

2011 WL 5289808 (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.
October 28, 2011.

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

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INTRODUCTION

This case involves the dispute over a 21-acre parcel of farmland located in Bear, Delaware (the “Field”), which was owned by Esther Camac (“Esther” or “Decedent”). Esther’s 1998 will devised the Field to her three surviving children-plaintiffs Eileen

(“Eileen”) Camac and Charles (“Charles”) Camac (collectively, “Plaintiffs”), and defendant Joyce Camac (“Defendant” or “Joyce”).

In May 2000, a time when the Master found Esther was lucid and independent, Esther transferred the Field to herself and Joyce as joint tenants with right of survivorship via a duly recorded deed (the “Deed”). Plaintiffs challenge this conveyance on grounds (i) the Deed was the product of Joyce exercising undue influence over Esther; and (ii) that Joyce made an oral promise to Esther to divide the Field equally with her siblings upon Esther's death.

At the close of four-day trial, the Master Kim E. Ayvazian delivered a draft report (the “Draft Report”) from the bench, ruling in Joyce's favor on all counts. Plaintiffs took exceptions to the Draft Report. Post-trial briefing on the exceptions followed. In August of this year, the Master issued a final report (the “Final Report”) in light of Plaintiffs' exception. Again, the Master found in favor of Joyce in all respects.

Plaintiffs then filed exceptions to the Final Report. Plaintiffs' second round of exceptions are grounded on two contentions: (i) the Master erred in finding that Esther executed the Deed after receiving competent and independent advice from her Delaware attorneys; and (ii) the Master applied the wrong legal standard for authenticating documentary evidence, and but for this ruling, they would have met their burden of proving the existence of a valid and enforceable oral promise. As detailed below, both exceptions are unsustainable.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs commenced this action 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). Plaintiffs amended their complaint and added a claim to set aside the Deed based on a theory of undue influence (Count IV).

As noted above, at the conclusion of a four-day trial, Master Ayvazian issued a Draft Report, finding in favor of Defendant on all of Plaintiffs' claims. Plaintiffs took timely exceptions to the Draft Report.

On August 26, 2011, the Master issued the Final Report, once again finding in favor of Defendant. Plaintiffs filed timely exceptions.

On September, 30 2011, Plaintiffs filed an Opening Brief on their exceptions to the Master's Final Report.

This is Defendant's Answering Brief in Opposition to Plaintiffs' Exceptions to the Final Report.

COUNTER-STATEMENT OF FACTS

Plaintiffs' factual recitation cites sparingly to the trial record and is rife with material omissions and false or unsubstantiated statements discredited by the Court. Set below is an accurate account 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 [Esther's] life and activities.” POB at 2. This statement is at odds with the trial record which confirms that, when the Deed was executed and recorded in the Spring of 2000, Esther lived on her own and 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 provided regular assistance to Esther, including taking her to the doctor's office. Tr. T. at 306:6-15.¹ 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. It was not until she left her job in 2005--five years after execution of the Deed--that Joyce assumed the role as Esther's primary caregiver. And even then, 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 also 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. These bald statements are 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 and dictated that everyone in attendance stay until *she* concluded the family meeting. *See* Tr. T. at 33:11-17;
- Toni Lynn Camac admitted at trial that well-after execution of the Deed she was free to contact Esther whenever she wanted (*see* Tr. T. at 75:9-10), and that Joyce never tried to stop her from taking Esther to the Bear Ladies Club meetings (Tr. T. at 75:24-76:2) or elsewhere. Tr. T. 77:20-22.
- Frank Manelski testified that, up until the final years of her life (i.e., years 2006-07), 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 Michael's interest in buying a portion 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). He explained that Joyce never made Esther do anything against her will. Tr. T. 312:18-21. Other trial witnesses testified along the same lines:
- 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
- Billy Jean Latos, Esther's care taker for several months in 2006, stated that 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 after Esther stopped driving in 2003, Esther would be in the care of friends and family members other than Joyce. Tr. T. 499-500.
- Stacey Ireland, Esther's granddaughter, explained that up until Esther's death in the summer of 2007, 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 assert, again without attribution, that Joyce “executed a plan to gain sole and complete control of the field property.” POB at 2. The trial evidence, however, leaves no doubt that 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 similarly, 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 had other reasons for wanting the Field to pass to Joyce instead of Plaintiffs. By April 2000, when the Deed was executed, Esther's relationship with Eileen was strained, to say the least. For example, in October 1998 Eileen wrote Esther a letter in which she complained that Esther left her house to Joyce. Tr. T. at 409; Tr. Ex. 11². In the same letter, Eileen lamented that Esther felt she was “... greedy, selfish, untrustworthy and just plain nasty ... [a]ctions really do speak louder than words and your action shows me plainly how you think of me.” *Id.* As for Charles, Esther was mindful that he had long ago left Delaware for Florida and made known that he wanted to sell the Field for development purposes. Tr. T. at 572:4-12.

Esther Executed the Will Based on Independent Legal Advice

Plaintiffs contend that Esther signed the Deed without receiving independent legal advice. Rejecting this assertion, the Master correctly found that “Esther had independent legal counsel, Anthony Figliola, Jr., who advised Esther in connection with the deed transfer.” FR at 6.³ The trial record amply supports this conclusion.

By letter dated October 25, 1999, Joyce informed Phillip J. Facciolo, Jr., Esquire that Esther wanted to transfer joint ownership in the Field to Joyce and herself. Tr. Ex. 7.⁴ Mr. Facciolo referred the matter to his partner, Mr. Figliola, in light of his extensive real estate experience. Mr. Figliola testified that he discussed the matter directly with Esther once or twice over the phone and in a face-to-face meeting in his office outside of Joyce's presence. Tr. T. at 887:22-24; 890:21-22. During his one-on-one meeting with Esther, Mr. Figliola explained to his client that, by transferring joint ownership in the Field 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. At the time of this private meeting with Esther, Mr. Figliola had been practicing law for nearly 20 years and had substantial experience in representing **elderly** clients. Tr. T. at 893:17-19. Based on this depth of experience, Mr. Figliola knew the importance of and how to ensure that Esther appreciated the legal and real-world ramifications of adding Joyce to the Deed. Tr. T. at 908:11-909:3. At 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; 900:4-20.

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

The trial record also discredits Plaintiffs' allegation that Esther's diminished health made her susceptible to Joyce's control. The Master properly observed that Plaintiffs' contention that Esther's health was declining in 2000 is “simply not borne by the record” and that “the testimony adduced at trial establishes that in the year 2000, Esther was independent and of sound mind.” FR at 5.

Plaintiffs' own trial witnesses validate the Master's findings. 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 Esther had her "whits about her" and never appeared "confused" or "unaware" until the "very end" of Esther's life in the summer of 2007-some seven years after execution of the Deed. Tr. T. at 158:10-17. Similarly, Mr. Morrison testified that he believed Esther was lucid and aware at least until 2002. Tr. T. at 323:1-9. 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 noted above, Messrs. Facciolo and Figliola testified that when they spoke with and met Esther in 2000 in connection with the conveyance, she was in full control of her mental faculties. Tr. T. at 828:6-13; 894:13-14. Ms. Ireland explained at trial that Esther was generally lucid at least until 2007 (Tr. T. at 728:2-11) and noted 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 trial witnesses who testified that Esther was 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 in 2006 and she was still 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 that Esther was in relatively good mental and physical condition as late as 2006. McNatt's Dep. T. at 54:14-55:4; 58:5-7.⁵; Pretrial Stipulation and Order, Sections 2(k) and (L).⁶

The Forestieri Document

Plaintiffs allege that on or about February 9, 2006, Joyce sent an e-mail to Susan Forestieri that contained a document (hereinafter, the "Forestieri Document"), which Plaintiffs maintain, evidences Joyce's purported oral promise to Esther that she would divide the Field equally with her siblings upon her mother's death. Tr. Ex. 9.⁷ The Forestieri Document is inherently untrustworthy on its face; it is a non-self-authenticating, computer-generated, unsigned, typed-written and partially integrated copy. The writing bears none of the traditional hallmarks of an e-mail, such as a "To" line, a "From" line, or even an e-mail address.

The contents of the document also discredit its reliability. It states, in pertinent part:

If Joyce survives Esther, she is to divide the ground into three parts, as equal as possible, and Eileen and Charles W. are to receive 1/3rd of this field. This is not a legal obligation for Joyce, but a moral one. Esther trusts that Joyce, having been her primary caregiver and having the most knowledge of her wishes, will do this.

At trial, Plaintiffs were unable to offer a credible explanation why, if Joyce authored the Forestieri Document as they claim, the writing refers to Joyce in the third-person. Conversely, Stacey Ireland testified that she received e-mail correspondences from Joyce regularly and Joyce never wrote in the third person. FR at 25 (citing Tr. T. at 757:1-3). There is nothing in the text of the document 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.

The testimony of Susan Forestieri, the alleged recipient of the document, is equally unpersuasive. Susan professes that she received this document on her AOL e-mail account, but Susan has never been able to produce a copy of the transmittal e-mail. Susan claims that she lost access to her e-mails when her computer hard-drive crashed shortly after Plaintiffs commenced this action. Tr. T. at 245. Yet curiously, Susan somehow managed to salvage from her crashed computer the Word Document she alleges Joyce e-mailed her. Tr. T. at 223:12-15. Susan could not credibly explain this anomaly at trial. Susan's testimony

regarding the origins of the Forestieri Document is also irreconcilably contradicted by Michael McNatt's testimony. Susan explained that after she received the Forestieri 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 initially showed the writing to Michael he was "shocked" by its contents. Tr. T. at 248: 20-24. In contrast, however, Michael testified that the first time he saw the Forestieri 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.

Plaintiffs' other witnesses were no more convincing. Eileen Keen and Toni Lynn Camac failed to cite any evidence to support their uninformed suspicion that Joyce originated the Forestieri Document. *See* Tr. T. at 66:1; Tr. T. at 404:13-15. Christopher Camac and Michael McNatt testified that Esther told them only that Joyce gave her the Forestieri 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 trial evidence outlined above together with the settled Delaware law dictate rejecting Plaintiffs' exceptions.

ARGUMENT

I. STANDARD OF REVIEW

A master's conclusions of law and findings of fact are reviewed *de novo*. *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999). *De novo* review of a master's factual findings, however, can be based on the record. *Id.* Where the parties do not except to the Master's factual findings, "the trial judge may review the record *de novo* accepting the master's facts in the same way that the judge would resolve a dispute presented on a stipulated set of facts." *Id.* Even where a party takes exception to one or more findings of fact, a new hearing is not necessary unless the "exceptions raise a *bona fide* issue as to dispositive credibility determinations." *Id.*

Here, since Plaintiffs have not raised *bona fide* issues regarding a dispositive credibility determination, a new hearing would serve no purpose. Accordingly, the Court may engage in *de novo* review of the Master's findings of fact based on the existing record.

II. THE MASTER CORRECTLY FOUND THAT ESTHER EXECUTED THE DEED AFTER RECEIVING INDEPENDENT LEGAL COUNSEL.

Plaintiffs argue that Joyce failed to meet her burden of establishing that Esther executed the Deed based on independent legal advice. They stress that in connection with the preparation and execution of the Deed Joyce paid Esther's legal fees and communicated directly with Esther's attorneys, and that Esther signed the Deed outside of her attorneys' presence. POB at 4-5. When viewed in its entirety, the trial record confirms that Esther knowingly and willingly executed the Deed based on competent and independent advice from disinterested counsel.

Plaintiffs' argument essentially charges that Esther's counsel was either complicit in a scheme to take the Field, or negligent in the professional duties they owed Esther. In either case, accepting Plaintiffs' argument would necessarily require the Court to find that two highly experienced Delaware attorneys breached their ethical obligations owed to Esther for the benefit of Joyce. There is nothing in the record that warrants such an extreme finding.

Joyce held power of attorney for Esther at the time the Deed was executed and the Field was conveyed to her and Esther as joint tenants with right of survivorship. FR at 17. Esther gave Joyce power of attorney and appointed her executrix of her will in 1998, when all parties agree Esther was lucid and independent.

Joyce did not use her power of attorney to effectuate the conveyance of the Field. *Id.* at 15. Nevertheless, the Master found that Joyce's power of attorney imposed a fiduciary duty on her in connection with the execution of the Deed. *Id.* at 16. The Master held that Joyce was a self-interested fiduciary, shifting the burden to Joyce to show that Esther voluntarily consented

to the execution of the Deed after full disclosure. *Id.* at 18 (relying on *Schock v. Nash*, 732 A.2d 217 (Del. 1999) and *Coleman v. Newborn*, 948 A.2d 422 (Del. Ch. 2007)). As the Master correctly stated, “[s]uch consent after full disclosure must be based on ‘impartial advice from a competent and disinterested third person.’ ” *Id.* at 19 (quoting *Carpenter v. Dinneen*, 2008 WL 859309, at *12 (Del. Ch.)).

The Master properly held that Joyce had “satisfied this test” because Esther voluntarily consented to the execution of the Deed “after full disclosure and after having received impartial advice from her attorney, Mr. Figliola.” FR at 19. The Master also found that Esther executed the Deed in accordance with her wishes:

I am satisfied that Esther was aware of what she was doing, fully understood the consequences of the deed conveyance, and that she did intend to transfer title to herself and Joyce-thus voluntarily consenting to the transaction after full disclosure and having received independent advice of counsel.

FR at 21. The trial record supports these findings. As Mr. Figliola explained, in his experience, communicating with the children of **elderly** clients was “normal practice.” Tr. T. at 899:16. Nor did Mr. Figliola find it unusual or concerning that Joyce paid the legal bills and handled the written communications relating to the representation, since he took appropriate steps to confirm that the conveyance was consistent with Esther's wishes and that she understood the ramifications of transaction. Tr. T. at 899:24-900:3.

Still, Plaintiffs argue that Mr. Figliola failed to exercise due care because he did not meet with Esther to “conclude the deed signing formalities.” POB at 5. As Mr. Figliola explained, however, he permitted Esther to execute the Deed outside his presence as an accommodation to Esther. Mr. Figliola stated that because of Esther's age and physical condition it was easier for her to go to a notary close to her house than travel to his office. Tr. T. at 896:20-897:3. Moreover, Mr. Figliola gave Esther specific instructions regarding the execution and notarization of the Deed. Esther had no difficulty carrying out her lawyer's instructions and returned the signed Deed to him within eight days. Tr. T. at 897-898.

The trial record also confirms that Mr. Figliola met one-on-one with Esther, outside of Joyce's presence, to discuss the Deed. Tr. T. at 890. Mr. Figliola testified that he specifically instructed Joyce to bring Esther to his office so he could meet privately with Esther. Tr. T. at 890:12-16. Once Joyce and Esther arrived at his office, Mr. Figliola “made Joyce leave.” Tr. T. at 890:22. This was consistent with Mr. Figliola's standard practice. Tr. T. at 892:15-22 (Figliola testifying that it was his practice to interview **elderly** clients in a one-on-one meeting to ensure the client was competent and acting according to his or her own free will).

During his private meeting with Esther, Mr. Figliola was careful to explain to her 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. At the end of the meeting, Esther confirmed to Mr. Figliola that conveyance of the Field to Joyce was what “she wanted done” because she was confident Joyce would preserve the property as undeveloped farmland. Tr. T. at 891:14-21; 893:11-13 (Figliola testifying that Esther “was positive in what she wanted done and why she wanted to do it”).

Mr. Figliola added that if he had any doubts as to whether the conveyance was consistent with Esther's wishes, he would not have carried out the transaction. Tr. T. at 894:18-23. Based on his many years of experience in representing **elderly** clients, Mr. Figliola was equally confident that Esther understood the nature and consequences of the conveyance. Mr. Figliola determined that Esther “understood what was going on. She was aware of the surroundings. She knew why she was in my office. And she seemed to indicate that she understood everything I talked about. And she asked the appropriate questions.” Tr. T. 894:11-14. Mr. Figliola concluded that he “got no indication from [Esther] that, other than physical ailments, there was anything wrong with her mental condition.” Tr. T. at 909:1-3.

At the end of his private meeting with Esther, Mr. Figliola (i) had no doubts that the Deed transaction was in conformity with Esther's wishes, Tr. T. at 900:7 (ii) Esther fully appreciated the legal significance of adding Joyce to the Deed as a joint tenant, Tr. T. at 900:11 (iii) Esther understood that the Deed effectively changed her last will and testament, Tr. T. at 900:15, and (iv) Esther was acting independently and free from Joyce's influence when she executed the Deed, Tr. T. at 900:20.

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, and that she was doing so of her own free will.

The trial record supports Mr. Figliola's conclusions. Esther confided to Stacey, her granddaughter, 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. Esther also told Billy Jean Latos, her caretaker at the time, that after she passed away she wanted Joyce to carry out her wish that the Field be preserved as farm land. Tr. T. at 471. And in keeping with Esther's wishes, Joyce has in fact preserved the Field by placing it in the Delaware Agricultural Land Preservation Program.

In sum, the trial evidence makes clear that Esther knowingly and willingly executed the Deed based on impartial legal advice from disinterested counsel.

III. THE MASTER APPLIED THE CORRECT EVIDENTIARY STANDARD IN DISCREDITING THE FORESTIERI DOCUMENT.

Plaintiffs argue that the Master applied the wrong legal standard for authenticating the Forestieri Document. This contention falls flat.

The Master observed that under [Delaware Rule of Evidence 901\(a\)](#) a document can be authenticated if there is "evidence sufficient to support a finding that a matter in question is what its proponent claims." FR at 24 (quoting [D.R.E. 901\(a\)](#)). Applying this standard, the Master correctly concluded that "[P]laintiffs have utterly failed to demonstrate that the email was generated by Joyce." FR at 26.

The Forestieri Document bears none of the traditional hallmarks of an e-mail. It has no "To" line, no "From" line, no e-mail address and no "Re" line. The absence of these distinctive characteristics alone justifies the Master's ruling. *See, e.g., United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) (explaining that e-mails may be authenticated by examination of their "distinctive characteristics," including e-mail addresses contain[ing] the name of the person connected to the address" and the appearance of "the name of the sender or recipient in the bodies of the e-mail, in the signature blocks at the end of the e-mail, [or] in the 'To:' and 'From:' headings") (internal quotation marks omitted).

Notable also is Plaintiffs' inability to produce the e-mail they claim Joyce sent to Susan transmitting the Forestieri Document. Susan claims that she lost the original e-mail and access to other e-mails when her computer "crashed." Tr. T. at 211. But curiously, while Susan supposedly lost access to the e-mails maintained on her AOL account, she was somehow able to salvage Word documents and photos from the crashed hard-drive. Tr. T. at 247. Equally suspicious is Susan's failure to explain at trial why she was unable to access her AOL e-mail account from a functioning computer via the internet. Tr. T. at 244-46. Understandably, the Master found Susan's testimony in this regard unpersuasive. FR at 25.

The Master also took into account Plaintiffs' inability to produce a single trial witness, other than Susan, who could speak with first-hand knowledge to the origin of the Forestieri Document. FR at 26. For instance, neither Eileen or Toni Lynn Camac were able to substantiate their suspicion that Joyce originated the writing. *See* Tr. T. at 66:1; Tr. T. at 404:13-15. Nor could Christopher Camac and Michael McNatt, both of whom testified that Esther told them only that Joyce *gave* her the Forestieri Document-not that Esther told them Joyce *authored* the writing. Tr. T. at 41:3-10; Dep. T. at 68:23-24. The Master aptly noted that Plaintiffs' witnesses' unsubstantiated "beliefs" regarding the origin of the Forestieri Document "are insufficient to authenticate the document." FR at 26.

If this were not enough to discredit the reliability of Forestieri Document, the Master also found the text of the document itself to be “dubious.” FR at 25. Specifically, the Master noted that the writing refers to Joyce in the third-person and that none of Plaintiffs' witnesses “offered an acceptable explanation” for this peculiarity. *Id.* Conversely, Stacey Ireland, Joyce's niece, testified that she received e-mail correspondences from Joyce regularly and Joyce never wrote in the third person. FR at 25 (citing Tr. T. at 757:1-3). Likewise, 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.

Susan's testimony regarding the origins of the Foresteri Document is also irreconcilably contradicted by Michael McNatt's testimony. Susan explained that after she received the alleged e-mail 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. Susan went on to explain that when she initially showed the writing to Michael in *May* he was “shocked” by its contents. Tr. T. at 248: 20-24. In contrast, Michael testified that the first time he saw the writing was in *February* 2006 when Esther showed it to him-some three months before Susan alleges to have first shown him the document. Dep. T. at 68:6-11.

For these reasons, the Master properly held that Plaintiffs failed to authenticate the Forestieri Document in accordance with [D.R.E. 901\(a\)](#).

IV. THE MASTER PROPERLY HELD THAT PLAINTIFFS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THE EXISTENCE OF A VALID AND ENFORCEABLE ORAL PROMISE.

As the Final Report properly observes, a party seeking to enforce an oral promise bears the heavy burden of proving the existence of the alleged promise by clear and convincing evidence. FR at 25. *See also Pipkin v. Johnston*, 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).

The trial record demonstrates, and the Master correctly held, that Plaintiffs failed to satisfy this exacting standard. FR at 25. The alleged oral promise at issue here is Joyce's supposed pledge to Esther in or about *2000-over ten years ago-to* divide the Field equally with the Plaintiffs upon Esther's death. According to Plaintiffs, there were no witnesses to the alleged oral promise other than Esther and Joyce. Esther, of course, was unavailable to testify on this subject at trial and Joyce has always denied the existence of such an oral promise. And the only documentary evidence of the putative oral promise that Plaintiffs proffered at trial was the Forestieri Document, which, as explained above, the Master properly concluded cannot credibly be attributed to Joyce.

Master Ayvazian determined that “even if plaintiffs could authenticate the [Forestieri Document], it would be of no consequence to my ultimate holding” because the writing does not demonstrate a legally enforceable oral promise by clear and convincing evidence. FR at 26; 27 n. 82 (noting that, even if Plaintiffs could have proved that Joyce had made such an oral promise, “plaintiffs would have severe, perhaps insurmountable, problems in enforcing the promise” due to lack of consideration and the statute of frauds). Thus, even assuming *arguendo* that the Master's ruling regarding the authentication of the Forestieri Document was in error, such error was harmless because there is no set of facts under which Plaintiffs could have shown the existence of a valid and enforceable oral promise between Joyce and Esther.

CONCLUSION

For the foregoing reasons, Plaintiffs' exceptions are not sustainable and the Final Report should be affirmed in all respects.

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Dated: October 28, 2011

Wilmington, Delaware

Footnotes

- 1 Sections of the trial transcript cited herein are attached in numerical order as Exhibit A.
- 2 Trial Exhibit 11 is attached hereto as Exhibit B.
- 3 FR at ___ refers to Master Ayvazian's Final Report dated August 26, 2011.
- 4 Trial Exhibit 7 is attached hereto as Exhibit C.
- 5 As Plaintiffs note in their opening brief, Michael McNatt did not testify at trial. The transcript of his deposition was lodged with the Court and is part of the trial record. Relevant portions of Mr. McNatt's deposition transcript are attached hereto as Exhibit D.
- 6 The Pretrial Trial Stipulation and Order, entered by the Court on June 9, 2011, is attached hereto as Exhibit E.
- 7 The Forestieri Document, which is part of Trial Exhibit 9, is attached hereto as Exhibit F.

End of Document

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