2011 WL 345484 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

E. Eileen KEEN and Charles W. Camac, Plaintiffs,
v.
Joyce A. CAMAC, a/k/a Joyce Camac-Elberson, individually
and as executrix of the estate of Esther I. Camac, Defendant.

No. 3492-MA.
January 31, 2011.

Defendant's Answering Brief in Opposition to Plaintiffs' Exceptions to the Master's Draft Report

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Dated: January 31, 2011

Wilmington, Delaware

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INTRODUCTION

Plaintiffs' exceptions to the Master's draft report of September 30, 2010 (the "Draft Report") are grounded on claims and theories found nowhere in Plaintiffs' pleadings and a seriously distorted view of the trial record. Through their post-trial papers Plaintiffs effectively attempt to litigate a case that differs dramatically from the one they actually pleaded and put on at trial. For example, Plaintiffs now urge the Court to "... declare the land conveyance void on grounds of breach of loyalty, unfairness, self-dealing, and unjust enrichment." POB at 8. Yet none of these grounds for voiding the challenged conveyance were alleged in the amended complaint or presented at trial. And Plaintiffs have all but abandoned the "oral promise" and "undue influence" claims which were once the cornerstones of their case.

Similarly, Plaintiffs contend the Court erred in determining the validity of the deed at issue (as defined *infra*, the "Deed") without passing on whether that instrument contained a legally sufficient property description. This allegation, too, is missing from the amended complaint and pretrial stipulation, both of which make clear that undue influence has always been the sole basis for Plaintiffs' challenge to the deed. Worse still, Plaintiffs' position has no basis in law. In essence, Plaintiffs assert that in every case where a plaintiff seeks to invalidate a legal instrument on the basis of undue influence the Court must also decide whether that instrument is valid on its face---*even if undue influence is the sole basis of the challenge*. Plaintiffs cite no authority for this proposition because none exists. Thus, in ruling on the validity of the deed the Master properly limited the analysis to the single question before the Court---whether the Deed was the product of undue influence.

Plaintiffs argue that the Court also committed legal error by requiring them, not Defendant, to carry the burden of persuasion on Count IV-the undue influence claim. Specifically, Plaintiffs assert that Defendant, as Esther Camac's attorney-in-fact, owed her mother a fiduciary duty of loyalty and, as such, it is Defendant who must prove the "ultimate fairness" of the challenged transaction. Plaintiffs are wrong. As Plaintiffs admit, Defendant "did not use her power of attorney to effectuate the conveyance of the Field ..." And the record makes equally clear that Defendant did not stand in a position of trust and confidence with her mother in 2000 such that a fiduciary relationship arose. Accordingly, the Master correctly charged Plaintiffs with the burden of persuasion on the undue influence claim.

Even if Defendant were deemed to have owed her mother fiduciary duties in connection with the Deed, the trial record demonstrates that Esther Camac consented to the transaction after full disclosure and based on independent legal advice. For these reasons, too, the Master correctly required Plaintiffs to shoulder the burden of proof on Count IV.

Equally flawed is Plaintiffs' contention that the Master misapplied the evidentiary standard for authenticating what they say is a key piece of evidence-the unsigned e-mail dated February 9, 2006. Plaintiffs argue that the Court improperly conflated the burden of proof applicable to their specific performance claim (*i.e.*, clear and convincing evidence) and the less rigorous evidentiary standard for authenticating a document for admission at trial. But the Court's application of the clear and convincing standard was correctly limited to Plaintiffs' claim for specific performance of the alleged oral promise. Nothing in the Draft Report can reasonably be read to suggest the Master required Plaintiffs to authenticate the February 9 e-mail by clear and convincing evidence.

Additionally, the record evidence amply supports the Master's finding that Plaintiffs failed to establish by sufficient evidence that Defendant created the February 9 e-mail. The proffered writing, itself, is inherently untrustworthy; it is a non-self-authenticating, computer-generated, unsigned, typed-written and partially integrated copy that is fraught with factual inaccuracies. And the extrinsic evidence Plaintiffs offered at trial aimed at authenticating the document is no more reliable. Indeed, the evidence Plaintiffs put on at trial that supposedly showed the process or system that produced the February 9 e-mail was, at best, inconclusive. Accordingly, the Master properly found that Plaintiffs did not sufficiently establish that Defendant created the writing.

For these and other reasons detailed below, the Draft Report requires no modification.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs commenced this suit by filing a complaint in this Court on January 24, 2008, alleging claims against Defendant for the imposition of a constructive or resulting trust (Count I), specific performance of an alleged oral promise (Count III), and an accounting (Count III). The original complaint did not seek to set aside the Deed.

A year later, on January 26, 2009, after the discovery cut-off, Plaintiffs moved for leave to amend their complaint in order to add a new cause of action seeking to cancel the Deed solely on the basis of undue influence. Notably, Plaintiffs did not seek to add claims for abuse of confidential or fiduciary relationship or cancellation of the Deed for lack of an adequate property description---claims which now figure prominently in Plaintiffs' post-trial brief.

Plaintiffs' motion for leave to amend was granted as unopposed. Soon after, Plaintiffs filed their amended complaint (hereinafter, the “Complaint”).

The Honorable Kim E. Ayvazian presided over a four-day trial of this matter. At the close of trial, on September 30, 2010, the Master issued the Draft Report from the Bench, finding in favor of Defendant on all of Plaintiffs' claims.

Plaintiff took exceptions to the Draft Report and filed an opening brief in support thereof. This is Defendant's answering brief in opposition to those exceptions.

COUNTER-STATEMENT OF FACTS

Plaintiff's factual recitation is rife with material omissions and false or unsubstantiated statements. Set below is an accurate presentation of the facts material to the exceptions before the Court.

Joyce Was Not Esther's Primary Caregiver When the Deed Was Executed

Plaintiffs assert, without attribution, that: “[i]n or around April, 2000, the decedent's physical health began to steadily decline and as a consequence, the defendant became her primary care giver and also exerted control of [the decedent's] life and activities.” POB at 2. This statement is at odds with the trial record which shows that, when the Deed was executed in April 2000, Esther did not require full-time care and, to the extent she did need assistance, the burdens of caring for her were shared by a number of people. For instance, in the years leading up to and including 2000, Russell Morrison often did chores for Esther and took her to the doctor's office. Tr. T. at 306:6-15. The record also shows that Joyce held down a demanding, full-time job at the time the Deed was executed and, as such, she could not have been Esther's primary caregiver. *See* Tr. T. at 519:5-13. And even after Joyce left her job in 2005, Esther had a homecare aide who looked after her on a daily basis. Tr. T. at 465:22-466-16

Joyce Did Not Isolate Esther From Her Family or Friends or Otherwise "Control" Esther

Plaintiffs contend, again without record support, that: "[t]he defendant isolated the decedent from other family members and exerted great influence over the decedent. Nearly all visits with the decedent were monitored by the defendant." POB at 2. This statement is discredited by the Plaintiffs' own witnesses, to wit:

• Chris Camac revealed that, during the May 2006 family meeting at Esther's house, more than six years after execution of the Deed, Joyce attempted to expel everyone from the house, but Esther overruled Joyce, permitting everyone in attendance to stay. *See* Tr. T. at 33:11-17;

• Toni Lynn Camac admitted that well-after execution of the Deed she was free to call Esther whenever she wanted (*see* Tr. T. at 75:9-10), and that Joyce never tried to stop her from taking Esther to Bear Ladies' Club meetings (T. Tr. at 75:24-76:2) or elsewhere. T. Tr. 77:20-22.

• Frank Manelski testified that, up until the final years of her life, Esther was independent (Tr. T. 118:18-22), and that Joyce never interfered with his relationship with Esther and, if anything, encouraged the relationship. Tr. T. 120:3-14

• Madeline McNatt testified that Joyce encouraged her and her husband, Michael, to speak privately with Esther about buying a piece of the Field. Tr. T. 159:8-11

• Russell Morrison also testified that Joyce never interfered with his relationship with Esther (Tr. T. 311:4-6) and explained that Joyce never made Esther do anything against her will. Tr. T. 312:18-21.

• Similarly, Margaret Gam stated that Joyce never prevented Esther from attending Bear Ladies' Club meetings (Tr. T. 343:4-12) and that Joyce never tried to prevent her from spending time with Esther. Tr. T. 344:5-8

Contrary to the record also is Plaintiffs' assertion that Joyce occupied an "exclusive position of influence and control over the decedent." POB at 7.

• Billy Jean Latos, who was Esther's care taker for a number of months, stated she never got the sense that Joyce controlled Esther (Tr. T. at 469:21-23) and that she never observed Joyce try to keep Esther from her friends or family. Tr. T. 470:4-9.

• Virginia Hastings testified that when Joyce would go to the beach Esther would be in the care of others. Tr. T. 449:22-500:1.

• Stacey Ireland, Esther's granddaughter, explained that she frequently communicated with Esther outside of Joyce's presence (Tr. T. 724:1-3) and that Joyce encouraged her to do so. Tr. T. 729:15-24.

• Phillip J Facciolo, Jr., Esq., who represented Esther in connection with the drafting of her 1998 Will and the 2004 Codicil, stated that Joyce never tried to block his access to Esther (Tr. T. 825:21-24), and he added that Esther knew what she wanted and was not a pushover. Tr. T. 828:23-24.

• Anthony A. Figliola, Jr., Esq., who represented Esther in connection with the Deed, testified that Joyce never tried to block his access to Esther. Tr. T. 889:11-15.

Joyce Did Not "Cause" Esther to Execute the Deed Against Her Will

Plaintiffs claim that it "is further undisputed that defendant caused the decedent to convey the 'field' property to decedent and herself in joint tenancy with rights of survivorship. (Tr. Ex. at 2)." POB at 4. This issue, however, has always been in dispute and the record resolves the question in Defendant's favor.

The trial evidence proves that Esther's execution of the Deed was of her own free will, based on independent legal advice, and consistent with her wish that the Field remain preserved as agricultural land. For example, in about 2002 Esther told her neighbor and friend, Virginia Hastings, that she added Joyce's name to the Deed because Joyce shared her wish that the Field remain undeveloped. Tr. T. at 493:9-13; 489:22-24.

Likewise, Esther explained to her homecare aide, Billy Jean Latos, that she wanted Joyce to take care of the Field after she died because she knew Joyce would honor her wish to preserve the Field. Tr. T. at 471:12-17. Ms. Latos added that Esther was "adamant" that Joyce own the Field following Esther's death. Tr. T. at 472:8-13.

Stacey Ireland testified along the same lines, explaining that Esther told her multiple times that she wanted Joyce to have the Field because she was confident Joyce would protect the Field from development. Tr. T. at 737-740.

Esther Executed the Will Based on Independent Legal Advice

Plaintiffs contend that Esther did not obtain independent legal advice in connection with the challenged conveyance. This allegation, too, flies in the face of the record.

By letter dated October 25, 1999, Joyce informed Mr. Facciolo that Esther wanted to transfer joint ownership in the Field to Joyce and herself. PX. 7. Mr. Facciolo testified at trial that Joyce followed her October 25 letter with a phone call. Tr. T. at 817:20-818:4.

Mr. Facciolo turned the task of drafting the Deed to his partner, Mr. Figliola, who had extensive real estate experience. Mr. Figliola testified that he discussed the matter directly with Esther once or twice over the phone and in a one-on-one meeting in his office. Tr. T. at 887:22-24. Mr. Figliola added that he conferred with Esther alone and outside of Joyce's presence. Tr. T. at 890:21-22. During his one-on-one meeting with Esther, Mr. Figliola explained to his client that by deeding the property to Joyce she would effectively be "disowning her other children from sharing in the potential proceeds of the sale of that property." Tr. T. at 891:9-10. Esther confirmed at the meeting that she understood and accepted the consequences of the transfer because she believed Joyce would preserve the Field as undeveloped farm land. Tr. T. at 891:12-21.

By 2000 Mr. Figliola had been practicing law for nearly 20 years and had plenty of experience in representing **elderly** clients. Tr. T. at 893:17-19. Based on his experience, Mr. Figliola knew the importance of and how to ensure that Esther appreciated both the legal and real-world ramifications of adding Joyce to the Deed. Tr. T. at 908:11-909:3. By the end of the consultation, Mr. Figliola was certain that Esther "understood what was going on" because Esther "understood everything I talked about" and "asked appropriate questions." Tr. T. at 894:13-14. Esther's attorney had no doubts that her desire was to convey the Field to Joyce as a joint tenant, that Esther fully understood the legal consequences of the conveyance, and that when Esther executed the Deed, she did so of her own volition and free of Joyce's influence. Tr. T. at 900:4-20.

Esther Did Not Occupy a Weakened Mental State When She Executed the Deed

Plaintiffs claim that when the Deed was executed in 2000 Esther was "suffering from dementia" and dominated by Joyce. POB. at 4. This is another misrepresentation of the record. The record is devoid of any evidence that even tends to suggest that Esther was in a weakened mental condition in or around 2000, when the Deed was executed. Eileen testified that it was merely her "assumption" that Esther's health had declined in 2000 to the point where Joyce made medical decisions for her. Tr. T. at 366:18-19. Mrs. McNatt confirmed that it was not until the "very end" of Esther's life that she appeared confused, but

prior to the "very end" Esther had her "whits about her" and never appeared "confused" or "unaware". Tr. T. at 158:10-17. Similarly, Mr. Morrison testified that he thought that Esther was lucid and aware at least up until 2002. Tr. T. at 323:1-9. Mr. Morrison also confirmed that he never heard Esther ramble or say anything that did not make sense. Tr. T. at 19-21. Similarly, Mr. Maneliski explained that it was not until about the last year and a half of Esther's life that she started to show signs of decreased mental capacity. Tr. T. at 118:23-119:3.

Likewise, as set forth above, Mr. Facciolo and Mr. Figliola both testified that when they spoke with and met Esther in 2000 to execute the Deed, she was in full control of her mental faculties. *See* Tr. T. at 828:6-13; 894:13-14. Ms. Ireland shared her view that Esther was generally lucid at least until 2007 (Tr. T. at 728:2-11) and noted, in particular, that she observed Esther competently handle money and balance a checkbook in 2006. Tr. T. at 730: 4-17. Ms. Latos joined the chorus of witnesses who testified at trial that Esther was both of sound body and mind until at least 2006. Tr. T. at 467:22-468:1 (testifying that Esther was never in a prolonged state of confusion or disorientation); Tr. T. at 467:6-8; 468:11-17 (explaining that Esther's physical health was also stable in 2006 and she was able to shower by herself, feed herself, and go for walks around her house).

As if all this were not enough, the investigations conducted by the Adult Protective Services ("APS") in 2005 and 2006, finding the charges of physical **neglect** and financial exploitation meritless, also underscore the fact that Esther was in reasonably good mental and physical condition as late as 2006. McNatt's Dep. T. at 54:14-55:4; 58:5-7. [1] *See also* Pretrial Stip. at 7.

The record evidence outlined above, together with the controlling authority discussed *infra*, dictates rejecting Plaintiffs' exceptions and leaving the Draft Report undisturbed.

ARGUMENT

I. PLAINTIFFS HAVE WAIVED AND ARE BARRED FROM ASSERTING THE CLAIMS AND LEGAL THEORIES CENTRAL TO THE EXCEPTIONS BEFORE THE COURT.

Plaintiffs have basically abandoned the oral promise and undue influence claims which were once central to their case. Instead, they now try to inject in the case two entirely new theories for canceling the Deed.

First, Plaintiffs argue that the Master failed to require Joyce to prove the fairness of the Deed because, they say, she owed Esther a fiduciary duty of loyalty as Esther's agent. Plaintiffs go on to contend that Joyce violated her position of trust in causing Esther to transfer joint ownership of the Field to her. Thus, Plaintiffs now urge the Court to "... declare the land conveyance void on grounds of breach of loyalty, unfairness, self-dealing, and unjust enrichment." POB at 8. None of these grounds for voiding the Deed are alleged in the Complaint (attached hereto as Exhibit A) or even mentioned in the pretrial stipulation and order (attached hereto as Exhibit B).

Second, Plaintiffs argue that the Master should have set aside the Deed on the basis it contains a legally insufficient property description. This allegation is also missing from the Complaint and pretrial stipulation and order, both of which make clear that undue influence is the sole basis for Plaintiffs' challenge to the Deed.

Plaintiffs are barred from asserting these new theories at this late stage of the proceedings. It is well established that "[c]laims that are not fairly presented at trial are waived." *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 658 (Del. 2008). *See also Kosachuk v. Harper*, 2002 WL 1767542, at *8 n.51 (Del. Ch.) (dismissing legal theories not presented at trial even though those theories were contained in the pretrial order).

Similarly, it is equally settled that issues not set forth in the pretrial order are deemed waived. *See, e.g.*, *Gates v. Texaco, Inc.*, 2008 WL 1952165, at *8 (Del. Super.) (stating that "the Court puts great emphasis on pretrial stipulations as the universe in which legal issues should be identified" and that the Court "will not consider ... an argument regarding an issue of law not

earlier identified in the pretrial stipulation"), *aff'd*, 962 A.2d 257 (Del. 2008) (table); *Babby v. City of Wilmington*, 614 F. Supp. 2d 508, 510-11 (D. Del. 2009) (holding that "legal theories and issues not raised in the pretrial order are considered waived").

Likewise, Plaintiffs' failure to seek to invalidate the Deed on grounds of abuse of a confidential trust and an insufficient property description before the close of discovery also bars them from attempting to raise those claims now. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22n. 117 (Del.Ch.) (barring an argument raised for the first time in a pretrial brief because discovery had closed and permitting the issue to be considered for trial would be prejudicial to the other party).

In light of the above, Plaintiffs are barred from seeking to invalidate the Deed on the bases of abuse of a confidential relationship or lack of an adequate property description.

II. THE MASTER DID NOT COMMIT ERROR BY REQUIRING PLAINTIFFS TO CARRY THE BURDEN OF PERSUASION ON THEIR CAUSES OF ACTION.

Referring to the Count IV, the Draft Report states: "[t]he burden is on plaintiffs to demonstrate by a preponderance of evidence undue influence." Tr. T. at 941. The Court went on to conclude: "I do not find that the plaintiffs have met their burden as to any undue influence on Joyce's part, that the deed was the product of any undue influence." *Id.* at 942.

A. Joyce and Esther did not occupy a fiduciary relationship when they executed the Deed.

Plaintiffs contend that the Master erred by not placing the burden of persuasion on Joyce. POB at 6 and 9. While Plaintiffs never specify the claim or claims to which this exception applies, presumably it refers only to Count IV, which seeks to invalidate the Deed on the basis of undue influence. This argument fails.

Plaintiffs rely on *Shock v. Nash*, 732 A.2d 217, 225 (Del. 1999) for the proposition that an interested transaction that violates an agent's duty of loyalty to her principal is voidable and, if challenged, the burden of persuasion regarding the validity of the transaction rests with the fiduciary. POB at 6. Typically, the burden rests with the party challenging an *inter vivos* transaction to show undue influence because there is a presumption in favor of the validity of the transaction. *Mitchell v. Reynolds*, 2009 WL 132881, at *9 (Del. Ch.). In order to rebut the presumption of a valid transfer, the challenging party must present "clear and convincing evidence showing that the parties [to the transaction] were in a fiduciary or confidential relationship." *Id.*

Here, Plaintiffs failed to present clear and convincing evidence of the existence of a fiduciary relationship warranting the burden-shifting analysis described in *Shock.* Such a fiduciary relationship can exist in one of two ways: where there is an attorney-in-fact relationship (*see, e.g., Coleman v. Newborn*, 948 A.2d 442, 429 (Del. Ch. 2007)) or where the parties have a confidential and dependent relationship. *Id.*

The first scenario---the attorney-in-fact relationship---is not implicated here. As Plaintiffs admit, "Joyce Camac did not use her power of attorney to effectuate the conveyance of the Field ..." POB at 7. Nor is the second scenario---the confidential relationship---present in this case. "The courts have consciously refused to delineate those situations where a fiduciary relationship may exist ... since in the ramifications of human activity, it is undesirable to fix a rigid limitation on the application of such a salutory principle." *Coleman*, 948 A.2d at 429 (quoting *Swain v. Moore*, 71 A.2d 264, 267 (Del. Ch. 1950)). "Given this doctrine, the finding of a fiduciary relationship is a factual inquiry that requires an examination into whether the 'relationship is of such a confidential or dependent nature as to rise to fiduciary status.' " *Id.* (quoting *White v. Lamborn*, 1977 WL 9612, at *4 (Del. Ch.)).

There are several notable cases where this Court found a fiduciary relationship based on a confidential relationship. *See, e.g., Swain v. Moore*, 71 A.2d 264 (Del. Ch. 1950); *White v. Lamborn*, 1997 WL 9612 (Del. Ch.); and *Coleman v. Newborn*, 948 A.2d 422 (Del. Ch. 2007). All of these cases are readily distinguishable from the instant case. First, in each of the cases cited directly

above the principal relied exclusively on the agent for virtually all needs at the time of the challenged transaction. For example, in *Swain* the principal was "a lonesome old man living alone" who transferred a car and money to his agents in exchange for them driving him around, letting him live with them, and taking care of him. *Swain*, 71 A.2d at 266-67. Similarly, in *White* the principal "was completely and totally enraptured by, obsessed with, and dependent upon [the agent]." *White*, 1997 WL 9612 at *4. Likewise, in *Coleman* the agent was the principal's "only close friend" and "exercised virtually exclusive control over [the principal's] financial affairs and became actively involved in [her] assisted living situation." *Coleman*, 948 A.2d at 425. The instant case stands in stark contrast to *Swain* and its progeny. Indeed, the record leaves no doubt that in 2000 (i) Esther enjoyed an active social life, (ii) she was in no way isolated from friends and family, (iii) she controlled most, if not all, of her own financial affairs, and (iv) she relied on a cadre of people other than Joyce for support to the extent she needed any.

The *Swain* line of cases is also markedly distinguishable because in each of those cases the principal was estranged from friends and family and relied exclusively on the agent for companionship and emotional support. *See, e.g.*, *Swain*, 71 A.2d at 267 (stating that the principal had "soured on his own family" but was "fond" and had "affection" for his agents); *White*, 1977 WL 9612, at *4 (finding that the agent's relationship with the principal "resulted in the gradual estrangement of an **elderly** man from his family, and this estrangement in turn caused him to become continually more dependent upon her"); *Coleman*, 948 A.2d at 432 n.25 (noting that the principal's relationship with her agent "created animosity between [the principal] and her children and contributed to [her] isolation."). In contrast, Esther was neither estranged nor isolated from her family when the Deed was executed (if ever).

Swain, *White* and *Coleman* are also inapposite insofar as in each of those cases the principal asked the agent to return the transferred property and the agent refused. Not so here. Indeed, far from requesting that Joyce agree to return sole ownership of the Field to her, Esther was content with the challenged transfer. The record is devoid of any evidence even suggesting that Esther regretted executing the Deed-much less that she sought to have the Deed undone. This case, unlike *Swain* and its progeny, does not involve a remorseful grantor seeking to recover property given to her agent after the relationship deteriorated. Rather, the claimants here are a brother living in Florida that Esther did not think wanted the Field (Tr. T. at 473:6-7) who told Esther that, contrary to her wishes, he would sell any portion of the Field he inherited (Tr. T. at 552:3-4), and a "jealous" sister (Tr. T. at 735:13-15) who Esther thought was "greedy, untrustworthy, and selfish." Tr. T. at 410:17-24.

Finally, in *Swain*, *White* and *Coleman* the principal alleged an abuse of the fiduciary relationship *before* trial. *Swain*, 71 A.2d at 266; *White*, 1977 WL 9612, at *3; *Coleman*, 948 A.2d at 428. In the present case, Plaintiffs did not adopt the theory that Joyce abused her fiduciary duties owed to Esther until after the Draft Report. Plaintiffs are barred from raising this issue now.

B. Joyce could have easily shown the fairness of the challenged transaction had she been required to do so.

Where an *inter vivos* transaction involves direct dealings between a fiduciary and her principal, the fiduciary can show the validity of the transaction by proving that (1) the principal "voluntarily consented to an interested transaction after full disclosure"; and (2) "such consent [was based on] impartial advice from a competent and disinterested third person." *Estate of Carpenter v. Dinneen*, 2008 WL 859309, at *12 (Del. Ch.).

Esther consented to the transaction after full disclosure and having received impartial advise from an attorney. In particular, the trial record shows that Esther received independent legal advice from Mr. Figliola in connection with the conveyance. Mr. Figliola met one-on-one with Esther to discuss the Deed (Tr. T. at 890:21-22) and was careful to explain to Esther that, by deeding the Field to Joyce as joint tenants with a right of survivorship, "she was, in essence, disowning her other children from sharing in the potential proceeds of the sale of that property." Tr. T. at 891:7-10. Mr. Figliola further explained to Esther that, by transferring the Field to Joyce as a joint tenant, that the Field would not transfer in three shares as stated in her will. Tr. T. at 905:1-12. Mr. Figliola testified that if he had any doubts that the Deed was what Esther wanted to do, he would not have drafted it. Tr. T. at 894:18-23. In short, Mr. Figliola was satisfied based on his many years of experience in representing **elderly** clients that Esther knew exactly what she was doing in transferring the Field to Joyce and herself as joint tenants. *See* Tr. T. at 893:11-13 (Mr. Figliola testifying that Esther "was positive in what she wanted done and why she wanted to do it.")

Esther's consent to the transaction is further evidenced by the fact that she viewed the disposition of the Field to Joyce as somewhat of a relief. Esther told her granddaughter Stacey that maintaining the Field was a burden and that transferring the Field to Joyce felt like an "albatross" had been lifted off her shoulders. Tr. T. at 738:1-14.

In sum, the trial evidence makes clear that Esther voluntarily executed the Deed based on full disclosure of the particulars of the conveyance and impartial legal advice. Thus, even if Joyce had to demonstrate the fairness of the challenged conveyance, she could easily satisfy that burden. Accordingly, it makes no difference which party is assigned the burden of persuasion; Count IV fails either way.

III. THE COURT CORRECTLY APPLIED THE EVIDENTIARY STANDARD FOR DOCUMENT AUTHENTICATION.

Plaintiffs contend that the Master misapplied the evidentiary standard for authenticating a key piece of evidence---the unsigned e-mail dated February 9, 2006 (the "Unsigned Document"). [2] In particular, Plaintiffs state: "The Master concluded that 'clear and convincing' evidence was required to authenticate the email, as its authorship was contested by the alleged author." POB at 13. Plaintiffs appear to suggest that the Court incorrectly conflated the burden of persuasion applicable to their specific performance claim and the standard for authentication a document under the rules of evidence. The particular text Plaintiffs seize on is the Court's statement: "I also do not find that there was sufficient evidence, clear and convincing evidence of any oral promise made by Joyce to divide the property in thirds after her mother's death." Tr. T. at 944:3-6. But this statement correctly articulates the burden of persuasion applicable to a specific performance claim involving an alleged oral promise. *See, e.g., Pipkin v. Johnson,* 1977 WL 9570, at *2 (Del. Ch.) (noting that the "clear and convincing" standard of proof necessary to establish entitlement to specific performance is particularly appropriate where the contract at issue is oral).

More pointedly, nothing in the Draft Report can be fairly read to suggest that the Master required Plaintiffs to authenticate the Unsigned Document according to the clear and convincing standard. Specifically, the Court concluded:

> I also do not find that there was sufficient evidence, clear and convincing evidence of any oral promise made by Joyce to divide the property in thirds after her mother's death ... I saw .. an allege e-mail ... that had allegedly been sent from Joyce to her niece, Susan, according to Susan's testimony, for proof reading and comment. There was some ... presentation ... on a computer disk which came from Susan's computer. And I was not convinced by the -- let me just say I do not think that plaintiffs met their burden of proof as to demonstrating that the document, indeed, came from Joyce Camac.

Tr. T. at 944 (emphasis added). Thus, regardless of which party shouldered the burden of persuasion, the Court correctly found that "... the evidence demonstrated more likely than not that it was Esther's intent that the property go to Joyce and be preserved for use as farmland and to be developed." Tr. T. at 945.

Delaware Rule of Evidence 901 provides that authentication or identification of a document is "a condition precedent to admissibility" that is only satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." D.R.E. 901(a). *See also Tricoche v. State,* 525 A.2d 151 (Del. 1987); 5 FEDERAL RULES OF EVIDENCE MANUAL § 901.02 [1] at 901-14 (8th ed. 2002) ("Evidence is sufficient for authentication purposes if the foundation for particular evidence warrants the trier of fact in finding that it is what the proponent claims.")

Still, Plaintiffs argue that they presented evidence at trial sufficient to authenticate the Unsigned Document. POB at 12. Specifically, Plaintiffs stress that several witnesses testified at trial that they believe---but could not prove---Joyce generated the Unsigned Document. But these witnesses are ill-informed and heavily biased in favor of Plaintiffs. Two witnesses, Eileen Keen and Toni Lynn Camac, offered no factual support whatsoever for their bald assertion that the Unsigned Document originated

from Joyce. *See* Tr. T. at 66:1; Tr. T. at 404:13-15. While two other Plaintiffs' witnesses, Christopher Camac and Michael McNatt, [3] testified that Esther told them only that Joyce *gave* her the Unsigned Document; but neither witness went as far as to say that Esther told them that Joyce *authored* the writing. Tr. T. at 41:3-10; Dep. T. at 68:23-24.

The testimony of Susan Forestieri, the alleged recipient of the Unsigned Document, is equally unpersuasive. Susan's testimony deserves scant weight because she is financially beholden to her mother, co-Plaintiff Eileen Keen. Even putting aside her strong bias toward her mother, Susan's testimony still lacks credibility. Susan testified that Joyce e-mailed her the Unsigned Document on February 9 or 10, 2006, but she has never been able to produce a copy of the actual e-mail, conveniently claiming that her computer hard-drive crashed shortly after Plaintiffs commenced this action. Tr. T. at 245. Yet, remarkably, Susan somehow managed to salvage from her crashed computer the Word Document she alleges Joyce e-mailed her. Tr. T. at 223:12-15 (explaining that the Unsigned Document was the only thing saved on the CD-ROM). Susan could not credibly explain this anomaly at trial. Equally dubious is Susan's inability to articulate how the title of the Unsigned Document could have been changed after she locked the Unsigned Document as a “read only” document. Tr. T. at 251-254.

Susan's testimony regarding the origins of the Unsigned Document is also irreconcilably contradicted by Michael McNatt's testimony. Susan explained that after she received the Unsigned Document from Joyce, she did nothing with it until she showed it to Michael three months later in May 2006. Tr. T. at 248:11-15. She went on to explain that when she showed the Unsigned Document to Michael in May he was “shocked” by its contents. Tr. T. at 248: 20-24. Yet Michael testified that the first time he saw the Unsigned Document was in February 2006 when Esther showed it to him some three months before Susan alleges to have first shown him the writing. Dep. T. at 68:6-11.

In addition, the Unsigned Document, itself, is inherently untrustworthy; it is a non-self-authenticating, computer-generated, unsigned, typed-written and partially integrated copy. The contents of the writing also discredit its reliability. For instance, the text incorrectly states that the Deed was prepared in 1999. Had Joyce set out to articulate her position regarding ownership of the Field, as she is alleged to have done, it stands to reason that she would have taken care to cite the correct date of the challenged conveyance. Moreover, the Unsigned Writing refers to Joyce in the third person. There is nothing in the text of the Unsigned Writing which would account for why Joyce would have done so. Nor is there any record evidence suggesting that it was Joyce's practice or habit to refer to herself in the third person. Conversely, Stacey testified that she received e-mail correspondences from Joyce regularly and Joyce never wrote in the third person. Tr. T. at 757:1-3

Even if there were evidence establishing that Joyce authored the Unsigned Document, the Master's error would be harmless because the Unsigned Document, by itself, does not amount to clear and convincing evidence of an oral promise, especially where the extraordinary remedy of specific performance is sought. In light of the above, the Master correctly concluded that Plaintiffs failed to establish by sufficient evidence that Joyce created the Unsigned Document.

IV. THE MASTER DID NOT ERR IN DETERMINING THE VALIDITY OF THE DEED WITHOUT DECIDING WHETHER THE DEED WAS VALID ON ITS FACE.

Plaintiffs appear to argue that the Court should have invalidated the Deed for lack of an adequate property description. More specifically, Plaintiffs charge the Master with having “mixe[d] the issue of capacity to convey a valid deed with the requirements of a valid deed.” POB at 15. As established above, Plaintiffs waived this claim by failing to affirmatively allege it as a cause of action in the Complaint or citing it in the pretrial stipulation and order. Thus, in ruling on the validity of the deed the Master properly limited the analysis to the only question before the Court---whether the Deed was the product of undue influence.

In any case, the Deed is not facially invalid. To be valid, a deed need only contain a description of the property conveyed. 10 *Del. C.* § 121. “Normally, courts will construe property descriptions in deeds liberally to give effect to the intention of the grantor.” *Faraone v. Kenyon,* 2004 WL 550745, at *10 (Del. Ch.). [4] Thus, a deed must merely contain enough of a property description so that it “will be sufficient to identify the [property] with reasonable clarity.” *Id.* at *10 n.34 (quotations omitted).

In *Faraone*, the Court set aside a deed for lacking a property description where the instrument contained no property description beyond a hand written tax identification number. *Id.* at *5. Here, however, the Deed contains both a printed tax identification number as well as a description of the land.[5] The Deed, therefore, contains a sufficient description so that the Field can be identified with reasonable clarity.

For these reasons, Plaintiffs' arguments regarding the facial validity of the Deed are procedurally improper and, in any event, without merit.

CONCLUSION

For the foregoing reasons, Plaintiffs' exceptions are without merit and, accordingly, the Draft Report requires no modification.

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Footnotes

1 As Plaintiffs note in their opening brief, Micheal McNatt did not testify at trial, but the transcript of his deposition was lodged with the Court and is part of the trial record. POB at 12 n.9.

2 The Unsigned Document is the subject of Defendant's pending Motion in *Limine*, filed on June 10, 2010.

3 Plaintiffs cite page 101 of Mr. McNatt's deposition for the proposition that the Unsigned Document came from Joyce. One searched page 101 of Mr. McNatt's deposition in vain for such a reference.

4 Plaintiffs rely on *Faraone* for the proposition that a deed can be invalidated if it is completely void of a property description. POB at 15. But unlike the instant case, the plaintiff in *Faraone* alleged *prior to trial* that deed in that case should be set aside because it lacked specificity. *Faraone*, 2004 WL 550745 at *7.

5 The Deed describes the property it covers as: "All that certain parcel of land with buildings thereon known as Lot 2 of Record Minor Subdivision Plan for Lands of Esther I. Camac prepared by Clifton L. Bahsh, Jr., Inc. and recorded in the Office for the Recording of Deeds, New Castle County, Delaware. Microfilm No. 13431, recorded February 19, 1998." PX 2.

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