2010 WL 2024203 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

In the matter of the Estate of G. James SEPPI, deceased.

No. 3189-MA.
May 17, 2010.

Petitioner Henry Seppi's Answering Brief to Respondent's Exceptions to the Master's Final Report

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Dated: May 17, 2010

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NATURE AND STAGE OF PROCEEDINGS

This is a Caveat to the admission to probate of a purported Last Will and Testament of G. James Seppi, dated March 2, 2006 and Complaint to Invalidate Transfers of Property, and Rescind Trust Agreement and Invalidate Transfers to Same brought by Henry J. Seppi ("Petitioner") against Bruno Seppi ("Respondent"). A trial was held in front of Master Ayvazian on four days - February 2-4, 2009, and March 31, 2009. Master Ayvazian issued her final report on March 30, 2010 in which she held that the 2006 Estate Documents, 2004 POA, and all transfers of Henry Seppi's ("Seppi" or "Mr. Seppi") property and beneficiary changes after December 15, 2004 were void because they were the products of undue influence. *See In Re Seppi*, Del.Ch., C.A. No. 3189, Ayvazian, M. (Mar. 30, 2010)(Report). The Master also concluded that the 1983 Will should be admitted to probate and that Henry, as personal representative of his father's estate pursuant to the 1983 Will, should be entitled to an accounting from Bruno and to surcharge Bruno for any assets unrecoverable by the estate.

On April 6, 2010, Bruno filed his Notice of Exceptions, and Filed his Opening Brief in Support of His Exceptions to the Master's Final Report ("Respondent's Opening Brief") on April 26, 2010. This is Petitioner Henry J. Seppi's Answering Brief.

STATEMENT OF FACTS

Petitioner Henry J. Seppi ("Petitioner" or "Henry") is the only son of G. James Seppi (the "Decedent" or "Mr. Seppi"). Mr. Seppi passed away on August 22, 2007 at the age of 87. Mr. Seppi had been widowed for over 25 years at the time of his death, and had almost exclusively lived in his Dagsboro, Delaware home since his wife passed away.

A. Prior to 2004, Mr. Seppi and Henry had a wonderful father/son relationship.

Prior to 2004, Henry's relationship with his father could best be described as "wonderful." Mr. Seppi and Henry traveled together, and saw each other often; they did everything together. [1] TR 526. Mr. Seppi taught Henry to fish and hunt, and they often took Mr. Seppi's boat out together. *Id.* When Henry was younger, Mr. Seppi and his wife would take Henry camping. TR 528. After Henry's mother died, he and his father continued to travel together. *Id.* They took many trips throughout the United States to visit relatives, and traveled to Europe together. *Id.* Henry would often accompany his father to Marine Corps reunions, both in the U.S. and abroad. TR 531.

Mr. Seppi's love and devotion for his son was evident to everyone who knew them. Gina Pecher ("Ms. Pecher"), Henry's stepdaughter, testified that Henry and his father were close, and she never saw them argue. TR 199, 201. Robert Bowman ("Mr. Bowman"), Henry's cousin, testified that, prior to 2004, Henry and Mr. Seppi's relationship had always been "great", and that Mr. Seppi had always been proud of Henry. TR 397. Similarly, Mr. Bowman's wife, Garnet ("Mrs. Bowman"), testified that Mr. Seppi and Henry had a good father/son relationship prior to 2004. TR 438. Whenever Mr. Seppi discussed the time he spent with his son, according to Mrs. Bowman, he was very happy. *Id.*

Mr. Seppi's love for his son was reflected in his estate plan, in which he bequeathed the majority of his assets to Henry. On August 18, 1983, Mr. Seppi executed a valid last will and testament in which he devised the majority of his estate to Henry. Ex. A. Also, Mr. Seppi executed a valid power of attorney dated July 24, 1991, appointing Henry as his attorney in fact. Ex. B. There is no evidence, nor has Respondent alleged, that Mr. Seppi was incapacitated or subject to undue influence in any way when he executed the aforementioned estate documents. In connection with Mr. Seppi's estate plan, he taught Henry how to organize and manage his financial affairs. TR 537-540. Mr. Seppi always managed his own financial accounts, and showed Henry how to file financial documents, and keep track of transactions. *Id.* It was very important to Mr. Seppi that he avoid probate. TR 540. In furtherance of Mr. Seppi's desire to avoid probate, he told Henry that he was placing Henry on some accounts as a beneficiary, on others as "TOD" or "POD," and still others as a joint owner.[2] TR 540. Mr. Seppi told his son that his entire estate was Henry's, and that it was easier to put Henry on the accounts so that they would not be tied up in probate. *Id.* Henry's testimony was corroborated by Mr. Seppi's handwritten notes on numerous financial account statements, indicating that he wished the accounts to become Henry's property upon Mr. Seppi's death, rather than being probated. For example, on a Hartford Life Insurance Company document, Mr. Seppi had written a note to Henry stating, "Let the insurance company know of my death, no probate." *See* Ex.N, BS 2579. On another occasion, Mr. Seppi had written a note stating, "PD to Henry POD" on an Adams Express Company document. *See* Ex.N, BS 1990.[3] Bruno also testified that he knew it was very important to Mr. Seppi that he avoid probate. TR 911-12. In addition, Ms. Pecher testified that on two separate occasions, Mr. Seppi told her that he was leaving his entire estate to Henry. TR 205-07. Mr. Seppi's actions during his lifetime confirm his generosity with and adoration of Henry. Mr. Seppi gave gifts to his son, in the form of cash and real estate, throughout his life. TR 283, 440-41, 532-37. However, at no time did Mr. Seppi consider his son to be spoiled, or think that Henry did not appreciate the gifts he received. TR 284, 441.

Conversely, Mr. Seppi's relationship with his brother, Bruno Seppi (the "Respondent" or "Bruno") could generously be described as "not close." Prior to 2004, Mr. Seppi had little to no contact with Bruno; Respondent rarely, if ever, visited Mr. Seppi after Mr. Seppi moved to Delaware in 1979. TR 570. In fact, as Henry testified, Mr. Seppi rarely saw his brother prior to 2004. *Id.* Mr. Seppi often told his son that he wished he saw Bruno more often. TR 571. Prior to 2004, Ms. Bowman would ask Mr. Seppi how Bruno and Bruno's family were doing, and Mr. Seppi would respond that he hadn't seen them in a long time. TR 442. Only after he was contacted by Ms. Lee did Bruno take a more active role in Mr. Seppi's affairs. Mr. Seppi's relationship with Bruno was reflected in Mr. Seppi's estate plan, in which he devised none of his property or assets to him Ex. A.

By 2003, it was clear that Mr. Seppi's mental and physical health had deteriorated to the point that he was unable to manage or care for himself or his financial affairs. TR 556, 561, 751, 754.[4] As a result, Henry decided to retire and move to Delaware for the sole purpose of being near his father so that he could care for him. TR 756. Henry purchased a parcel of land close to Mr. Seppi's home and proceeded to have a home constructed upon it. TR 559-60. In April, 2004, while Henry's house was being built near his father in Sussex County, Henry actually lived with him and assisted him with his daily tasks, including the distribution of his medications and managing his financial affairs. TR 560. Prior to this time, Vernice Lee ("Ms. Lee"), a long-time friend ,was primarily handling these tasks for Mr. Seppi, especially his finances. TR 565.

B. By the fall of 2004, Bruno enters the picture and Henry's relationship with his father deteriorates.

In mid 2004, as Henry began taking a more active role in his father's finances and care, these actions seemed to "step on the toes" of Ms. Lee. TR 568. Henry was concerned that his father was spending too much time alone in the house without appropriate care and supervision. TR 566. Therefore, when his house was eventually built nearby, Henry began having his father stay with him for short periods of time to help alleviate this situation. TR 566. Unfortunately, during this time, Ms. Lee became increasingly intrusive and obstructive in Henry's continuing attempts to handle Mr. Seppi's finances and care. TR 566. Despite Mr. Seppi's desire in having his son assist in the handling of his finances, Ms. Lee refused to turn over Mr. Seppi's checkbook and began intercepting his mail, which included important financial documents. TR 568. Feeling threatened by Henry, she then contacted Bruno, who suddenly became immersed in Mr. Seppi's affairs. TR 571.

Ms. Lee and Bruno pitted Mr. Seppi against his son by taking every opportunity to disparage Henry, and continually made Henry look like the "bad guy" to Mr. Seppi and fueled and/or initiated his irrational thoughts against Henry. For example, it was increasingly clear that Mr. Seppi could no longer drive due to his failing health. TR 587. Henry, at the direction of Mr. Seppi's physician, took the lead in attempting to prohibit him from driving by taking away his keys and his access to the car. TR 587-88. Because Mr. Seppi had lived independently for most of his life, his increasing cognitive difficulties made it difficult for him to understand the rationale for these precautions. Although Henry had his father's best interests at heart, Mr. Seppi was very angry at his son, and neither Bruno nor Ms. Lee took any steps to assuage Mr. Seppi's anger. *Id.* Instead, they told Mr. Seppi that they thought it was OK for him to drive, but Henry would not permit it. TR 588.

On another occasion, Ms. Lee convinced Mr. Seppi that Henry had stolen some sawhorses from him. Although Henry did not have the sawhorses, Ms. Lee simply assumed that he did. *See* Lee Deposition, pp.93-94, Exhibit C. Moreover, instead of attempting to calm Mr. Seppi down, she escalated the situation by driving Mr. Seppi to his son's house to look for them, rather than calling Henry to see if he had the sawhorses, thereby defusing the situation. *Id.* at 95-96. While there, Ms. Lee and Henry got into a dispute, and Cathy eventually called the police. *Id.* Mr. Seppi was very upset by this incident, and it was but one more time that Henry was made out to be the "bad guy," even though he had done nothing wrong.

Of most significant note, Bruno convinced Mr. Seppi that his son was stealing from him. For example, Bruno and Ms. Lee accused Henry of stealing Mr. Seppi's checkbook. TR 574-75, 859-61. Mr. Seppi was understandably very upset when he was told that his son had stolen his checkbook. TR 575. Of course, the checkbook had not been stolen at all; Ms. Lee apparently had it the whole time. TR575, 859-66. Bruno made similar allegations against Henry with regard to a watch that Mr. Seppi apparently could not find. TR 862. Bruno accused Henry of stealing it, but conceded that he didn't even know whether the watch was missing when he made the accusation against Henry. *Id.* The most egregious accusation made by Vernice and Bruno, and the one which upset Mr. Seppi the most, was their allegation that Henry had stolen $65,000 from his father. The circumstances surrounding Henry' withdrawal of this money from an account titled jointly in his and Mr. Seppi's name will be detailed at length, *infra.* At this point it is enough to note that the accusation was completely unfounded. TR 943. Although the aforementioned allegations were completely unfounded, Mr. Seppi believed them due to his weakened intellect and mental capacity. Indeed, Mrs. Bowman testified that when she and her husband visited Mr. Seppi in April of 2006, Bruno and Ms. Lee alleged that Henry was cheating his father and otherwise was generally a bad person. TR451-55. In fact, Ms. Lee had sent Ms. Bowman and her husband a Christmas card in which she ranted and raved about how bad a person Henry was, and that he was lying and cheating Mr. Seppi, and she even hinted that Henry was physically abusing Mr. Seppi. *Id.* Of course, Ms. Bowman and her husband knew that the allegations were absurd, and concluded that Ms. Lee must have "lost her mind." TR 455.

Perhaps the most telling testimony regarding the control that Bruno, and, especially Ms. Lee, exercised over Mr. Seppi came from Karen Fisher, a caretaker hired to look after Mr. Seppi after the guardianship proceedings had concluded. Ms. Fisher testified that, after she began caring for Mr. Seppi, Ms. Lee did not like the fact that she was no longer "in charge." *See* Fisher deposition pp.17-18, Exhibit E. Ms. Lee was reluctant to relinquish the stronghold she had over Mr. Seppi, and enlisted Bruno in her efforts to prevent Ms. Fisher from doing her job. *Id.* at 17-19. Ms. Lee also attempted to disparage Henry to Ms. Fisher, but Ms. Fisher cut her off. *Id.* at 23. Ms. Fisher also testified that Ms. Lee never had anything positive to say about Henry. *Id.* at 25. Moreover, Mr. Seppi told Ms. Fisher that he had changed his will because Ms. Lee had told him that Henry was stealing money. *Id.* at 24-25. When Ms. Fisher expressed disbelief that Henry would do such a thing, Mr. Seppi indicated that

Respondent and Ms. Lee had provided such information to him. *Id.* at 45-46. It is worth noting that Ms. Fisher bears no ill will to any of the parties involved in these proceedings, and in fact testified that she loved both Bruno and Henry. *Id.* at 30. As such, her testimony is particularly relevant and believable. In short, the testimony presented at trial clearly established that Respondent's actions destroyed Mr. Seppi's relationship with his son.

By early 2004, Mr. Seppi's long-time family doctor, Dr. Daryl Sharman ("Dr. Sharman"), had diagnosed Mr. Seppi as suffering from dementia, which had progressed by September, 2004 to "mild to moderate" dementia consistent with Alzheimer's. TR 234-36, 240-44. Without consulting Henry, Respondent and Ms. Lee terminated Mr. Seppi's relationship with Dr. Sharman and instead began taking Mr. Seppi to Ms. Lee's physician, Dr. Kevin Wallace ("Dr. Wallace.") On December 13, 2004, Respondent and Ms. Lee contacted Stephen Parsons, Esquire, Ms. Lee's real estate attorney, and had him prepare a form durable power of attorney in Respondent's favor, which they later picked up from Mr. Parsons' office and had Mr. Seppi execute on December 15, 2004 ("the 2004 POA"). Parsons Deposition, p.7. Mr. Parsons testified that he never even met, and does not even recall speaking to, Mr. Seppi. *Id.* at 7-10. Thus, Bruno produced no evidence showing that Mr. Parsons ever met Mr. Seppi, much less explained the legal significance of the document to Mr. Seppi or had him execute the document in his presence. *Id.* at 7-9. Further, as will be discussed further, the facts show that Mr. Seppi did not possess the capacity to execute this durable power of attorney or was otherwise subject to undue influence.

In an effort to protect his father's well being and his assets, Henry filed a guardianship petition on September 15, 2005. *See* Petition for Guardianship. The Physician's Affidavit attached to the petition, dated September 5, 2005, indicated that Mr. Seppi suffered from moderately severe dementia. *Id.* Bruno contested the guardianship action, and was represented in that action by Kashif Chowdhry ("Mr. Chowdhry"). Shannon Carmean, Esquire ("Ms. Carmean"), was appointed as the attorney ad litem for Mr. Seppi. Ms. Carmean met with Mr. Seppi on October 4, 2005. *See* Report of Attorney Appointed for Alleged Disabled Person, dated January 6, 2006. Ms. Carmean became aware of Bruno and Ms. Lee's allegations that Henry was stealing from his father by reading Bruno's Objection to the Guardianship Petition (the "Objection"). *See* Objection to Guardianship Petition, ¶¶3-9; Carmean Deposition, p.14-16. In addition, Bruno called Ms. Carmean as many as 10 times in order to further the allegations he made in the Objection. Carmean Deposition, p.18.

Ms. Carmean opined that, pursuant to 12 *Del.C.* § 3901, Mr. Seppi was a "disabled person" as of October 4, 2005, and clearly needed a guardian. *See* Report of Attorney Appointed for Alleged Disabled Person, dated January 6, 2006, p.5. 12 *Del.C.* § 3901 provides that a "disabled person" is any person who:

> By reason of mental or physical capacity is unable to properly manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;

Moreover, she believed that Henry should be appointed as his father's guardian. *See* Carmean deposition pp. 11-13. Ms. Carmean spoke to Henry and discovered that he had set up a room on the first floor, close to a bathroom, for Mr. Seppi to sleep in when he visited so that he would not have to climb the stairs. *Id.* at 27. Ms. Carmean had no concerns over the room set-up. *Id.* at 27. She testified that, in her opinion, Henry adored his father, and wanted to take care of him. *Id.*

In advance of filing the aforementioned guardianship action, Henry withdrew $65,000 from an account titled jointly in his and Mr. Seppi's name in order to ensure that funds would be available to pay for Mr. Seppi's medical costs, as well as costs associated with the guardianship proceedings. TR 580-584. Although Respondent and Ms. Lee knew that Henry had withdrawn these funds to safeguard them for his father's care, they convinced Mr. Seppi that his son had, in fact, stolen them. TR 941-42. Ms. Carmean was aware of Respondent's allegations, and noted in her report, "One of my biggest concerns before meeting with the Petitioner was the allegation of the Petitioner's dissipation of Jim's assets. Accordingly, I questioned the Petitioner about the joint accounts he holds." *See* Report of Attorney Appointed for Alleged Disabled Person, dated January 6, 2006, p.3. In fact,

Ms. Carmean, aware of Respondent's allegations, met with Henry and believed the accusations to be unfounded. *Id.* at 23. She testified that they "were baseless allegations," and "didn't see any support for them." *Id.*

Bruno did everything he could to promulgate these false accusations and absolutely nothing to alleviate them. Bruno conceded that he never took any action to alleviate the dissension that had arisen in the family, or clear up the obvious misunderstandings between Henry and his father. TR 869, 876. He never said to Mr. Seppi, "Hey... there's got to be a logical explanation for this. Let's give him a call. Let's sit down. Let's talk about this." *Id.* In fact, Bruno acknowledged that Henry had every right to make the withdrawal from the joint account and was within his legal rights to do so. TR 867. Despite that understanding, he made allegations that Henry was stealing to anyone and everyone who had anything to do with Mr. Seppi- financial advisors, doctors, friends and most importantly, Mr. Seppi himself. For example, Dr. Kevin Wallace ('Dr. Wallace") testified that, when Mr. Seppi told him that his son had stolen money from him, Bruno was present and "certainly didn't deny it." Wallace deposition, p.17. Dr. Paul Rosenberg ("Dr. Rosenberg"), another doctor who treated Mr. Seppi, testified that we was aware that there was a conflict between Mr. Seppi and Henry over money, and that Bruno and his wife had "indicated their account of this recent conflict." TR 359. David Baker, Esq. testified that Bruno confirmed to him the allegations Mr. Seppi was making regarding Henry's alleged theft. TR 699. [5]

As a result of Bruno's actions, this period of time was the hardest time of Henry's life. TR 585. He neither saw, nor spoke to his father much during the entire year of 2006. TR 584-86. Mr. Seppi told Henry that Bruno and Ms. Lee did not want them to see each other. *Id.* Mr. Seppi also believed that he was "not allowed" to visit with his son. *Id.* Henry testified that he did drive over to his father's house on a couple of occasions in the hopes of seeing Mr. Seppi, but he was unsuccessful. *Id.* Eventually, Henry concluded that he had to stop attempting to contact his father while the guardianship action was pending, because the stress was greatly affecting his father's health. *Id.* He decided that he had no choice but to let the guardianship proceedings to play themselves out. *Id.* Henry and Cathy were married in April of 2006. Henry felt that he could not even invite his father to the wedding because of what Bruno and Ms. Lee would do. TR 471, 595-96. Cathy had even wanted to ask Mr. Seppi to walk her down the aisle, but felt that she could not do so with the way things were at that point in time. TR 471. Although it devastated Henry to not have his father attend his wedding, he felt that not inviting him was the only way to protect Mr. Seppi's deteriorating physical and mental health. TR 595-96.

Despite the pending guardianship, Bruno set about to have Mr. Seppi change his existing estate plan to benefit himself and effectively disinherit Henry. Mr. Chowdhry advised his own client that he should have no part in attempting to change Mr. Seppi's estate plan due to the pendency of the guardianship and that this matter should be referred to his attorney, Ms. Carmean. Chowdhry Deposition, p.29; *See also* Ex. FF, Letter to Shannon Carmean from Kashif Chowdhry dated December 21, 2005. Ms. Carmean responded to Mr. Chowdhry that she did not feel it was appropriate for Mr. Seppi to execute any estate documents. Carmean Deposition, p.33. Notwithstanding the foregoing, six months after the guardianship proceedings had been initiated, Mr. Chowdhry contacted David W. Baker ("Mr. Baker"), an attorney, in order to obtain a new estate plan for Mr. Seppi. Chowdhry Deposition, p.27. As a result of this contact, Respondent brought Mr. Seppi to Mr. Baker's office. At this initial meeting, Mr. Baker met with both Respondent and Mr. Seppi and discussed Mr. Seppi's situation. TR 665. It was explained to Mr. Baker, and Bruno confirmed, that Henry was stealing from his father and that Mr. Seppi wanted to disinherit his son. TR 667, 698-99.

> Mr. Chowdhry told Mr. Baker that there was a pending contested guardianship case, and that Mr. Seppi's competency was being questioned. TR 688. As a result, Mr. Baker requested letters from Mr. Seppi's physicians before he would agree to draft the estate documents. TR 704-05. Accordingly, Bruno acted as the "point man" in obtaining a letter regarding Mr. Seppi's condition from Dr. Wallace and Dr. Rosenberg. TR 886-87. Significantly, neither Dr. Wallace nor Dr. Rosenberg's letter addressed whether Mr. Seppi was subject to undue influence. Instead, both doctors only discussed Mr. Seppi's alleged capacity. [6]

Mr. Baker testified that, had Dr. Wallace or Rosenberg included language regarding Mr. Seppi's susceptibility to undue influence in their respective letters, he would have had great concern about preparing and allowing Mr. Seppi to execute estate documents.

TR 704-05. Similarly, if he had known that Ms.Carmean, as attorney ad litem, had opined that Mr. Seppi was a "disabled person" as of October 4, 2005, he would have, at the very least, required more information from the doctors. TR 706, 720. Furthermore, Mr. Baker was not aware that Mr. Seppi was represented by Ms. Carmean. TR 707. Instead, he believed that Mr. Chowdhry, who was Bruno's attorney, represented Mr. Seppi. *Id.* Accordingly, Mr. Baker mistakenly believed that Mr. Chowdhry was protecting and acting in Mr. Seppi's best interests. TR 707-08. If Mr. Baker had been aware that Mr. Seppi was actually represented by Ms. Carmean, and she had not given permission for him to meet with her client, he would not have done so. *Id.* Even more importantly, if Mr. Baker had known that Ms. Carmean thought it was inappropriate to allow Mr. Seppi to execute new estate documents, he would never have prepared them. *Id.*

In any event, as a result of the aforementioned meeting (and not having all of the necessary information), Mr. Baker drafted a Will (the "2006 Will"), Revocable Trust Agreement (the "Trust"), as well as a Letter of Instruction and Bill of Sale (collectively, the "2006 Estate Documents") for Mr. Seppi to re-title his assets in the name of the Trust. The Trust was the sole beneficiary of the 2006 Will, and Respondent was the sole beneficiary of the Trust. *See* Exs E-G. After the initial meeting, Respondent and Mr. Seppi again met with Mr. Baker on March 2, 2006 in order to execute Mr. Seppi's new estate planning documents. At this second meeting, Mr. Baker explained to Bruno the administrative details involved in re-titling Mr. Seppi's property in the name of the Trust. TR 704. Mr. Baker treated these communications with Bruno as confidential, and viewed this particular area of the law as within his legal field of competence. *Id.* Mr. Seppi executed the 2006 Will and Trust, as well as the Bill of Sale transferring all of his then-owned property into the Trust, effectively disinheriting his son.

C. Bruno utilized the 2004 POA, and, otherwise acting as Mr. Seppi's fiduciary, removed Henry from Mr. Seppi's accounts

After Bruno arrived on the scene, he utilized the 2004 POA, and/or generally acted as Mr. Seppi's fiduciary, to change the beneficiary designations and ownership of many of Mr. Seppi's accounts and financial instruments to effectively disinherit Henry. As far back as 1991, Mr. Seppi had placed Henry as a joint account holder on several of his financial accounts, with the intention that Henry would take ownership after his passing by virtue of survivorship. Such retitling of accounts coincided with his execution of a power of attorney in favor of his son. Upon Respondent becoming Mr. Seppi's new attorney in fact in or around December 15, 2004, he began unilaterally closing these accounts and removing Henry's name completely. Mr. Seppi was minimally involved in these transactional changes and/or was not afforded independent counsel as to the changes' effects.

> The motivation underlying Bruno's actions is easy to discern. While he represented to Mr. Seppi that he was willing to move to Delaware to be his caretaker, he never in fact truly did so. TR 931. For example, Bruno's cardiologist and dentist were still in Maryland. TR 932-933. He filed and paid taxes in Maryland, banked in Maryland, and received his mail in Maryland. *Id.* He never changed his driver's license from Maryland to Delaware. *Id.* He and Ms. Seppi continued to operate their Christmas tree farm in Maryland, a farm which required year round maintenance, is open sun-up to sun-down during the holidays, and has no employees other than Bruno and his wife. TR 932-933. Moreover, the farm has a tax lien on it. *Id.* Indeed, Ms. Seppi testified that they could not make a living off a farm the size of theirs, and that they had to take two jobs to make ends meet. TR 775. In Mr. Seppi, Bruno and his wife simply saw an opportunity to increase their net worth, and grab a beach house along the way. They both testified that they enjoyed traveling to Lewes, Delaware and Ocean City, Maryland. TR 774, 936. Even after Mr. Seppi passed away, and while his estate is in dispute, Bruno and his wife have nevertheless stayed at Mr. Seppi's house, essentially treating it as their own beach house. TR 774. In light of the foregoing, it is clear why Bruno took steps to remove Henry from Mr. Seppi's estate plan.

Below is a summary of Mr. Seppi's assets, and a description of how these assets were re-titled to remove Henry, either as a joint owner, or as a beneficiary.[7] As will be discussed more fully herein, each of the transactions described below (the "Questioned Transactions") was undertaken by Bruno in his capacity as a fiduciary for Bruno.

(a) PNC Accounts

Since, at least, 1992, Decedent had owned four accounts at PNC (formerly Bank of Delaware) jointly with Henry: an interest checking account #XXXXXXXXXXXX; a performance money market account #XXXXXXXXXXXX; and 2 certificates of deposit, #31100084899 and #31300094172 (the "Joint PNC Accounts"). TR 917-919; Ex.TT.

PNC Account # XXXXXXXXXX in Mr. Seppi's sole name was opened on November 4, 2005 and received a deposit of $20,000.00 on November 7, 2005 from the Joint PNC Accounts. *See* Stipulation of Additional Facts, ¶9. PNC Account # XXXXXXXXXX was opened in G. James Seppi's sole name on September 24, 2005, and received a transfer from PNC account #XXXXXXXXXX (one of the Joint PNC Accounts) in the amount of $2,079.00 and a $322.00 transfer from 5790183923 (also one of the Joint PNC Accounts) on October 4, 2005. *See* Stipulation of Additional Facts, ¶¶9-13. It then received a $20,000.00 and a $7,000.00 telephone transfer from PNC account #XXXXXXXXXX (a Joint PNC Account) and a $2,000.00 telephone transfer from # 56-7479-1500 (a Joint PNC Account) on November 3, 2005. *Id.* PNC certificate of deposit 31100084899 matured on August 20, 2006, and PNC certificate of deposit #31300094172, (both part of the PNC Joint Accounts) matured on September 3, 2006 . *See* Stipulation of Additional Facts, ¶¶9-13; TR 918-922. However, after the two joint certificate of deposits matured, they were not renewed, but were instead transferred into new certificates of deposits in Mr. Seppi's sole name. TR 919-920. Bruno testified that he utilized his power of attorney to complete the aforementioned changes to the Joint PNC Accounts, removing Henry. *Id.*

(b) Phoenix Investment Partner

On March 22, 2000, the Decedent completed an Account Re-Registration form for Phoenix Partners, LTD., account #XXXXXXXXXX changing the account from his sole name to be TOD to Henry J. Seppi (the "Phoenix Accounts"). *See* Stipulation of Additional Facts, ¶¶1-2. The Phoenix Accounts remained titled as aforementioned until March, 2006 when Henry J. Seppi was removed as a beneficiary of the Phoenix Accounts. *Id.* Bruno testified that he contacted a representative at Phoenix Investment to obtain the form necessary to retitle the Phoenix Accounts and otherwise assisted Mr. Seppi in removing Henry from them. TR 901-904.

(c) Tri-Continental Corporation

The Decedent owned account #XXXXXXXXXX for shares of Tri-Continental Corporation, Payable on Death to Henry J. Seppi. *See* Stipulation of Additional Facts, ¶6; Ex.HH, BS 876. This account remained titled as aforementioned until February 2, 2006 when the shares were transferred to account #XXXXXXXXXXXX in Mr. Seppi's sole name. *Id.* Bruno testified that he assisted Mr. Seppi in removing Henry from this account. TR 895-896.

(d) T. Rowe Price Accounts

As of October 28, 1998, the T. Rowe Price collective accounts under investor number 30575 including account #s 200514286-4, 400356619-4, and 400107938-2 were titled in the Decedent's sole name, payable TOD to Henry J. Seppi (the "T. Rowe Accounts"). *See* Stipulation of Additional Facts, ¶¶3-4. The T. Rowe Accounts remained titled as aforementioned until January, 2006 when Henry J. Seppi was removed as a beneficiary of the T. Rowe Accounts. *Id.* Bruno prepared the letter for Mr. Seppi's signature to send to T. Rowe Price in order to have Henry removed from these accounts. TR 906-908.

(e) Johnson Controls, Inc.

On January 13, 2006, the entire balance of Johnson Controls, Inc., account #XXXXXXXXXX (the "Johnson Controls Account") in the name of G James Seppi, TOD to Henry J. Seppi, in the amount of $110,679.36 was transferred to a new Johnson Controls, Inc. account, # XXXXXXXXXX, which did not include the TOD beneficiary in favor of Henry J. Seppi. *See* Stipulation of Additional Facts, ¶5. The Johnson Control Account had been titled as aforementioned since, at least, July 6, 2000. *Id.* Bruno testified that he assisted in re-titling the Johnson Controls Account to remove Henry. TR 904-906.

(f) Fidelity Investments

The Decedent owned a Fidelity Investments account, #XXXXXXXXXX, in his sole name with TOD to Henry J. Seppi (the "Fidelity Account"). Ex.PP, BS 1517; TR 908-910. The Fidelity Account was changed on or about April 1, 2006 in which to remove the TOD for the benefit of Henry J. Seppi. TR 909-911; Ex.PP, Fidelity 233. Bruno assisted Mr. Seppi in drafting a letter to Fidelity Investments to have Henry removed as beneficiary from this account. *Id.*

(g) Royal Dutch Accounts

Since, at least, July 24, 1998, the Decedent owned shares of the Shell Transport and Trading Company, Limited, held in account #XXXXXX by the Bank of New York as agent for Royal Dutch Shell to be TOD to Henry J. Seppi (the "Royal Dutch Account"). *See* Stipulation of Additional Facts, ¶¶7-8. The Royal Dutch Account remained titled as aforementioned until the Royal Dutch Account was closed and all shares therein were transferred on January 9, 2006 to a new account, # 9472, with no TOD provision for Henry J. Seppi. *Id.* Bruno conceded at trial that he had assisted his brother in having Henry removed from this account. TR 912-913.

In addition to the Questioned Transactions, Bruno attempted to retitle Morgan Stanley accounts held jointly by Mr. Seppi and Henry. TR 425. It is telling that Mr. Seppi's longstanding financial advisor at Morgan Stanley, David A. Humes, refused to honor Bruno's instructions because he was extremely skeptical of his actions, and required authorization from Henry before he would agree to re-title the accounts. TR423-426. Mr. Humes had been the account manager for Mr. Seppi's Morgan Stanley account since 2000, after his mother, Mr. Seppi's previous financial advisor, began to transition herself out of the business. TR 419. Mr. Seppi and Mr. Humes would speak about Mr. Seppi's Morgan Stanley account approximately two times a year about routine account administration issues, such as reinvestment of maturing bonds. TR 419-20. Mr. Humes has testified that the Morgan Stanley account was explicitly created in May, 1990 to be joint with Henry Seppi, with rights of survivorship, pursuant to the underlying documents. TR 418-19.

However, in April, 2006, Mr. Humes received an anxious call from Bruno indicating that he wanted to meet on that same day. TR 421-22, 429. Mr. Humes accommodated this request and later that afternoon, Mr. Humes met with Bruno, his wife, Ms. Lee, and Mr. Seppi. *Id.* The aforementioned meeting lasted about 20 minutes and consisted of Bruno doing the majority of the talking which centered around the same unfounded allegations that Henry was stealing Mr. Seppi's assets and, as a result, Respondent requested that Henry's name be removed from ownership of the Morgan Stanley account. TR 424-26, 430. Mr. Humes felt that this was Bruno's request, as opposed to a request by Mr. Seppi and was concerned by Respondent, being a third party with no ownership in the account, making such a request in a virtually bullying fashion. TR 427-28. Mr. Humes, despite Respondent's aggressive behavior, refused to oblige Bruno's request. TR 425-26. Unfortunately, unlike Bruno's interaction with Mr. Humes, the Questioned Transactions discussed above were undertaken by phone and/or mail whereby no one could independently evaluate Mr. Seppi's condition and observe Bruno's control over him.

D. All of the medical testimony introduced at trial supports the conclusion that Mr. Seppi lacked capacity, and was susceptible to undue influence.

Dr. Carol Tavani, a board-certified neuro-psychiatrist, testified on behalf of Henry at trial. In reaching her opinions, Dr. Tavani met and interviewed Mr. Seppi, and reviewed the following records: (1) Mr. Seppi's medical records from Dr. Pedro J. Perez,

Dr. Daryl Sharman, Dr. James J. Morgan, Dr. Kevin Wallace, Dr. Elena Padrell, and Dr. Paul Rosenberg; and (2) the deposition transcripts of Dr. Wallace, Dr. Rosenberg, David Baker, Joseph Rofrano, Martha Seppi, Bruno Seppi, Henry Seppi, Kathleen Seppi, and Vernice Lee. TR 33-38. Dr. Tavani testified that, in her opinion, Mr. Seppi was especially susceptible to undue influence and had a weakened intellect as of March 2, 2006. TR 109. She based her opinion on all of the above documents, as well as her interview with Mr. Seppi, noting that Mr. Seppi was very susceptible because of his mental frailty, physical frailty, and the nature of his relationships with Ms. Lee and Bruno. TR 111. Dr. Tavani also opined that Mr. Seppi lacked capacity on March 2, 2006. TR 109-113. Again, her opinion was based upon her review of all of the aforementioned documents and her personal interview of Mr. Seppi. *Id.* According to Dr. Tavani, Mr. Seppi had "significant dementia" that was "at least moderate." TR 109. Moreover, Mr. Seppi had been suffering from this dementia as far back as 2003, at least. TR 111. Based on the foregoing, Dr. Tavani concluded that there was no way that Mr. Seppi would have had the capacity to execute estate documents in March of 2006, or to change, or direct someone else to change, ownership or beneficiary designations of financial accounts. *Id.* [8]

Bruno introduced testimony from two doctors, Dr. Wallace and Dr. Rosenberg, both of whom had provided letters to Mr. Baker in February, 2006 stating that Mr. Seppi had the requisite capacity to execute estate documents at that time. TR 705. Neither letter offered any opinion as to whether Mr. Seppi was susceptible to undue influence. TR 705. Dr. Wallace testified that, after he had written his February 2, 2006 letter to Mr. Baker, his opinion on Mr. Seppi's condition changed. Wallace Deposition, p.22. When he had issued his opinion, Dr. Wallace, unlike Dr. Tavani, had not had the benefit of speaking to or reviewing the deposition transcripts of Mr. Baker, Henry Seppi, or Kathy Seppi, and had not reviewed all of Mr. Seppi's medical records. *Id.* However, after he had the opportunity to speak with Henry, Dr. Wallace found that "there was more to the situation than [he] realized." *Id.* Dr. Wallace realized that the possibility that Mr. Seppi had been unduly influenced was very real. *Id.* at 22-23. Moreover, had he been armed with this new information, Dr. Wallace may have never even written the aforementioned letter. *Id.* at 23. In fact, Dr. Wallace agreed that, as of March 2, 2006, Mr. Seppi was susceptible to being taken advantage of. *Id.* at 24.

Dr. Rosenberg, for his part, acknowledged that his letter did not discuss whether Mr. Seppi was susceptible to undue influence as of March 2, 2006. TR 364. Moreover, as of October 20, 2005, Dr. Rosenberg agreed that, if Mr. Seppi were given false information about an individual, he could have been misled. TR 366-67. Dr. Rosenberg further agreed that, given Mr. Seppi's cognitive impairments, his susceptibility to being misled was heightened. TR 367. He conceded that Mr. Seppi suffered from Alzheimer's, and was at a mild to moderate stage, complete with accompanying dementia. TR 324-35. However, he still opined that Mr. Seppi possessed the necessary capacity to execute the Estate Documents. In reaching this conclusion, Dr. Rosenberg relied upon Mr. Seppi's history as relayed by Bruno, Martha, and Ms. Lee, as he stated that Mr. Seppi himself was "not in a position to give an accurate, coherent history." TR 326, 358. Like Dr. Wallace, Dr. Rosenberg did not speak to Henry or Kathy Seppi to hear their version of Mr. Seppi's history. TR 358. Also like Dr. Wallace, Dr. Rosenberg agreed that if he were aware of certain facts that he could have learned from other family members, his opinions in this case could be potentially undermined. TR 380. [9]

In sum, Bruno and others promulgated false allegations against Henry to anyone that would listen including Mr. Seppi's friends, relatives, financial advisors, attorneys, doctors and Mr. Seppi himself. Such unfounded allegations were ingrained in Mr. Seppi by Bruno and due to Mr. Seppi's cognitive impairments, he was unable to discern the veracity of the accusations. The testimony presented established that Mr. Seppi did not possess the requisite capacity at the time to execute the 2006 Estate Documents and certainly was of a weakened intellect and susceptible to undue influence. Mr. Seppi's friends, relatives, his financial advisor, and neighbors all testified to Mr. Seppi's physical and mental decline in the last years of his life and his complete and dependent reliance on others for care and assistance.

As noted, as early as 2004 Mr. Seppi had been diagnosed with mild to moderate dementia. Henry was told that Mr. Seppi needed 24-hour care, as early as 2005. TR 591. Bruno testified that, as early as 2003, Mr. Seppi was forgetful and constantly repeated questions and statements. TR 845. While he could remember things that happened in World War II, Mr. Seppi could not remember whether he had attended a doctor's appointment the day before. TR 592, 847-48. He would walk around tapping his head and say that "he just couldn't think straight." TR 846. Mr. Seppi relied upon Bruno, Martha Seppi, and Ms. Lee to run errands, cook, shop, and drive him to medical appointments, and was completely dependent on Bruno and Ms. Lee in

"navigating" his medications. TR 848-51. Ms. Carmean noted that Mr. Seppi needed assistance with daily tasks, including financial assistance, as well as help taking and managing his medications. *See* Report of Attorney Appointed for Alleged Disabled Person, dated January 6, 2006, p.5. Indeed, Ms. Carmean concluded that, were it not for assistance, Mr. Seppi's mental and physical condition would render him incapable of caring for himself. *Id.*

E. The guardianship action is settled

The guardianship action was settled in January of 2007. TR 627; Ex. AAAA. Pursuant to the settlement Bruno and Henry would be Co-Guardians, and each would alternate taking care of Mr. Seppi monthly. *Id.* As a result, in February of 2007 was finally able to interact with his father again. *Id.* Henry began assisting his father with his everyday activities, such as cooking, preparing medications, driving him to appointments, and maintaining his house. *Id.* While Henry was overjoyed to be able to spend time with Mr. Seppi, he felt that he had to essentially reintroduce himself to his father, because Mr. Seppi was "not the father" he had known before. TR 627-28. Nevertheless, the last few months that Henry was able to spend with his father before Mr. Seppi passed away meant everything to Henry. TR 631. They were able to travel to a family reunion in Ohio, where Mr. Seppi and Henry had a good time together. TR 630-631. However, the brief time Henry spent with his father in 2007 did not change the fact that Bruno's actions prevented Henry from sharing his father's life in the previous 3 years. As Henry testified:
I realized what I've lost in the last three years not being able to help him and share his company. It was my total thought upon retiring to share my father's remaining years with him. And I was robbed of that. I feel my father was robbed of a longer life because I feel that definitely brought him to death sooner by feeling his son wasn't around. TR 631.

ISSUES PENDING FOR DECISION

(1) Whether the change in ownership and beneficiary changes undertaken by Respondent are valid?
(2) Whether the 2006 Estate Documents are valid?

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a Master's factual and legal findings is *de novo*. *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del.1999). However, a new trial is not necessary if the Court of Chancery can read the relevant portion of the factual record and draw its own conclusion. *Cartanza v. DNREC*, 2009 WL 106554, * 1 (Del.Ch.) Nor will a new trial be necessary where none of the key factual issues turn on credibility determinations. *Id.*

In the case at hand, the only key factual issue that turned on a credibility determination by the Master was her rejection of certain portions of Vernice Lee's ("Vernice" or "Ms. Lee") testimony; Ms. Lee was deceased at the time of the trial, and her entire testimony was presented in the form of her deposition testimony. Moreover, it should be noted that there is an extensive written record in this case. The parties stipulated prior to trial to numerous facts, as set forth in the Pre-Trial Stipulation and Order. Trial itself lasted four days, much of which was spent discussing the various financial account statements as well as handwritten notes made by various persons, all of which are part of the record. Accordingly, it is respectfully submitted that a new trial is not necessary in this matter as this Court can reach its conclusion based upon the written record.

II. THE 2004 POA IS INVALID AND BOTH IT AND THE QUESTIONED TRANSACTIONS SHOULD BE RESCINDED.

As will be set forth in greater detail, *infra*, the 2004 POA should be rescinded because Mr. Seppi lacked testamentary capacity to execute it and/or was unduly influence to do so. Accordingly, all of the Questioned Transactions entered into by Bruno should be rescinded because Bruno entered into the Questioned Transactions pursuant to the authority Mr. Seppi allegedly conveyed to him via the 2004 POA. Since, as will be explained, the 2004 POA was invalid, any transactions Bruno entered into based upon it should be rescinded. Second, regardless of whether the POA was valid, Bruno was acting as a fiduciary (either by virtue of the 2004 POA, or due to the nature of his relationship with Mr. Seppi), and has the burden to establish that the Questioned Transactions should be upheld. Again, Bruno did not meet this burden. Finally, even if the Court finds that Bruno did not breach any fiduciary duties and was only acting at Mr. Seppi's direction, the Questioned Transactions should be rescinded because Mr. Seppi did not possess the requisite capacity, and/or was under undue influence, such that the Questioned Transactions should be voided.

A. The 2004 POA is invalid and, therefore, any retitling of assets and/or changes in beneficiary designations enacted pursuant thereto are, likewise, invalid and should be rescinded.

If the 2004 POA was invalid, any changes in assets made pursuant to the 2004 POA by Bruno would also necessarily be invalid. As a preliminary matter, and as will be set forth herein, pursuant to the Court's decision in *In re Melson*, 711 A.2d 783 (Del., 1998), Bruno has the burden to prove that Mr. Seppi possessed the requisite testamentary capacity and that he was not under undue influence when he allegedly executed the 2004 POA. As set forth herein, Bruno did not meet this burden.

1. Pursuant to *In Re Melson*, the burden of proving Mr. Seppi had the requisite capacity to execute the 2004 POA, and/or was not subject to undue influence in executing the 2004 POA, rests with the Respondent.

In *Melson*, the Delaware Supreme Court found that under certain circumstances it is appropriate to shift the burden on claims of competency and undue influence to the proponent of a contested will rather than the challenger. While the *Melson* case specifically addresses claims of competency and undue influence in the context of a will contest, the underlying concepts should certainly be applied here in light of the fact that the 2004 POA was clearly used as an estate planning device prior to Mr. Seppi's alleged execution of the 2006 Will.

Under *Melson*, the burden shifts to the proponent of the will where the party challenging the will demonstrates by clear and convincing evidence that (1) the will was executed by a testator who was "of weakened intellect," (2) the will was drafted by a person in a confidential relationship with the testator, and (3) the drafter received a substantial benefit under the will. *Id.* at 788. Petitioner submits that the rationale underlying the *Melson* decision also applies to a power of attorney document. It is undisputed that Vernice Lee was aligned and/or an agent of Bruno. Bruno and Martha agreed that they, along with Ms. Lee, acted in concert and as a "team" with regard to Mr. Seppi. TR 759, 945-46. It is undisputed that Mr. Seppi was a person of weakened intellect as of the time of execution of the 2004 POA. Dr. Sharman testified that, by September of 2004, Mr. Seppi was suffering from mild to moderate dementia consistent with dementia. Moreover, while the 2004 POA was not specifically drafted by the Bruno or his agents, it was procured in all regards by Bruno. The rationale behind *Melson* is that when an attorney is involved, some safeguards exist to not require such a shifting of burdens. Mr. Parsons never met Mr. Seppi, let alone explained the legal significance of this document. Thus, no such safeguards were present. Further, it is undisputed that Bruno was in a confidential relationship with the Disabled Person and that the 2004 POA benefitted Bruno. Therefore, the burden to prove the Disabled Person's competency and issues of undue influence rest with Bruno.

(a) Bruno did not meet his burden to prove that Mr. Seppi possessed the requisite capacity to execute the 2004 POA.

In determining Mr. Seppi's capacity to execute the December 15, 2004 durable power of attorney, it is proper for this Court to use standard set forth in *In re West*, Del. Supr., 522 A.2d 1256 (1987) for evaluating a claim of lack of testamentary capacity in which the Supreme Court held:

> "The standard is that one who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act. Thus, the law requires [a testatrix] to have known that she was disposing of her estate by will, and to whom....Delaware law presumes that capacity when executing her will, and the party attacking testamentary capacity bears the burden of proof. It is important to note that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will..."

See *Id.* at 1263; See also *In re Rick,* 1994 WL 148268, *10-11 (Del.Ch.) (Exhibit A).

As noted, *supra*, the peculiar facts of this case dictate that Bruno actually has the burden to show that Mr. Seppi possessed the requisite capacity to execute the 2004 Power of Attorney. However, even if the burden has not shifted to Bruno, Henry presented medical evidence and testimony that established, by a preponderance of evidence, that Mr. Seppi lacked capacity when he executed the 2004 Power of Attorney. First, prior to the execution of this document, Mr. Seppi was diagnosed with mild to moderate dementia by his physician, Dr. Sharman. By September of 2004, Dr. Sharman believed that Mr. Seppi was suffering from significant dementia consistent with Alzheimer's.

Further, there is no evidence that Stephen Parsons discussed the 2004 document with Mr. Seppi or that he even understood it. Also, Bruno has not provided evidence that Mr. Seppi was aware of the extent of his estate/property and/or was clear about his wishes as to who should benefit from it. Again, it should be noted that the document was not even executed in the presence of Mr. Parsons. Rather, the prepared form was picked up from Mr. Parson's office and signed elsewhere. Mr. Parsons was neither the Seppi family attorney nor someone who had represented Mr. Seppi over the years. Mr. Parsons' only connection with Mr. Seppi, therefore, came at the invitation of Ms. Lee. Moreover, Mr. Parsons had no knowledge of Mr. Seppi's medical history, his sheltered/isolated living arrangement since his wife's death, or his gradually deteriorating ability to manage his own personal and financial affairs. Parsons Deposition 6-11.

Bruno failed to provide any evidence showing that the 2004 POA(or the new estate documents signed by Mr. Seppi on March 2, 2006) was/were executed by him during a "lucid interval" or "window of competence." Accordingly, Bruno did not meet his burden to establish that Mr. Seppi had the requisite capacity to execute the 2004 POA.

(b) Bruno did not meet his burden to show that Mr. Seppi was not under undue influence when he allegedly executed the 2004 POA.

The standards for establishing undue influence are well-settled:
Undue influence is an excessive or inordinate influence considering the circumstances of the particular case. The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own. It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will .... The essential elements of undue influence are (1) a susceptible testator;

(2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and (5) a result demonstrating its effect.

In re Rick, 1994 WL at * 10-11 (citing *In re West,* 522 A.2d 1256, 1263-64 (Del. 1987)). Again, it should be noted that *Melson* shifts the burden to Bruno to show that he did not exert undue influence upon Mr. Seppi when he executed the 2004 POA.

However, even if the burden were to remain upon Henry, the evidence presented clearly established that Bruno exerted undue influence upon Mr. Seppi. Accordingly, the Master's findings should be upheld.

(A) Susceptibility

First, it is undisputed that, when Mr. Seppi executed the 2004 POA, he was a susceptible testator. All agree that Mr. Seppi had begun to mentally and physically deteriorate by 2003, and needed assistance in managing his affairs. Dr. Sharman testified that Mr. Seppi was in the mild to moderate stage of dementia in June of 2004, and could have been susceptible to designing persons at that point. As noted by Master Ayvazian, Mr. Seppi's score on a mini-mental state examination on October 11, 2004 was 16 out of 30, which placed him in the moderate range of severity of cognitive impairment. *Seppi*, at *34.

(B) Opportunity

Second, it is clear that Ms. Lee and Bruno had the opportunity to exert influence over Mr. Seppi. As discussed previously, Bruno had the ear of Mr. Seppi, and effectively "cut out" Henry from Mr. Seppi's life. Master Ayvazian correctly noted that Mr. Seppi and Ms. Lee lived a few houses apart, and, by December 2004, Mr. Seppi depended on Ms. Lee for his meals, transportation, and for his healthcare when he was not with Henry. *Id.* at *35. Thus, the Court correctly concluded that Ms. Lee had the opportunity to influence Mr. Seppi.

(C) Disposition

Next, Petitioner established that Ms. Lee and Bruno had both the disposition to exert influence for an improper purpose, and actually did so. The Court acknowledged that Ms. Lee had developed a strong dislike for Henry by 2004, because his presence meant that she would no longer have access and control to Mr. Seppi. *Id.* Thus, the Court correctly reasoned, Ms. Lee had the disposition to use her influence for an improper purpose, i.e., "to deprive [Mr. Seppi] of his chosen attorney-in-fact (Henry), replacing him with a new attorney-in-fact (Bruno) who would help [Ms. Lee] maintain her control over [Mr. Seppi's] personal and financial affairs." *Id.*

Henry also presented evidence that Bruno had little to no contact with Mr. Seppi throughout the majority of Mr. Seppi's life, and only involved himself after the request of Ms. Lee. Bruno's interaction with Mr. Seppi was calculated to obtain Mr. Seppi's considerable assets upon his death. Testimony was presented that Bruno had a tax lien on his property in Maryland. Martha Seppi stated that their farm was not big enough to make a living off of, and that they needed to take two jobs as a result. Although Bruno estimated his net worth at between two and three million dollars, his wealth was tied to his real estate holdings: a 35-acre farm in Maryland and two and a half acres in Alaska. He has a pension and earned a few thousand dollars a year selling Christmas trees. Moreover, both Bruno and Martha testified that they enjoyed visiting Lewes, Delaware and Ocean City, Maryland, and had been staying at Mr. Seppi's house to visit the beach even after Mr. Seppi passed away. Put simply, by unduly influencing Mr. Seppi to leave his estate to Bruno, Bruno and his wife would be able to pay off their obligations, as well as acquire a beach house for their enjoyment. In short, the Court correctly determined that Ms. Lee and Bruno had the disposition to unduly influence Mr. Seppi.

(D) Actual Exertion of Undue Influence

As Master Ayvazian correctly concluded, the record established that Ms. Lee and Bruno actually exerted undue influence on Mr. Seppi. The Court's discussion on this issue is particularly compelling:

Vernice testified that Seppi discovered his power of attorney was missing from his safe. Seppi then somehow found out that Henry had it. Vernice told Seppi that he should get a new power of attorney, and he agreed when "he began to see this kind of action out of Henry." In her testimony Vernice did not specify what "kind of action" Seppi had seen, but she testified Seppi

told her: "[I]t's about time to change this because I don't believe he is a person that's going to represent me and assure my care." About a year later, Seppi finally obtained a new power of attorney when "different incidents" occurred. According to Vernice, these "incidents" included Henry not spending any time with Seppi, Henry traveling all the time, and Henry taking other items out of Seppi's house. After that, according to Vernice, Seppi kept the 2004 POA in his drawer for some time "just to be sure that he was doing the right thing.

The only part of Vernice's account that sounds plausible is her testimony that she told Seppi to get a new power of attorney. One of the incidents she cited - Henry taking items out of Seppi's house - presumably refers to the alleged thefts of Seppi's checkbook, watch, and sawhorses. Henry denied taking these items, and Bruno admitted that he had no first-hand knowledge of these incidents. While Henry admitted that he had taken a few weekend or week-long trips during 2004 and 2005, whenever he was away Kathy was available to care for Seppi. The evidence shows that Henry participated in caring for his father after he moved to Delaware, despite efforts by Vernice and Bruno to thwart him. It was not until 2006 that Henry stopped visits and calls to his father because of Seppi's growing distress at the conflict between his son and Vernice. This occurred well after the 2004 POA was executed and, thus, could not have been the cause of Seppi's decision to revoke the 1991 power of attorney. Undue influence is the only plausible explanation for Seppi's execution of the 2004 POA.

Seppi at * 36-37.

(E) Result Demonstrating the Effect of Undue Influence

Finally, the results of Ms Lee's and Bruno's undue influence are clear: Ms. Lee benefitted because the 2004 POA revoked Henry's authority to make decisions on Henry's behalf, and conferred such legal authority on someone who would be useful to her - Bruno. Bruno, for his part, gained a mechanism by which he could eventually become Mr. Seppi's sole beneficiary, even though Mr. Seppi clearly expressed a desire, prior to his deteriorating mental and physical health, that his only son receive the majority of his estate. Thus, Master Ayvazian correctly determined that the record established, by a preponderance of the evidence, that Mr. Seppi executed the 2004 POA as a result of undue influence.

B. Even if the 2004 POA is valid, Bruno has the burden to show that the Questioned Transactions should be upheld because he was acting as a fiduciary

As discussed previously, Henry established that Bruno, utilizing the 2004 POA, or otherwise acting as a fiduciary on behalf of Mr. Seppi, undertook a designed course of action to retitle accounts to remove Henry's ownership thereof. For example, Henry established that Bruno would: 1) close accounts that would benefit Henry and open up new accounts that would benefit himself under the contested estate plan, as stated above; 2) retitle accounts removing Henry's ownership; and 3) retitle accounts removing "TOD" or "POD" designations for the benefit of Henry (the "Questioned Transactions"). As set forth previously, Henry contends that the 2004 POA is invalid because Mr. Seppi lacked the capacity to execute it, or was under the undue influence of Bruno when he executed it. Accordingly, any transactions into which Bruno entered pursuant to the 2004 POA should also be voided. However, even if this Court finds that the 2004 POA itself is valid, Henry established that the Questioned Transactions should be voided because Bruno breached his fiduciary duties to Mr. Seppi in entering into them; as will be discussed in greater detail herein, these fiduciary duties were imposed upon Bruno either by virtue of the 2004 POA (if valid), or through the very nature of Bruno's relationship with Mr. Seppi. In either case, the fiduciary duties are the same, and, accordingly, Bruno has the burden to establish that the Questioned Transactions he entered into should be upheld by this Court.

(1) Assuming it was valid, the 2004 POA imposed fiduciary duties on Bruno.

The Delaware Supreme Court has discussed the fiduciary duties that are involved when an individual executes a power of attorney in favor of another person. In *Schock v. Nash*, 732 A.2d 217, 225-26 (Del.1999), the Court stated:

> The common law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duty principles of trust law must, therefore, be applied to the relationship between a principal and her attorney-in-fact. An attorney-in-fact, under the duty of loyalty, always has an obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure. At common law, transactions which violated the fiduciary duty of loyalty were void. Recently...we found that a transfer by the trustee to herself is voidable by the beneficiary unless the terms of the sale are approved by the court, the beneficiaries, or the grantor before the trustee took office. *If the transaction is challenged, the burden of persuasion to justify upholding the transaction is on the fiduciary.*

Id. (emphasis added.) Thus, the burden is on Bruno to establish that the aforementioned transactions were in the best interest of Mr. Seppi, or that Mr. Seppi voluntarily consented to Bruno engaging in interested transactions after full disclosure. Put simply, Bruno did not meet this burden. He presented no evidence that Mr. Seppi consulted with independent counsel regarding the aforementioned transactions, or otherwise even understood the significance of the transactions. In light of the foregoing, it is clear that Bruno, by entering into the self-interested transactions discussed above, breached his fiduciary duties to Mr. Seppi, and the transactions should be voided.

(2) The nature of his relationship with Mr. Seppi imposed fiduciary duties upon Bruno.

As has been discussed previously herein, shifting the burden, as proposed herein, is already recognized under Delaware law in situations regarding transfers to persons who occupy a fiduciary relationship with the donor. *See Schock v. Nash*, 732 A.2d 217, 225-26 (Del.1999); *Faraone v. Kenyon*, 2004 WL 550745, *9 (Del.Ch.)(Ex.B) With regard to determining whether or not a fiduciary relationship exists, there is no bright line rule in situations not involving the obvious relationships, such as trustee-beneficiary. In those other situations, it is a "...rule of thumb, that where one party has a relationship of superiority to another, and the other party's protections are based on investing trust and confidence in the person holding the superior position, those circumstances will give rise to a fiduciary relationship". *Faraone*, 2004 WL at *8. Mr. Seppi was in poor health and could no longer care for himself, and depended on others for assistance in meeting his everyday needs. As a result of Mr. Seppi's dependancy upon others, mainly Bruno, Bruno was clearly in a superior position which gave rise to the existence of a fiduciary relationship, regardless of whether the 2004 POA was valid. Indeed, Bruno testified that he was acting a fiduciary for Mr. Seppi when he undertook the questioned transactions. TR 895-96, 901-13, 918-22. Thus, Bruno, as a fiduciary, bears the burden of showing fairness in connection with the aforementioned transactions for the reasons already set forth herein.

Accordingly, the burden is on Bruno to establish that the aforementioned transactions were not fraudulent, but, rather, were fair and in the best interest of Mr. Seppi, or that Mr. Seppi voluntarily consented to Bruno engaging in interested transactions after full disclosure. Put simply, Bruno did not meet this burden. There is no evidence that Mr. Seppi consulted with independent counsel regarding the aforementioned transactions, or otherwise even understood the significance of the transactions. Prior to his cognitive decline, Mr. Seppi did all of his own account maintenance. However, as discussed, *supra*, after Bruno, Martha and Ms. Lee took over his financial matters, Mr. Seppi no longer had any say in his financial decisions. Indeed, as set forth previously, letters regarding the Questioned Transactions were prepared by either Bruno, Martha or Vernice and then given to Mr. Seppi to sign. Bruno, Martha and/or Vernice would make the calls, write the letters, make the transfers, and request the change of beneficiary forms for the Questioned Transactions -- not Mr. Seppi. Afterwards, they would place some forms and letters in front of Mr. Seppi, a cognitively impaired man under severe influence, and ask him to sign them. Bruno certainly has not presented any evidence that Mr. Seppi gave his informed consent to the transactions at issue. In light of the foregoing, it is clear that Bruno, by entering into the self-interested transactions discussed above, breached his fiduciary duties to Mr. Seppi, and the transactions should be voided.

III. THE QUESTIONED TRANSACTIONS AND THE 2006 ESTATE DOCUMENTS

Even if the Court finds that Mr. Seppi had testamentary capacity and was not unduly influenced to execute the 2004 POA, and Bruno did not breach any fiduciary duties and was only acting at Mr. Seppi's direction, both the Questioned Transactions and the 2006 Estate Documents should be rescinded because Mr. Seppi did not possess the requisite capacity, and/or was under undue influence, when he entered into them, as will be discussed below.

A. The Questioned Transactions and 2006 Estate Documents are invalid and should be rescinded because Mr. Seppi lacked the requisite capacity to engage in such transactions.

As previously discussed, under *Melson*, the burden of proof shifts to the proponent of a will where the party challenging the will demonstrates by clear and convincing evidence that (1) the will was executed by a testator who was "of weakened intellect," (2) the will was drafted by a person in a confidential relationship with the testator, and (3) the drafter received a substantial benefit under the will. *Id.* at 788. Again, Henry established by clear and convincing evidence that these factors are met in the instant case, and, accordingly, the burden was on Bruno to establish that Mr. Seppi had the capacity to execute the 2006 Estate Documents, and/or that Bruno did not exercise undue influence.

It is undisputed that by March, 2006, Mr. Seppi was of "weakened intellect." Indeed, guardianship proceedings had been initiated six months earlier, and a physician had found that Mr. Seppi was suffering from moderately severe dementia. As set forth previously, Ms. Carmean concluded that as of October 4, 2005, Mr. Seppi was "disabled" as defined by 12 *Del. C. §* 3901. Henry also established that the second prong of the *Melson* test is met. While Bruno did not personally draft the 2006 Estate Documents, Bruno's attorney in the guardianship proceedings, Mr. Chowdhry, contacted Mr. Baker on behalf of Bruno in order to prepare the 2006 Estate Documents. Significantly, Mr. Baker assumed that Mr. Chowdhry was *Mr. Seppi's* attorney. Thus, he assumed that Mr. Chowdhry was protecting Mr. Seppi's interests. In reality, as discussed previously, Mr. Chowdhry was representing Bruno, and was protecting his interests, not Mr. Seppi's. In essence, Mr. Seppi was completely unprotected in this transaction; his attorney, Ms. Carmean had already advised that he should not execute any estate documents, and she was completely unaware that Bruno had surreptitiously taken Mr. Seppi to see Mr. Baker. Furthermore, Bruno participated in both meetings with Mr. Baker regarding the documents, and confirmed the unfounded allegations against Henry. Moreover, Petitioner established that Mr. Baker provided legal advice to Bruno during these meetings and was actually the attorney for Bruno, rather than Mr. Seppi. Mr. Baker considered his communications with Bruno during the aforementioned meetings to be confidential. Thus, an attorney-client relationship existed between Mr. Baker and Bruno when Mr. Baker drafted, and Mr. Seppi executed, the 2006 Estate Documents. *See Herzing v. Priestly*, 1992 WL 76957, *4 (Del.Ch.)(Exhibit C) (noting, "[O]ne sufficiently establishes the existence of the relationship when legal advice is sought and received."; *See also Benchmark Capital Partners, IV, LLP v. Vague, et. al.*, 2002 WL 31057462, *3 (Del.Ch.)(Exhibit D) (recognizing that, while not controlling, submission of confidential information to an attorney is an important factor in establishing the existence of an attorney-client relationship.) In effect, Mr. Baker was acting as Bruno's attorney and agent when he drafted the 2006 Estate Documents. Finally, there is no dispute that Bruno received a substantial benefit under the 2006 Estate Documents. Accordingly, the burden will shift to Bruno to establish that Mr. Seppi had the capacity to execute the 2006 Estate Documents, and was not acting under the undue influence of Bruno.

As was set forth previously, the standard applied by Delaware courts in evaluating whether a testator possessed testamentary capacity is as follows:

> "The standard is that one who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act. Thus, the law requires [a testatrix] to have known that she was disposing of her estate by will, and to whom....Delaware law presumes that capacity when executing her will, and the party

> attacking testamentary capacity bears the burden of proof. It is important to note that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will..."

In re West, Del. Supr., 522 A.2d 1256,1263 (1987); *See also In re Rick,* 1994 WL 148268, * 10-11 (Del.Ch.). Furthermore, as Henry has also set forth herein, pursuant to the *Melson* decision, Bruno actually has the burden to establish that Mr. Seppi possessed testamentary capacity when he executed the 2006 Estate Documents. Bruno was unable to meet this burden. He presented no evidence that Mr. Seppi, who was clearly suffering from moderately severe dementia, knew that he was disposing of his property, the nature of said property, or to whom he was allegedly conveying said property. Nor did Bruno present any evidence that, when Mr. Seppi executed the 2006 Estate Documents or entered into any of the Questioned Transactions, he was capable of exercising thought, reflection and judgment. Indeed, Bruno's medical experts conceded that they did not have access to all of the information that would have been necessary for them to render an accurate opinion, and that their opinions could have been different had they known all of the facts.

In contrast, Dr. Tavani interviewed Mr. Seppi, reviewed extensive reports, and was unequivocal that Mr. Seppi lacked capacity when he allegedly executed the 2006 Estate Documents. Accordingly, Bruno was unable to establish that Mr. Seppi possessed testamentary capacity when he executed the 2006 Estate Documents and entered into the Questioned Transactions, and they should be voided. Moreover, even if the burden resided with Henry, he clearly established that Mr. Seppi was not legally capable of executing estate documents in March 2006.

B The Court should void the Questioned Transactions and 2006 Estate Documents and because Mr. Seppi was subject to the undue influence of Bruno.

Henry previously set forth the standard by which Delaware courts evaluate whether an individual was subject to undue influence when he executed a will. The essential elements of undue influence are (1) a susceptible testator; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and (5) a result demonstrating its effect. Moreover, as Petitioner has already discussed, the burden is on Bruno to establish that he did not exert undue influence upon Mr. Seppi when the 2006 Estate Documents were executed. As will be set forth, Bruno was unable to meet this burden. Moreover, even if Bruno does not have the burden, the foregoing facts clearly establish that Mr. Seppi was unduly influence by Bruno.

1. The Questioned Transactions

(A) Susceptible Testator

Nothing in the record established that Mr. Seppi's susceptibility to undue influence had diminished since December 2004. Every fact witness that gave testimony in this matter, *including Bruno*, agreed that, at least by 2004, Mr. Seppi's cognitive abilities were declining. There was considerable testimony, *supra*, that Mr. Seppi's memory was failing and that he needed care 24-hours a day in order to handle his financial, medical, and day-to-day needs. Both Dr. Sharman and Dr. Wallace had found that Mr. Seppi suffered from moderately severe dementia. Ms. Carmean testified that as of October 4, 2005, Mr. Seppi was "disabled" as defined by 12 *Del.C. §* 3901. Moreover, Dr. Tavani and Dr. Wallace both testified that Mr. Seppi was susceptible to being taken advantage of by March, 2006. Dr. Rosenberg offered no opinion whatsoever regarding undue influence, but did concede that due to Mr. Seppi's dementia and Alzheimer's, he was susceptible to being misled. In short, all of the medical testimony indicated that Mr. Seppi indeed fit within the definition of a "susceptible testator."

(B) Opportunity to exert influence

It is also clear that Ms. Lee and Bruno had the opportunity to exert undue influence over Mr. Seppi during the pendency of the guardianship action. Indeed, by 2006, Bruno claims he was essentially living with Mr. Seppi, and he prevented Mr. Seppi from visiting or otherwise communicating with Henry. As already set forth herein, Ms. Lee and Bruno played a major part in handling and managing Mr. Seppi's financial affairs, as well as Mr. Seppi's other day-to-day needs. Bruno used the 2004 POA as early as 2005 in re-titling Mr. Seppi's PNC accounts. There is no question that Ms. Lee and Bruno had ample opportunity to influence Mr. Seppi.

(C) Disposition to exert influence for an improper purpose

As noted, supra, both Ms. Lee and Bruno had a disposition to exert undue influence on Mr. Seppi.

(D) Actual Exertion of Influence

The evidence at trial also clearly established that Ms. Lee and Bruno actually exerted influence over Mr. Seppi with regard to the Questioned Transactions. Again, Master Ayvazian's opinion succinctly and accurately discusses this point:

> The record shows that Vernice and Bruno actually exerted their influence. Bruno and Vernice recorded their exertions in their own handwriting on account statements, forms, envelopes, and letters of instruction that "deleted" Henry from his father's accounts. In addition, Humes witnessed Bruno leading his brother in an unsuccessful attempt to have Henry removed as a joint owner of Seppi's Morgan Stanley brokerage account. The results of these efforts by Vernice and Bruno was that Seppi's financial assets, with the exception of the Morgan Stanley account, were now titled in Seppi's sole name and would not transfer automatically to Henry upon his father's death. It is not plausible that these transfers and beneficiary changes were made to simply prevent Henry from withdrawing more money from his father's accounts. If that were the explanation, then there would have been no need to remove Henry's name as TOD and POD beneficiary of Seppi's investment accounts. The only plausible explanation for these beneficiary changes and transfers was that Vernice and Bruno were planning and laying the groundwork for the 2006 Estate Documents, pursuant to which Bruno would receive the bulk of Seppi's assets upon Seppi's death. Therefore, I conclude that Henry has demonstrated by the preponderance of the evidence that the beneficiary changes and account transfers were the products of undue influence by Vernice and Bruno.

Seppi at *41. [10]

2. The 2006 Estate Documents

(A) Susceptible Testator

As has been discussed previously, Mr. Seppi was clearly a susceptible testator by the time by March, 2006. It is worth repeating that, at the time Mr. Seppi executed the 2006 Estate Documents, guardianship proceedings were already well underway, and both Dr. Sharman and Dr. Wallace had found that Mr. Seppi suffered from moderately severe dementia. Moreover, Dr. Tavani and Dr. Wallace both testified that Mr. Seppi was susceptible to being taken advantage of by March, 2006. Dr. Rosenberg offered no opinion whatsoever regarding undue influence, but did concede that due to Mr. Seppi's dementia and Alzheimer's, he was susceptible to being misled. In short, all of the medical testimony indicated that Mr. Seppi indeed fit within the definition of a "susceptible testator."

(B) Opportunity to exert influence

As has already been discussed, supra, both Ms. Lee and Bruno had the opportunity to exert influence over Mr. Seppi with respect to the 2006 Estate documents.

(C) Disposition to exert influence for an improper purpose

As noted, supra, both Ms. Lee and Bruno had a disposition to exert undue influence on Mr. Seppi.

(D) Actual Exertion of Influence

Petitioner clearly established that Bruno actually exerted undue influence on Mr. Seppi. As set forth previously, Bruno fed Mr. Seppi's irrational fears that Henry was stealing from him. Even though Bruno knew that Henry had stolen nothing from his father, he continued to allow Mr. Seppi to believe that his only son was harming him. Bruno even relayed and/or confirmed the baseless allegations to third parties: friends, doctors, lawyers, anyone who would listen. Even if the circumstantial evidence provided in this case were not enough to establish that Respondent unduly influenced Mr. Seppi, Henry produced ample direct evidence of Bruno's exertion of undue influence. This Court's decision in *In Re Estate of Konopka*, 1988 WL 62915, *5 (Del.Ch.) is instructive in analyzing this issue.

In *Konopka*, one of the issues to be decided was whether the decedent ("Mrs. Konopka") had been unduly influenced by one of her sons ("Henry Konopka") into executing a will whereby Mrs. Konopka disinherited her other children. In executing her new will, Mrs. Konopka removed one of her sons ("Alexander") as executor, and substituted Henry Konopka in his place. *Id.* at *4. Mrs. Konopka had been motivated to do so because she believed that Alexander had been using her funds for his own benefit. *Id.* Significantly, the *Konopka* Court found that Henry Konopka knew that there was no basis for that belief, yet knowingly permitted his mother to persist in that misimpression. *Id.* The court found that Henry Konopka "admitted he had no independent knowledge that Alexander [had misappropriated funds], yet he remained silent whenever his mother voiced her belief that Alexander was stealing from her." The court concluded that Henry Konopka's behavior evidenced "both a motive to influence his mother for an improper purpose, and his actual exertion, however subtle, of undue influence." *Id.*

In the case at bar, evidence was presented that the motivating factor underlying Mr. Seppi's change in estate plans was his belief that Henry had stolen $65,000 from him. In fact, Henry had withdrawn the funds to ensure that there would be money available to pay for Mr. Seppi's medical costs, as well as costs associated with the guardianship proceedings. TR 580-584. Bruno acknowledged that Henry had every right to make the withdrawal from the joint account and was within his legal rights to do so. TR 867. Indeed, Bruno incurred legal expenses totaling $53,942.70 during the guardianship litigation, and paid for these expenses with money from Mr. Seppi's sole accounts, just as Henry did. TR 944. As noted in Petitioner's Opening Brief, Ms. Carmean, aware of Respondent's allegations, met with Henry and believed the accusations to be unfounded. Carmean Deposition at 23. She testified that they "were baseless allegations," and "didn't see any support for them." *Id.*

In spite of the foregoing, and knowing that Henry had withdrawn these funds to safeguard them for his father's care, Bruno and Ms. Lee convinced Mr. Seppi that his son had, in fact, stolen them. TR 941-42. Moreover, Bruno conceded that he never took any action to alleviate the dissension that had arisen in the family, or clear up the obvious misunderstandings between Henry and his father. TR 869, 876. He never said to Mr. Seppi, "Hey... there's got to be a logical explanation for this. Let's give him a call. Let's sit down. Let's talk about this." *Id.* In fact, rather than attempt to clear up Mr. Seppi's misconceptions, Bruno compounded the problem by making allegations that Henry was stealing to anyone and everyone who had anything to do with Mr. Seppi-financial advisors, doctors, friends in addition to Mr. Seppi himself. For example, Dr. Kevin Wallace ('Dr. Wallace") testified that, when Mr. Seppi told him that his son had stolen money from him, Bruno was present and "certainly didn't deny it." Wallace deposition, p. 17. Dr. Paul Rosenberg ("Dr. Rosenberg"), another doctor who treated Mr. Seppi, testified that we was aware that there was a conflict between Mr. Seppi and Henry over money, and that Bruno and his wife had "indicated their account of this recent conflict." TR 359. David Baker, Esq. testified that Bruno confirmed to him the allegations Mr. Seppi was making regarding Henry's alleged theft. TR 699. [11]

Thus, Bruno's actions are actually far more egregious than those perpetrated by Henry Konopka. The *Konopka* Court had found direct evidence of undue influence where Henry Konopka had merely been silent when his mother voiced her concerns that Alexander had been stealing from her; such silence was in and of itself misleading. In contrast, Bruno's actions went far beyond remaining silent. Rather, Bruno actively made allegations to Mr. Seppi and others that Henry was stealing from him, even though he knew that the allegations were baseless. Such actions are direct evidence of both a motive to influence Mr. Seppi for an improper purpose, and his actual exertion of undue influence. *Konopka*, 1988 WL at *4

Moreover, Petitioner presented evidence that Bruno was instrumental in changing title of Mr. Seppi's assets, as set forth in great detail in the discussion of the Questioned Transactions, *supra.* Bruno just as instrumental in Mr. Seppi's alleged execution of the 2006 Estate Documents. Bruno took Mr. Seppi to Bruno's office, sat in on the meetings with Mr. Baker, confirmed that Henry was "stealing" from his father, procured the doctors' letters required by Mr. Baker, and received the instructions from Mr. Baker regarding the procedures involved in re-titling Mr. Seppi's assets into the Trust.

(E) Results Demonstrating the Effect of the Undue Influence

The results of Bruno's undue influence are readily discernable: Henry was effectively disinherited, and Bruno became Mr. Seppi's sole heir. As discussed previously, Mr. Baker drafted a Will (the "2006 Will"), Revocable Trust Agreement (the "Trust"), as well as a Letter of Instruction and Bill of Sale (collectively, the "2006 Estate Documents") for Mr. Seppi to re-title his assets in the name of the Trust. The Trust was the sole beneficiary of the 2006 Will, and Bruno was the sole beneficiary of the Trust. *See* Exs E-G. As discussed, *supra*, Bruno caused Henry to be removed from Mr. Seppi's accounts, either as joint owner, as a "TOD" or "POD" beneficiary, or as a named beneficiary. As a result, upon Mr. Seppi's death, these assets became a part of Mr. Seppi's estate (contrary to Mr. Seppi's desire to avoid probate.) Since the 2006 Will named the Trust as beneficiary, and Bruno was the sole beneficiary of the Trust, all of the changed assets went to Bruno. In short, Petitioner clearly established that Mr. Seppi was acting under undue influence when he purportedly executed the 2006 Estate Documents. Accordingly, the 2006 Estate Documents, and any transactions made in connection with them, should be voided by this Court.

In the event that this Court does not rescind the transactions but does agree to invalidate the will, Henry has been damaged by certain assets being subject to probate that would otherwise not have been a part of Mr. Seppi's estate. These assets by Bruno's admission are, at least, 1 million dollars. *See* Ex. L, DBS 15, 16, 33. The damages are, at least, 1.75% of these assets, Representing the Register of Wills' assessment, as set forth on Ex. MMM- the Register of Wills cost sheet, p.2.

IV. HENRY IS NOT COLLATERALLY ESTOPPED

Respondent briefly argues that the Questioned Transactions should be upheld because, as part of the consent order entered in the guardianship action, Henry specifically agreed that all accounts "however currently titled, shall remain as such." Respondent failed to raise this as an issue in pre-trial briefing, but to the extent that the Court is willing to consider this new argument, the stipulation should be rescinded, or reformed, based on Henry's material unilateral mistake.

In Delaware, a party is permitted to rescind an agreement based upon its unilateral mistake when: (1) enforcement of the agreement would be unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) it is possible to place the other party in the status quo." *Burge v. Fidelity Bond and Mortg. Co,*. 648 A.2d 414, 420 (Del. 1994)

In the instant case, at the time that Henry entered into the stipulation at issue, he had no idea that Bruno had already begun changing the titles of the assets. In fact, the language highlighted by Respondent above was suggested by *Henry's counsel* in order to prevent the very changes that had already taken place, unbeknownst to him. Respondent never informed Henry, directly, through his counsel, or by asking the court for permission, that he had been removed from the accounts at issue when Henry

agreed to the guardianship order. In essence, Respondent was well aware that Henry was mistaken in his beliefs regarding the titling of the disputed assets, but allowed Henry to enter into the stipulation anyway; Bruno was “knowingly silent.” Respondent should not now be rewarded for this “gotcha” maneuver. Thus, Petitioner submits that enforcement of the agreement would be unconscionable, by allowing Respondent to profit from his surreptitious actions. Moreover, the language at issue clearly relates to the substance of the consideration. Henry has also established that the mistake occurred regardless of the exercise of ordinary care. Henry had no reason whatsoever to know that Respondent had already begun changing the asset titles. Finally it is possible to place Henry in the status quo by simply voiding the title changes. Accordingly, to the extent that the Court considers Respondent's argument, Petitioner submits that the stipulation should be rescinded, at least with regard to the titling language or, otherwise should not bar Henry's requested relief.

In the alternative, again to the extent that the Court is willing to consider Respondent's new argument, Petitioner submits that the stipulation should be reformed to reflect the parties' intent. Reformation is appropriate when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence. *James River-Pennington Inc. v. CRSS Capital, Inc.* 1995 WL 106554, *7 (Del.Ch.)(Exhibit D). As discussed above, Respondent was well aware that Henry was mistaken in his beliefs regarding the title of the assets when he entered into the stipulation, but never revealed the changes to him. As such, Bruno was “knowingly silent.” Accordingly, the stipulation should be reformed to indicate that neither party was permitted to change the title of the assets at issue, as was Henry's understanding.

CONCLUSION

In Bruno's Conclusion, he fires this parting shot: “If Henry had devoted half of the energy expended in this litigation on the needs of his father, the parties would not be before this court today.” This preposterous assertion was countered by countless witnesses at trial; in truth, there is only one reason we are before the court today. Bruno fought Henry's guardianship petition (*i.e.*, Henry's attempt to address the care and needs of Mr. Seppi) solely to drive a wedge between father and son. Then, he perpetuated Mr. Seppi's tragically unfounded belief that his son was stealing from him in order to keep Mr. Seppi and his son apart. Bruno's goal has always been to obtain a financial windfall to support himself, his wife, and his family, at Henry's expense. *This* is the sole reason we are here today. Accordingly, Henry respectfully requests that the Court confirm and uphold Master Ayvazian's findings invalidating the 2006 Estate Documents and rescinding and invalidating the Questioned Transactions undertaken by Bruno, and award damages and such other relief as may be granted as a result.

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Footnotes

1 References to the Joint Trial Exhibits will be cited as Ex___ References to the trial transcript will be cited as TR ___

2 Respondent alleges as a "fact" that Mr. Seppi put Henry's name on his accounts merely as a "convenience." Respondent's Opening Brief, p.7. The only evidence presented at trial in support of this allegation was Bruno's own self serving testimony that Mr. Seppi allegedly described the accounts as "convenience accounts." No other witness testified that these were only convenience accounts, and all of the documentary evidence established that the accounts in question were held jointly between Mr. Seppi and his son. In any event, beyond this single mention, Respondent does not appear to be arguing that the accounts were merely "convenience accounts."

3 These are just two examples of Mr. Seppi's desire to avoid probate and leave his assets to Henry. A more thorough list of the Joint Trial Exhibits demonstrating Mr. Seppi's estate plan is attached as Appendix AA.

4 In Respondent's Opening Brief, he states, with no cite to the record, that Mr. Seppi was "an independent man who throughout most of his life took care of himself and his family and friends. He was not the kind of man to suffer slights lightly." Opening Brief, p.3. While Petitioner agrees that Mr. Seppi was independent when he was younger, there is no real factual dispute that he required great assistance with all aspects of his life by 2004. Moreover, there is absolutely no support for the allegation that Mr. Seppi "did not suffer slights lightly." The only apparent reason for this statement is to attempt to deflect the effects of Respondent's undue influence and provide a purported motivation for Mr. Seppi's change in estate plans. Again, Respondent has provided no factual support for this allegation.

5 Dr. Wallace, Dr. Rosenberg, and Mr. Baker's testimony will be discussed at greater length in later sections of this Memorandum.

6 The reliability, or lack thereof, of Dr. Wallace and Dr. Rosenberg's letters will be discussed at length later in this Memorandum.

7 It is worth noting that in his Opening Brief, Bruno does not discuss any of the Questioned Transactions at any time in his extensive recitation of the facts.

8 In Respondent's Opening Brief, Bruno takes issue with the testimony of Dr. Carol Tavani. In short, Respondent relies upon the Court's holding in *Sloan v. Segal*, 2009 WL 1204494 (Del.Ch.) in contending that Dr. Tavani impermissibly relied upon her interview with Henry, as well as the deposition testimony of Ms. Carmean, Ms. Fisher, Ms. Lee, and Dr. Padrell in reaching her conclusions that Mr. Seppi lacked testamentary capacity and was unduly influenced. In *Sloan*, the Court concluded that it would give little weight to the testimony of Dr. Tavani, who was serving as a medical expert in that case, that had been based solely on what her client had told her about the capacity of her client's mother. The court concluded that Dr. Tavani had simply "credited what her client or his lawyer had told her; there was no professional rigor to the testimony." *Sloan*, 2009 WL at *15 n. 90.
In contrast, in the case at hand, Dr. Tavani did not simply rely upon information obtained from Henry. Rather, she reviewed all relevant medical records, as well as the deposition testimony of presumably neutral parties in this matter. She also met personally with Mr. Seppi and conducted a lengthy interview of him. Accordingly, the concerns expressed by the *Sloan* Court are simply not present in the instant case, at least with regard to Dr. Tavani's testimony. Moreover, as will be discussed more fully herein, Respondent introduced no expert testimony to dispute Dr. Tavani's opinion that Mr. Seppi was unduly influenced.

9 Thus, Dr. Rosenberg's testimony does raise the same concerns expressed by the *Sloan* Court. Dr. Rosenberg relied upon Mr. Seppi's history only as relayed to him by Bruno, Martha, and Ms. Lee, as he stated that Mr. Seppi himself was "not in a position to give an accurate, coherent history." TR 326, 358. Dr. Rosenberg did not speak to Henry or Kathy Seppi, or anyone else for that matter, to hear their version of Mr. Seppi's history. TR 358. Moreover, Dr. Rosenberg agreed (much like Dr. Wallace) that if he were aware of certain facts that he could have learned from other family members, his opinions in this case could be potentially undermined. TR 380. Thus, if *Sloan* would serve to discredit anyone's testimony, it would have to be Dr. Rosenberg's, not Dr. Tavani's.

10 Bruno briefly alleges that Henry does not have standing to bring a claim to void the Questioned Transactions because Henry was not a beneficiary. Respondent's Opening Brief, p.46. This argument is clearly without merit: Henry was the only beneficiary of the 1983 Will that was allegedly revoked as a result of the execution of the 2006 Estate Documents, and was the joint account holder or named beneficiary of all of the accounts involved in the Questioned Transactions. As Henry was effectively disinherited as a result of Bruno's actions, he unquestionably has standing to bring his claims.

11 In light of the foregoing, Bruno's testimony that he never told Mr. Seppi that Henry had stolen money is less than credible, and should be given little weight.