms. Cernak returned to the United States. She visited Mr. Hendricks in the hospital the following morning. He was in the intensive care unit. He was intubated and could not speak, but he did squeeze her hand.

34. On July 12, 2017, Ms. Ramon returned to Texas. Mr. Hendricks had been transferred out of the intensive care unit by that time. Prior to her departure, Ms. Cernak and Ms. Ramon discussed ongoing care for Mr. Hendricks with his health care providers. Ms. Cernak then brought Ms. Ramon to the airport.

Health and Cognitive Functioning During BMC Hospitalization

35. On June 28, 2017, Mr. Hendricks arrived at BMC at approximately 11:00 am with acute respiratory failure: "The onset was abrupt. The course/duration of symptoms is constant. The character of symptoms is decreased responsiveness. The degree at present is severe." His baseline status was "alert and oriented x 4."[1] [Jt. Ex. 3, p. 421].

36. Mr. Hendricks had a history of altered mental status, alcoholic cirrhosis, hepatic encephalopathy, hepatorenal spine syndrome, atrial fibrillation, bilateral pleural effusions, coronary artery disease, critical care illness myopathy, and ascites. [Jt. Ex. 3, pp. 421, 652]. He was in end-stage liver failure.

37. Due to his respiratory condition upon arriving at the hospital, Dr. Michele Shroeder intubated Mr. Hendricks and admitted him to the intensive care unit.

38. At 9:33 pm, Richard Barus indicated in a fall risk assessment that Mr. Hendricks was delirious, and disoriented to time, place, and person. He was a high risk for falling. [Jt. Ex. 3, p. 466].

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[1] While there was no detailed testimony on the meaning of this notation, several witnesses testified regarding whether Mr. Hendricks was oriented to person, place, and time. Further, in will contests, similar notations in medical records are interpreted as relating to whether a person is oriented to person, place, and time. See In re Estate of Galatis, 88 Mass. App. Ct. 273 (2015) ("Galatis is described in the medical records as 'A+O x 3'–i.e., oriented to person, place, and time.").

39. At 9:33 pm, Richard Barus indicated in a confusion assessment method ("CAM") that Mr. Hendricks was positive for inattention and altered level of consciousness. The higher the score, beginning at zero, the more cognitive limitations the person is experiencing. Mr. Hendricks was not tested for disorganized thinking. He was given a CAM score of 3. [Jt. Ex. 3, p. 465].

40. Throughout the day, providers administered the following medications to Mr. Hendricks: metoprolol, fentanyl, rifaximin, lactulose, Norepinephrine, insulin, magnesium sulfate, potassium chloride, famotidine, sodium phosphate, piperacillin-taxobactam, vancomycin, and midazolam [Jt. Ex. 3, pp. 488, 490, 491, 492, 508, 513, 518, 520, 531, 548, 566, 587].

41. Lactulose is used to remove toxins from the liver. Liver toxicity can cause confusion and drowsiness.

42. On June 29, 2017 at 9:49 am, Cynthia Killian indicated in a CAM assessment that Mr. Hendricks was positive for inattention and altered level of consciousness. Mr. Hendricks was not tested for disorganized thinking. He received a score of 3. [Jt. Ex. 3, p. 641].

43. At 8:50 pm, Richard Barus indicated in a CAM assessment that Mr. Hendricks was negative for inattention, altered level of consciousness, and disorganized thinking. He was given a score of 0. [Jt. Ex. 3, p. 673].

44. At 10:50 pm, Richard Barus indicated in a fall risk assessment that Mr. Hendricks had no fall cognitive limitations. [Jt. Ex. 3, p. 674].

45. Throughout the day, providers administered the following medications to Mr. Hendricks: midodrine, heparin, and albumin. [Jt. Ex. 3, pp. 691, 693, 708].

46. On June 30, 2017 at 9:27 am, Francis Collins indicated in a fall risk assessment that Mr. Hendricks was disoriented to time, place, and person. [Jt. Ex. 3, p. 725].

47. At 9:00 pm, Ryan O'Connor indicated in a fall risk assessment that Mr. Hendricks had no cognitive impairments. [Jt. Ex. 3, p. 752].

48. On July 8, 2017, the day Ms. Cernak returned to the United Sates, Eric Tuvell indicated in a fall risk assessment at 3:31 pm that Mr. Hendricks was "Confused, Delirious, Disoriented to time, place, or person, Experiences Short term Memory Loss, Impulsivity, Does not Follow Instructions, Does not Realize Cognitive Limitations, Does not realize Physical Limitations." [Jt. Ex. 3, p. 1542].

49. At the same time, Eric Tuvell indicated in a CAM assessment that Mr. Hendricks was positive for inattention, altered level of consciousness, and disorganized thinking. He received a score of 3. [Jt. Ex. 3, p. 1545].

50. At 8:00 pm, Randall Shrader indicated in a fall risk assessment that Mr. Hendricks was "Confused, Impulsiv[e], Does not Realize Cognitive Limitations, Does not Realize Physical Limitations." [Jt. Ex. 3, p. 1570].

51. At 11:11 pm, Randall Shrader indicated in a CAM assessment that Mr. Hendricks was positive for inattention and altered level of consciousness. He was not tested for disorganized thinking. He received a score of 3. [Jt. Ex. 3, p. 1574].

52. Throughout the day, providers administered the following medications to Mr. Hendricks: lactulose, fentanyl, bisacodyl, docusate, milk of magnesia, midodrine, magnesium sulfate, sodium phosphate, and pottasium chloride. [Jt. Ex. 3, pp. 1582-1618].

53. On July 9, 2017 at 9:00 am, the day Ms. Cernak visited Mr. Hendricks after returning from her trip, Eric Tuvell indicated in a fall risk assessment that Mr. Hendricks was "Confused, Delirious, Disoriented to time, place, or person, Experiences Short term Memory Loss, Impulsivity, Does not Follow Instructions, Does not Realize Cognitive Limitations, Does not Realize Physical Limitations." [Jt. Ex. 3, p. 1639].

54. At 10:15 am, Eric Tuvell indicated in a CAM assessment that that Mr. Hendricks was positive for inattention, altered level of consciousness, and disorganized thinking. He received a score of 4. [Jt. Ex. 3, p. 1630].

55. At 9:00 pm, Richard Barus indicated in a fall risk assessment that Mr. Hendricks was "Delirious, Disoriented to time, place, or person." [Jt. Ex. 3, p. 1669]

56. At 10:00 pm, Richard Barus indicated in a CAM assessment that Mr. Hendricks was positive for inattention and altered level of consciousness. He was not tested for disorganized thinking. He received a score of 3. [Jt. Ex. 3, p. 1667].

57. Throughout the day, providers administered the following medications to Mr. Hendricks: lactulose, fentanyl, potassium chloride, and midodrine.

58. On July 12, 2017 at 5:34 am, Andrea Jones noted on Mr. Hendricks' biophysical assessment that Mr. Hendricks stated, "I think there is mylar hanging from the ceiling watching us." [Jt. Ex. 3, p. 1913]. With regard to neurological symptoms, she noted that he was experiencing confusion and disorientation, and was oriented to person and place. She described him as having periods of delusion, and being "very forgetful and repetitive." [Jt. Ex. 3, p. 1913].

59. At 9:00 am, Melissa Arroyo indicated in a biophysical assessment that Mr. Hendricks was "A/o x 2 confused. able to follow commands and answering direct questions appropriately then making delusional statements." He was oriented to person and place. [Jt. Ex. 3, p. 1962].

60. At the same time, Melissa Arroyo indicated in a fall risk assessment that Mr. Hendricks was "Confused, Disoriented to time, place, or person." [Jt. Ex. 3, p. 1970]

61. At 9:49 am, Olivia Milanesi made the following note on a speech therapy assessment: "soft hand restraints in place. Confused, difficult to redirect at times but participating in all PO trials." [Jt. Ex. 3, p. 1943]

62. In a 3:37 pm progress note, Michelle Arroyo indicated that Mr. Hendricks' level of consciousness was "alert and awake" and "oriented to person, place, time." Further, he

was experiencing visual hallucinations, without agitation." [Jt. Ex. 3, p. 1956]. At 3:59 pm in a biophysical assessment, Michelle Arroyo indicated Mr. Hendricks was oriented to person and place. He was "A/o x 2 confused. able to follow commands and answering direct questions appropriately then making delusional statements." [Jt. Ex. 3, p. 1966].

63. At 4:45 pm, Melissa Arroyo indicated in a progress note that Mr. Hendricks was alert and oriented times 2 to 3, and "was making delusional statements but no aggression." He was "[w]eepy at times but redirectable." [Jt. Ex. 3, p. 1957].

64. At 9:10 pm, Kelley Douglass indicated in a CAM assessment that Mr. Hendricks was negative for being inattentive and disorganized thinking, and his level of consciousness was not altered. [Jt. Ex. 3, p. 1995].

65. Throughout the day, providers administered the following medications: ativan, lactulose (except when refused by Mr. Hendricks), maalox, morphine, and ondansetron. [Jt. Ex. 3, pp. 1989, 1990].

Execution of Second Medical Orders Life-Sustaining Treatment Form

66. Upon returning to the hospital on July 12, 2017, Ms. Cernak discussed Mr. Hendricks' health condition with him. Mr. Hendricks told Ms. Cernak that he knew he had liver damage, but hoped for a transplant. Ms. Cernak informed him that the situation was more serious, and, in addition to the liver damage, he had kidney, lung, and heart damage. She explained that medical staff inquired as to whether he would like to be reintubated if he experienced respiratory arrest again, and he stated that he did not and had enough. Accordingly, Ms. Cernak informed Mr. Hendricks' medical providers that he was requesting comfort measures only.

67. At 5:06 pm, Dr. Joshua Allgaier ("Dr. Allgaier") noted the following: "Patient intermittently confused this morning . . . Patient seen bedside this morning accompanied by wife and daughter. . . . When his wife returned, another meeting was conducted with her, myself, and palliative care (Sarah Rossmassler): conversation regarding his prognosis and what he would want. She stated that he told her that he did not want to be reintubated, and would prefer to have medication to help with his shortness of breath should he experience that again. . . . Leslie feels that she does not have enough support at home at this time to bring him home. . . . We discussed that there is a possibility that the patient may pass within days, should we withdraw the current care, and she demonstrated understanding. The 3 of us returned to the room to speak to the patient, who appeared to be lucid, and recognized Sarah from previous talks. He indicated that he did not want to continue in his current condition, and understands that he is at the end of his life. His goal is to get home and spend his remaining time with his wife. At the conclusion of this meeting, the patient was made CMO with the understanding that he would continue with his lactulose to maintain his mental status, and the rectocele as long as this is continued. The patient was notified that he could refuse the lactulose if he does not want it." [Jt. Ex. 3, p. 1986] After that meeting providers instituted a comfort measures only treatment plan.

68. Thereafter, on July 13, 2017, nurse practitioner Sara Rossmassler ("Ms. Rossmassler") and Dr. Allgaier met with Mr. Hendricks and Ms. Cernak with respect to Mr. Hendricks' medical wishes. [Jt. Ex. 3, pp. 1957, 1988]. Ms. Rossmassler served as Mr. Hendricks' nurse practitioner while he was hospitalized at BMC. They met in the afternoon. They discussed Mr. Hendricks' request for comfort measures only, and executed a second MOLST form, with do not resuscitate, do not intubate and ventilate, and do not hospitalize orders should Mr. Hendricks go into cardiac or respiratory arrest again. [Jt. Ex. 3, p. 2190]. Mr. Hendricks signed his name on the form, but did not include a date. It appears that Ms. Rossmassler affixed the date next to Mr. Hendricks' signature.

69. Shelly Albano ("Ms. Albano") is a nurse care manager at BMC and a registered nurse. She has been in that position for 4 years. Her duties generally consist of discharge planning and next level of care. Ms. Albano was also engaged in discharge planning for Mr. Hendricks on July 13, 2017 in the early afternoon. She met with him four times throughout the day, with Ms. Cernak attending some of the meetings. Ms. Albano found Mr. Hendricks to be an active participant and appropriate in conversations regarding discharge planning. She later served as an attesting witness to Mr. Hendricks' Will.

70. At 4:54 pm, Ms. Rossmassler indicated in a progress note that Mr. Hendricks' mental status was "waxing and waning." [Jt. Ex. 3, p. 1989] She further wrote: "Wife [L]eslie shares that she and James have had some meaningful and directive conversations this afternoon during a time in which he was lucid and 'like himself.' She shares that he reiterates that he does NOT wish to be reintubated, and would choose 'pain medicines over intubation.' She shares that he understands his liver disease is advanced and he may die as a result.' Leslie asks that Dr. Allgaier and I review the discussion with him given his very clear mental state. James reiterates his wish to return home. 'I'm done with the hospital.' Agrees that focus on comfort is appropriate, acknowledges that he may be approaching the end of life. Wishes his team can find a way for him to have end of life at home." [Jt. Ex. 3, p. 1991].

71. In meeting with Mr. Hendricks and Ms. Cernak, providers determined that Mr. Hendricks had the requisite capacity to execute a MOLST order. As such, Mr. Hendricks' healthcare proxy was never invoked during his hospitalization. Capacity in the context of executing medical documents is distinct from capacity in the context of executing legal documents. Capacity to make medical decisions depends on risks and benefits of certain treatments–if something is high risk, there is a higher threshold for capacity. With respect to declining life-sustaining care, there is a low risk when cardiac resuscitation would likely be futile.

Procurement and Execution of July 2017 Will

Mr. Hendricks' Medical and Mental Status

72. On July 13, 2017, Ms. Cernak arrived at the hospital at 10:30 am. Healthcare providers indicated in his medical chart that they were beginning end-of-life care. Throughout the July 13, 2017 medical records, providers focused on discharge and end-of-life planning

for Mr. Hendricks.

73. From that day, Ms. Cernak has an evening recording of Mr. Hendricks, in which they had a casual conversation. The subject matter included spiders. Mr. Hendricks sounded engaged in the conversation. [Pet. Ex. 1].

74. At 3:00 am, Kelley Douglass indicated in Mr. Hendricks' progress notes that he was "alert and oriented to person and place with some confusion at times." He refused a dose of lactulose that night, which was used to help with his mental status. [Jt. Ex. 3, p. 2071].

75. At 5:03 am, a CAM was conducted by Kelley Douglass who indicated that Mr. Hendricks did not have mental status changes and was not inattentive, disorganized, and did not have an altered level of consciousness. He received a CAM score of 0. [Jt. Ex. 3, p. 2077].

76. At 11:40 am, Laurie Kaeppel noted under neurological symptoms in Mr. Hendrick's biophysical assessment notes that he was confused, disoriented and weak, and was not oriented to person or place, but may have been oriented to time.[2] [Jt. Ex. 3, p. 2074].

77. However, at 10:47 am, a progress note written by Dr. Allgaier indicated that Mr. Hendricks had been "intermittently confused, but is fully oriented to person, place, and time." [Jt. Ex. 3, p. 2078]. Dr. Allgaier wrote that after Mr. Hendricks was transferred out of the ICU: "Another meeting was conducted 7/12/2017 that resulted in the patient being made CMO. He is now less delirious and much more comfortable without invasive measures and a new room." [Jt. Ex. 3, pp. 2078-2079].

78. At 11:47 am, Laurie Kaeppel indicated in a biophysical assessment that Mr. Hendricks' neurological symptoms included confusion, disorientation and weakness. He was not oriented to person or place. [Jt. Ex. 3, p. 2080].

79. At 11:47 am, Laurie Kaeppel also indicated in a fall risk assessment that Mr. Hendricks was "confused, disoriented to time, place, or person." [Jt. Ex. 3, p. 2082]

80. At 1:54 pm in a palliative care progress note, Ms. Rossmassler indicated, "Chief complaint: follow up of altered mental status . . . continues to refuse lactulose." [Jt. Ex. 3, p. 2093].

81. At 4:30 pm, in a progress note, Laurie Kaeppel wrote that Mr. Hendricks was, "alert, and oriented times 2-3, forgetful at times." [Jt. Ex. 3, p. 2105].

82. Throughout the day, providers administered morphine for pain. In addition, they administered lorazepam for anxiety and zofran for nausea. Finally, they administered thiamine and lactulose "to maintain mental status as long as possible." However, they noted that they "will discontinue if patient continues to refuse." [Jt. Ex. 3, p. 2079].

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[2] The notation is unclear. The care provider wrote: "Orient to person, place, time: not oriented, Time."

Procurement and Execution of the Will

83. Attorney John Discenzak ("Attorney Discenzak") is an estate planning attorney in Holyoke, Massachusetts. He holds a Juris Doctor from Suffolk University Law School and Master of Laws ("LLM") from University of Miami. He was formerly an adjunct faculty member at Western New England University Law School, where he lectured and helped designed and taught an LLM program. He has also been a Massachusetts Continuing Legal Education ("MCLE") instructor. He drafts 100 to 150 wills and trusts each year.

84. On July 13, 2017, Attorney Discenzak was informed that Ms. Cernak called to speak with him. He returned her call and they scheduled a phone meeting for 2:00 pm on the same day.

85. At 2:00 pm, Ms. Cernak met Attorney Discenzak in his office. She told him that she thought the situation was too important for a phone call. Ms. Cernak explained that Mr. Hendricks was hospitalized and wanted to execute a will. Ms. Cernak then dictated the terms to be included in the will and left the office.

86. Attorney Discenzak then drafted the will according to Ms. Cernak's instructions and brought it to BMC for execution.

87. Upon arriving in Mr. Hendricks' hospital room, Attorney Discenzak found Mr. Hendricks and Ms. Cernak. Ms. Cernak introduced Attorney Discenzak to Mr. Hendricks, and they shook hands. Mr. Hendricks did not appear to be surprised that Attorney Discenzak was there to execute the Will. It was the first time the pair met.

88. Attorney Discenzak then had a casual conversation with Mr. Hendricks. He mentioned that he owned a piece of Mr. Hendricks' artwork, and Mr. Henrdricks smiled and asked which piece. Attorney Discenzak did not know the name. Mr. Hendricks also asked how he came to acquire the artwork, and they continued with a general discussion. Attorney Discenzak showed Mr. Hendricks a photo of the painting, and Mr. Hendricks knew the name.

89. Attorney Discenzak did not ask Mr. Hendricks or Ms. Cernak if Mr. Hendricks had a prior will.

90. Attorney Discenzak did not ask why Mr. Hendricks was hospitalized or how long he was hospitalized. He did not inquire into the medications that Mr. Hendricks was taking.

91. After 15 minues of conversation, the conversation shifted to the Will. Attorney Discenzak invited Mr. Hendricks to review the document, and told him that the most substantive provisions were in clauses 1 and 2.

92. Mr. Hendricks wore his glasses while reviewing the document.

93. Mr. Hendricks looked at all of the pages, then returned to the first page. Attorney Discenzak asked him if there were any issues or changes, and Mr. Hendricks replied, "it's good." Attorney Discenzak asked Mr. Hendricks if he was ready to sign, to which he

replied, "yes."

94. Ms. Cernak then went to retrieve witnesses. While she was gone, Attorney Discenzak asked if Mr. Hendricks was signing by his own free will and was not being coerced, promised, or threatened into signing. Mr. Hendricks indicated that he was not and his estate consisted primarily of his artwork.

95. Attorney Discenzak also asked if Mr. Hendricks knew that everything was to go to Ms. Cernak or his children if she were to predecease him, to which he indicated that he understood.

96. Ms. Cernak then returned with witnesses, Ms. Albano and Michelle Manser ("Ms. Manser"). Attorney Discenzak explained that they were there to witness a will. He asked if they were familiar with Mr. Hendricks, and they replied affirmatively. He told them that they would be asked to state that the testator was over the age of 18 and was of sound mind. He then gave the Will back to Mr. Hendricks and provided him with a hard backing for his signature. Mr. Hendricks signed in two places, and Attorney Discenzak asked if it was his Will and if he signed the Will of his free act and deed, to which he replied, "yes." The witnesses then attested to Mr. Hendricks being over the age of 18 and of sound mind and provided their signatures.

97. Neither witness had any prior training or experience in determining whether someone is of sound mind.

98. Ms. Albano did not ask Mr. Hendricks any questions when witnessing his execution of the Will. Ms. Albano has been unsure about a patient's capacity in the past, and has asked for a physician's consult in those circumstances. Although she was familiar with Mr. Hendricks' condition, including his fluctuation in confusion and delirium, she did not check his medical chart for the latest update. She did not see him read the Will. She was in the room for approximately 5 minutes. Ms. Albano also made a determination that it was not necessary to consult with Mr. Hendricks' physician or nurses concerning his mental status. She did not believe that he was under any constraints or undue influence, but did not inquire into those issues.

99. Ms. Manser is a nurse case manager at BMC. She has been employed at BMC since 2016. Ms. Manser was in Mr. Hendricks' room during Attorney Discenzak's discussion regarding Mr. Hendricks' artwork; she believes Mr. Hendricks answered appropriately

100. Mr. Hendricks's Will was the first that she witnessed. She received no prior training in determining capacity for executing a will.

101. Ms. Manser did not ask Mr. Hendricks any questions when witnessing his execution of the Will. She was not, however, sufficiently familiar with Mr. Hendricks' condition, including his behavior and medications. She made a determination that it was not necessary to consult with Mr. Hendricks' physician concerning his mental status. She did not see him read the Will, and was in the room for approximately 5 minutes.

102. The execution of the Will occurred prior to 4:30 pm on July 13, 2017.

103. The next day, Mr. Hendricks was transferred to CareOne. His initial intake contains the following notations by a nurse practitioner who signed as Cames: "patient reports change in mental status; uncertain of baseline, appears intermittently confused." Additionally, he had "poor insight . . . into the severity of his condition and prognosis, tells me 'I am in pretty good health' . . . normal affect and confused . . . not oriented to time; knows he is in rehab facility, knows it is July but cannot state day or year-guesses it is 1999 . . . remote memory normal and recent memory abnormal; poor short-term memory, does not remember events of hospitalization." [Pet. Ex. 3, p. 6].

104. At 12:43 pm that day, nurse Paul Lastowski wrote that Mr. Hendricks' condition was "Alert," and his mood was "Pleasant" and "Content," and his mental status was "Alert: Oriented to time, place, and person." He was noted as not being lethargic, confused, or displaying a memory problem, and he displayed no hallucinations, delusion, or behavioral symptoms directed towards others. [Pet. Ex. 3, p. 7].

105. Dr. Elizabeth Davis works at South End Community Health Center in Boston, Massachusetts. She is the Chief of Adult Medicine and director of a addiction program. She studied at Brown University and received her medical degree in Tel Aviv and completed a psychiatric residency at Cambridge Hospital. She is board certified in internal medicine and psychiatry. In addition, Dr. Davis practices forensic psychiatry, which includes evaluations for civil commitment, evaluations for capacity to execute documents, and competency hearings. She has testified in court proceedings for civil commitments, competency to stand trial, and commitments for drug dependency. She has conducted 12 to 15 professional presentations, including on guardianship and capacity issues.

106. Dr. Davis has never conducted a testamentary capacity evaluation post-death. She did not conduct any interviews in developing her opinions.

107. Dr. Davis reviewed Mr. Hendricks' medical records, and opines that he did not have the capacity to execute the Will. Dr. Davis had no prior involvement with Mr. Hendricks. She opines that the medical records indicate that Mr. Hendricks was not going to recover from the liver issues, and his mental state worsened while he was hospitalized. Dr. Davis explains that encephalopathy occurs in advanced stage liver failure and includes symptoms of delirium. In addition, failure to take lactulose could exacerbate the build up of ammonia in the body and cause confusion. Further, Mr. Hendricks' kidney failure would make it difficult for him to clear toxins from the body, which ultimately affects cognitive functioning. With respect to Mr. Hendricks requiring intubation on three occasions, Dr. Davis suggests that those episodes would impact blood flow and oxygen to the brain, which also affects cognitive functioning.

108. With respect to Mr. Hendricks' and Attorney Discenzak's conversation about Mr. Hendricks' painting, Dr. Davis opines that Mr. Hendricks would have been able to have such a conversation because art was a big part of his life and it would be more likely for him to retain those related memories even while in an altered mental state.

109. Due to Mr. Hendricks being noted as confused on the day the Will was executed, Dr. Davis opines that it would be highly unlikely that he experienced a period of lucidity that day.

110. Dr. Michael Breznyak is a clinical and forensic psychologist in Northampton, Massachusetts. He received a Ph.D from the University of Colorado and has been a licensed psychologist since 2004. He has been a forensic psychologist since 2009. He has no medical training, but is familiar with conditions related to mental health. He has experience in issues related to criminal responsibility, civil commitment, and competency. He has testified as an expert in approximately 1300 competency exams, with 800 of those for commitment proceedings, and 500 for competency to stand trial. He has consulted in cases with family and guardianship issues, and has signed one medical certificate for a guardianship. In his forensic psychologist role, he performs evaluations by interviewing clients, reviewing records, and interviewing collateral sources.

111. In rendering his opinion on Mr. Hendricks, Dr. Breznyak reviewed his medical records, listened to audio recordings, and reviewed the Will. He believes that the medical records are essential to his review because they provide a more objective form of information and are more reliable than witness testimony or opinion.

112. Dr. Breznyak opines that the medical records clearly show that Mr. Hendricks was suffering from delirium and encephalopathy. Dr. Breznyak points to the few notes in Mr. Hendricks' medical records on July 12 and 13 that indicate that he was not suffering from delirium, however, in suggesting that Mr. Hendricks may have had periods of lucidity during those days. [See infra ¶¶ 64, 75]. With respect to the CAM assessments, Dr. Breznyak is unfamiliar with the assessment and researched its function in connection with this case. He points to CAM scores of 0 to support his conclusion that Mr. Hendricks' "mental status as documented in the medical record does not clearly preclude his testamentary capacity at the time the will was signed." [Pet. Ex. 3, p. 8].

113. Dr. Breznyak also opines that because Mr. Hendricks participated in medical decisions, he was competent to execute the Will.

RATIONALE

Undue Influence

"Four considerations are usually present in a case in which a supportable finding of undue influence has been made. These involve showings 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." Estate of Moretti, 69 Mass. App. Ct. 642, 654-655 (2007) (quoting Heinrich v. Silvernail, 23 Mass. App. Ct. 218, 233 (1986)). "A claim of undue influence is made out upon a showing that a third party, here [Ms. Cernak], by means of coercion, overpowered the mind of [Mr. Hendricks] and caused him to make a will that embodied [Ms. Cernak's] 'dominating purpose' rather than the 'wishes of the person signing the

instrument' i.e., the decedent." Rostanzo v. Rostanzo, 73 Mass. App. Ct. 588, 604 (2009) (quoting Neill v. Brackett, 234 Mass. 367, 369 (1920).

Here, there is no indication that an unnatural disposition was made. See Tetrault v. Mahoney, Hawkes, & Goldings, 425 Mass. 456, 465 & n.11 (1997) ("[T]here was no allegation that would support an inference that the testator's disposition of his assets was unnatural. Indeed, including the wife's name on the deed did not constitute a disposition that ignores the natural objects of the decedent's bounty where the wife and the testator had been married for twenty-seven years."). Contrast Popko v. Janik, 341 Mass. 212, 215 (1960) (finding undue influence where the testator left little to his nephew, who was like a "foster son" to him and principal object of his "bounty and affection" but instead gave his home to his housekeeper). Accordingly, the objector's argument fails on the first element and there can be no finding of undue influence.

Testamentary Capacity

"An individual 18 or more years of age who is of sound mind may make a will." G. L. c. 190B § 2-501. "At the time of executing a will, the testatrix must be free from delusion and understand the purpose of the will, the nature of her property, and the person who could claim it." Paine v. Sullivan, 79 Mass. App. Ct. 811, 826-27 (2011) (citing Santry v. France, 327 Mass. 174, 175-176 (1951)). "'It has been held that, a person [...] may possess testamentary capacity at any given time and lack it at all other times.'" Id. at 827. "The proponent has the burden of proof on the issue of testamentary capacity. In sustaining that burden, he is aided by a presumption that the testator had the requisite testamentary capacity." Id. However,"'[w]here there is some evidence of lack of testamentary capacity, the presumption of sanity loses effect and the burden [is] on the proponent of the will to satisfy the tribunal of fact by a fair preponderance of the evidence that the deceased was of sound mind an testamentary capacity when the instrument was executed." Id. at 817 (quoting Palmer v. Palmer, 23 Mass. App. Ct. 245, 250 (1986)).

In Paine, the decedent had developed dementia prior to death: he had "significant frontal dysfunction with poor insight and judgment, difficulty changing set and mild recent memory difficulties." Id. at 813. In the time prior to the contested will being executed, the decedent had been suffering from "significant cognitive impairment. Specifically, testing revealed mild disorientation (time), mild cognitive slowing, moderate anomia, moderate amnesia, and less pervasive frontal lobe deficits." Id. at 814. In these circumstances, diagnosis of a condition that calls into question someone's cognitive condition carries more weight when the cognitive deficits associated with the condition "manifest themselves in the loss of abilities that bear on testamentary capacity" Id. at 818.

An expert testified at trial that: (1) medical records showed the decedent's dementia was mild; (2) medical providers continued to direct their reports to the decedent and explained test results to the decedent; and (3) the decedent continued to be involved in decisions for himself. Id. As such, the expert concluded, "'[a]s a physician, the preponderance of evidence indicates that [the decedent] had capacity to know his property, who were the natural heirs to his bounty,

that he was in the process of making a will to make distribution with respect to those elements, and that he was in fact making such a plan.'" Id.

With regard to the drafting attorney's conduct, the attorney spoke with the decedent and received instructions only by telephone in the presence of the decedent's wife–he did not have a private conversation or visit with the decedent before drafting the will and mailing them to the decedent and the decedent's wife. Paine, 79 Mass. App. Ct. at 815. Then, the decedent and wife took the will to a local bank for execution. Id. The attorney did not supervise execution and could not provide evidence as to the decedent's capacity on the date the will was executed. Id. Bank employees who witnessed the signing of the will had no discussions with the decedent "aside from social niceties." Id. at 816.

At trial, the attorney learned of the decedent's history and diagnosis of dementia. Id. at 815. He asserted that had he known of the decedent's condition before, he would have further investigated the issue of capacity and requested a medical consultation. Id. at 816.

Despite the attorney's failure to conduct a thorough inquiry into the decedent, the trial judge found that the attorney possessed "'the requisite degree of attention to capacity and free will . . . expected of an attorney drafting a Will for a client.'" Paine, 79 Mass. App. Ct. at 816. The Appeals Court disagreed, concluding that the attorney was unable to provide relevant evidence as to the decedent's capacity on the day the will was signed–"The attorney had not seen John in a number of years and only spoke with him by telephone; John simply verified he wanted to do what Odette wanted. The attorney was unaware that John had been diagnosed with dementia. . . ." Id. at 820; see In re Estate of Galatis, 88 Mass. App. Ct. 273, 277 (2015) ("[T]he judge sharply criticized the lawyer for failing to inquire at all, at any point prior to the will execution, as to Galatis's mental status or medical diagnosis."). With respect to the witnesses, the Appeals Court took issue with the fact that "none recall whether John knew he was signing a will, knew his financial holdings, knew the natural objects of his bounty, or otherwise met the testamentary capacity standard." Id. at 821. Finally, with respect to the medical evidence, the Appeals Court explained, "his ability to participate in medical decisions, where treatment options were clearly explained, simply does not support the inference that he possessed testamentary capacity in a situation where his options appear not to have been explained to him." Id. at 819. On those facts, the Appeals Court held that the proponent of the will did not satisfy their burden of proving that the decedent possessed testamentary capacity to execute the will. Id.

In In re Estate of Galatis, on the day prior to the will signing, the decedent was diagnosed with encephalopathy. In re Estate of Galatis, 88 Mass. App. Ct. 273, 275 (2015), *rev. denied*, 473 Mass. 1105 (2015). A forensic psychiatrist and the decedent's attending physician explained that a person with encephalopathy suffers from "a loss of ability to communicate, remain oriented, think logically, solve problems, and remember information." Id. at 276. The trial judge credited the opinions of the experts in eliminating the presumption of capacity. Id. at 279. He ultimately concluded that the proponents failed to carry their burden of proving testamentary capacity. Id. The Appeals Court found no error. Id. at 279-280 ("To be sure, there was some

evidence to support the will proponents' position that Galatis had regained testamentary capacity on February 9 . . . but it was the judge's role as fact finder to assess all the evidence and to resolve any conflicts.").

Here, there is sufficient evidence to remove the presumption of testamentary capacity and place the burden on Ms. Cernak to prove that Mr. Hendricks possessed testamentary capacity on the day the Will was executed. Mr. Hendricks was hospitalized and experiencing encephalopathy, which impacted his cognitive functioning. Medical providers consistently describe Mr. Hendricks as confused and delirious in the days leading up to and the day the Will was executed.

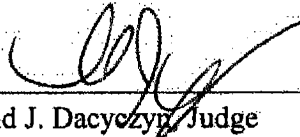
Ms. Cernak has not shown, by a preponderance of evidence, that Mr. Hendricks possessed testamentary capacity on July 13, 2017. While Dr. Breznyak points to places in the medical record that suggest Mr. Hendricks was lucid at times, those entries are outliers amongst dozens of notations showing that from early June until his transfer to CareOne in mid July, Mr. Hendricks consistently experienced disorientation, confusion, and delusion related to encephalopathy. Notably, on July 12, only one provider, Kelley Douglass, noted that Mr. Hendricks was attentive, possessed organized thinking, and his level of consciousness was not altered. However, every other provider on that day reported delusional statements, confusion, delirium, and hallucinations.

On July 13, Mr. Hendricks, his medical providers, and Ms. Cernak began planning for his future care, which all parties understood to be end-of-life planning. Planning in that context is distinct from estate planning, and the inquiry for capacity to determine end-of-life care is different than an inquiry into whether someone possessed capacity to execute a will. The fact that Mr. Hendricks executed a MOLST form and made other provisions for his treatment does not lead to a conclusion that he possessed testamentary capacity. Additionally, records from July 14 show that Mr. Hendricks did not remember the events of his hospitalization at BMC by the time he arrived at CareOne. There is no clear indication of a period of lucidity when the Will was executed.

Furthermore, the Court there were a number of procedural flaws in executing the Will, and those findings also lead to a conclusion that Ms. Cernak has not satisfied her burden. First, Attorney Discenzak's first and only time meeting Mr. Hendricks was while he was in the hospital. He drafted the Will solely on Ms. Cernak's instructions and without speaking to Mr. Hendricks. He did not inquire into Mr. Hendricks' medical condition, mental status, or medications. Asking whether Mr. Hendricks was being coerced, promised, or threatened into signing was not sufficient to determine whether he possessed the requisite capacity. Finally, he did not read the Will to Mr. Hendricks. As to the witnesses, both were aware that Mr. Hendricks had a history of cognitive limitations, but neither reviewed his most recent medical records, consulted with a physician, or conducted their own independent assessment of sound mind. Given their omissions, their assertion that he was of sound mind is not sufficient to tip the

balance of the evidence that shows that Mr. Hendricks lacked capacity to execute the Will on July 13, 2017.

July 29, 2019



David J. Dacyczyn, Judge