

2012 WL 2153403 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Rogers N. FOWLER, Petitioner-Appellant,
v.
George S. KULHOWVICK, Respondent-Appellee.

No. 2012-P-0277.
May 29, 2012.

Barnstable County Probate and Family Court Dept., Ryley, Arthur, Justice

Brief of the Appellant

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*1 I. STATEMENT OF ISSUES.

1. Whether the Probate Court erred as a matter of law by failing to vacate, for lack of jurisdiction and due process, a decree entered in reliance upon a citation issued in violation of Probate Court Rule 6?
2. Whether having ruled service of the citation defective, the Probate Court abused its discretion in failing to vacate the decree where the sworn evidence made out meritorious claims worthy of judicial inquiry?
3. Whether the Probate Court abused its discretion in making credibility and weight of evidence determinations in deciding whether Rogers Fowler had presented meritorious claims of testamentary capacity, undue influence and **elder** abuse?
4. Whether the Probate Court's findings of no evidentiary support for claims of lack of testamentary capacity, undue influence and **elder** abuse, were clearly erroneous?

II. STATEMENT OF THE CASE.

*2 Doris Rogers ("Doris") resident of Sandwich, Massachusetts, died on January 18, 2010, at the age of 95. **RA** 4. Her most recent will dated February 21, 2007, had been prepared by Roger O'Day, Esq., and named George Kulhowick of Vermont executor. **RA** 4, 21-24.

On February 23, 2010, George Kulhowick by his attorney, Roger O'Day, petitioned the Barnstable County Probate and Family Court to allow Doris' 2007 will and to appoint him executor. **RA** 4. His filing specified a total of sixteen interested persons. **RA** 4-12. Ten of the sixteen interested persons, including nine heirs, were listed as residing outside of Massachusetts. *Id.*

On March 5, 2010, the Probate Court issued a citation on the Petition requiring service by mail and by publication to all interested persons and set a Return Date of April 2, 2010. **RA** 25. On March 22, 2010, attorney O'Day filed a return of service certifying that he had complied with the citation by mailing to all persons interested, and by publication. **RA** 26.

On April 6, 2010, with no appearance or affidavit of objections having been filed, the Court (Ryley, J.) *3 entered a decree granting George Kulhowick's petition, allowing the February 21, 2007 will, and appointing him executor. **RA** 27.

On May 14, 2010, George Kulhowick filed his inventory listing \$128,052.00 of personal property and \$685,000.00 for Doris' home. **RA** 28.

On May 21, 2010, Rogers Fowler filed a petition to vacate the April 6, 2010 decree and a motion for leave to file an affidavit of objections. **RA** 31-37. The allegations were lack of notice, undue influence, lack of testamentary capacity, and a conflict of interest requiring appointment of an independent personal representative. *Id.* Affidavits of Rogers Fowler, Phyllis Philp, and Joan Snively, were filed in support. **RA** 42,43,44.

Rogers Fowler resides in Brewster, Massachusetts during the summer months and in Florida over the winter months. **RA** 415. Joan Snively resides in New Hampshire and Phyllis Philp in Foxboro Massachusetts. **RA** 43,44. Kulhowick's filing listed Rogers Fowler's Brewster address and accurately listed the New Hampshire and Massachusetts addresses for Ms. Snively and

Ms. Philp. See **RA** 4-11,42-44. Each of Mr. Fowler, Ms. Snively and Ms. Philp attested to his/her lack of *4 receipt of the mailed notice and lack of actual notice. **RA** 42, 43, 44.

The Court set a hearing date of September 2, 2010 on the Fowler petition and motion. See *RA* 415. Rogers Fowler filed six additional affidavits and a memorandum. **RA** 2,109,118,127,133,143,147. Fleshing out his petition's skeletal claims, the affidavits set forth sworn allegations of undue influence by Linda and George Kulhowick, a question of testamentary capacity and **elder** abuse by the Kulhowicks for their **financial exploitation** of Doris in order to maximize their inheritance under the 2007 will. *RA* 109-149.

Four disinterested care givers, swore the Kulhowicks failed or refused to spend money for the demonstrated needs of Doris Rogers, materially impairing her quality of life and resulting in personal injuries. *RA* 127-149.

On September 2, 2010, the Court (Ryley, J.) held an evidentiary hearing-limited solely to the question of notice. **RA** 270,415. The Court heard testimony from Rogers Fowler, Gloria Fowler, Ken Fowler, Kathleen and Rogers O'Day. **RA** 169-266.

*5 On November 8, 2010, the Court (Ryley, J.) entered an Order and Memorandum of Decision. Ruling that the issue was whether notice was defective even though the ... [will proponent, George Kulhowick] complied in all respects with the Order of Notice.¹ Because notice never reached its intended destination[, ...] Mr. Fowler's home in Florida ... the Court finds there was a defect in notice ... [requiring a hearing] to determine whether ... [the will contestant, Rogers Fowler] has a substantial and meritorious claim.

RA 416.

Following a hearing to establish the standard for the determination of whether Rogers Fowlers had presented "a meritorious claim[s]," (**RA** 417-429) on December 14, 2010, the Court (Ryley, J.) entered an Order authorizing the parties to submit additional affidavits and a brief, and did not require, but permitted the parties to present witnesses to testify, but for not more than two hours. **RA** 430. While Fowler had argued for application of a **Rule 16** burden of production and Kulhowick argued for credibility determinations and weighing of evidence, (**RA** 418-426) *6 the Probate judge declined to rule on the standard to be applied. **RA** 430. See also **RA** 434-437.

The parties submitted twelve additional affidavits and briefs. **RA** 449-538. On January 21, 2011, a second evidentiary hearing was conducted. **RA** 539-714. The witnesses examined were Roger O'Day, the attorney who prepared and oversaw the execution of the February 2007 will, and the two witnesses to the will, his wife and paralegal, Kathleen O'Day and his former secretary Carol Schofield. **RA** 548-689.

On February 24, 2011, the Court (Ryley, J.) entered two Orders and a Memorandum of Decision denying Rogers Fowler's Petition and his motion for leave to file an affidavit of objections. **RA** 720-32. The Court ruled that despite the defect in notice, the April 6, 2010 decision was a "final decree" to be set aside only in the sound discretion of the Probate judge. *Id.* In exercising his discretion, the Probate judge weighed competing, contradictory affidavits probative of both testamentary capacity and undue influence just before and at the time of the signing of the will. *Id.* With no examination, and no cross examination, of the dueling affiants, the judge credited one side and discredited the other. *Id.* The *7 Probate judge credited testimony as to testamentary capacity based not on personal knowledge, but habit and and custom. *Id.* In denying the petition and motion, the Court found (**RA** 728-729:

[i]f there is nothing in any of the affidavits that supports ... [the will contestant's] argument that on February 21, 2007 Ms. Rogers lacked testamentary capacity to execute a will...; [ii]f there was no evidence that the Kulhowicks used any opportunity to procure the contested disposition through improper means.; [iii]f as to the Kulhowicks' burden to establish a lack of undue

influence, [t]he credible testimony of Attorney O'Day clearly establishes that Doris Rogers was not under [undue] influence at the time she executed her 2007 or any prior will..., [ivE] there is no evidence ... the Kulhowvicks engaged in **elder** abuse.

III. STATEMENT OF FACTS.

Doris Rogers was born on XX/XX/XXXX, and was married to Leighton Rogers. **RA** 13. Leighton and Doris were childless. **RA** 612. From 1965 until a few months before her death on January 18, 2010, Doris lived in her home at 19 Dunes View Road in Dennis. **RA** 109,142, 498-499. Leighton had died in 1985. **RA** 109.

Leighton's nephew, Rogers Fowler in his late 70's, is not in the best of health, and retired from his upstate New York small chain of grocery stores. **RA** 109, 118. Rogers is married to Gloria Fowler. *Id.* For more than fifty years the Fowler family was close with ***8** Doris; in the first several decades of their marriage, Rogers, Gloria and their three sons spent every summer at a cottage adjoining Doris' house at 19 Dunes View Road. **RA** 109-121, 456, 460-467. For the past twenty years Rogers and Gloria have lived on the Cape only a short drive away from Doris. **RA** 109,118. One son Ken Fowler, with his wife and five children, have lived in nearby Brewster for more than twenty three years. **RA** 109-110,462.

After 1987 when he moved back to Brewster until the end of 2008, Ken Fowler spent more time with Doris than any one, and his parents, wife and children were not far behind in time, devotion and love. **RA** 462,724.

Over the years Rogers and Ken Fowler each paid for repairs, did chores, took Aunt Doris on outings, brought her to all Fowler family celebrations from birthday parties to graduations and never sought or desired recompense or anything from Doris except her love. ² *Id.*

The Fowlers took Doris to her medical appointments, took her for drives, ran errands, did ***9** household chores and made her meals. **RA** 109-121,456. When the weather was bad or there was a power outage, Ken Fowler would pick up his Aunt Doris and take her to his house. **RA** 138. When Ken and Jayne Fowler adopted Lauren, the entire family, the other four children, Gloria and Rogers Fowler and Aunt Doris all came to the Probate Court ceremony. Doris was part of the Fowler family. **RA** 462.

Doris had three siblings all of whom predeceased her. See **RA** 4-12, 492. Linda Kulhowvick, Doris' niece, is married to George Kulhowvick. **RA** 492. The Kulhowvicks are school teachers and live in Vermont. **RA** 492,500. They too have been close to Doris and Doris relied on George and Linda "to help her with her affairs" with George acting as her attorney in fact and "Linda as Doris' longtime health care agent." **RA** 118, 126, 494, 502.

In 2002, Doris appointed Linda Kulhowvick, her health care proxy and Gloria Fowler as Linda's alternate, and appointed Linda's husband George Kulhowvick as her attorney in fact. *Id.*

In 2002, Doris executed a will prepared by attorney O'Day, under which her house would be sold on her death (**RA** 616, 622), and her estate divided ***10** essentially into thirds, one share for the Fowlers, one for Linda and George Kulhowvick, and one for Russell Field. **RA** 461,462; see **RA** 648. In 2003, Doris explained to Ken Fowler the three most important people in the world to her were her nephew Russell, Ken's father Rogers Fowler whom she also considered her nephew, and Russell's sister Linda; and her reason for the new will was that: "the most important people in my life should share equally." **RA** 462.

Doris who took a number of medications and supplements daily was consistently mixing up her pills. **RA** 119. Gloria Fowler prepared a weekly organizer of the pills but because Doris continued to mix up the medications or failed to take them, Gloria Fowler kept all the pills and made daily deliveries of four individual containers for each meal and bedtime. *Id.*

In December 2003, Doris was hospitalized followed by a stay at the Epoch rehabilitation facility. **RA** 494,501. After discharge from Epoch and a discussion with Ken Fowler, Doris decided not to move to an assisted living facility and to continue to live at

19 Dunes View Road. **RA** 110. Having difficulty with the stairs, Doris set up a bedroom on the first floor. See ***11** *id.* Because the only full bath was on the second floor, Ken Fowler proposed to Linda and George Kulhowick to expand the first floor bathroom to add a handicapped shower but the Kulhowicks said no. **RA** 110. When Ken Fowler offered to install the shower at his own expense, the Kulhowicks rejected the offer. *Id.* In March 2004, Doris gave up her driver's license. **RA** 494.

From and after February 2006, Linda and George Kulhowick assumed control over Doris's affairs, including all her medical and **financial** decisions. **RA** 110, 118, 494, 502, 453-55, 486, 462-63. The Kulhowicks, and Linda principally, exercised this control by and large by phone and visited Doris approximately three or four times a year. *Id.*; **RA** 127,131-149.

By 2006, Doris was 92, confused, and was prescribed medications for anxiety (**RA** 119) and **dementia**. **RA** 111-114,453-455. Beginning in 2006, Ken Fowler, who saw Doris almost every day, repeatedly told Linda that Doris was not eating, was not taking her medications and needed professional care; and, that Doris was more than just confused and that "at times she was just out of it." **RA** 114.

***12** On February 6, 2006, Linda Kulhowick called attorney Roger O'Day to schedule an appointment to update Doris's power of attorney. **RA** 486. Linda and George took Doris to the lawyer's office where Doris executed two powers of attorney in favor of George, one enabling control of her investments and funds, and a general durable power of attorney. *Id.* Doris also executed a health care proxy in favor of solely Linda. *Id.* At this meeting there no discussion of changing the 2002 will. **RA** 679.

In 2006³, Lisa Francis, a home health aide with two decades experience, was engaged to provide part-time in-home care for Doris, a few hours a day for around three days a week. **RA** 453, 111. Linda told Ms. Francis that she and her husband George were acting under a power of attorney and made all of Doris' medical and **financial** decisions. *Id.* Unless away on business, Ken Fowler would come by daily to bring or make a meal and to check on Doris' medications. **RA** 111-113,454.

In 2006 and early 2007, Ms. Francis or Ken Fowler took Doris to her medical appointments. **RA** 453, 456.

***13** Ms. Francis accompanied Doris when speaking to the doctor and she answered some of the doctor's questions about Doris. **RA** 453-54. When Ken Fowler took Doris to her appointments, the doctor or Susan Duenas, her primary care nurse practitioner, "would come out and explain to me their observations." **RA** 113, 465. According to both, Doris often would not understand what the doctor had said or recommended. **RA** 113,453-54,465. Sometimes in the doctor's office, Doris would ask Ken Fowler: "why are we here." **RA** 113, 465.

Ken Fowler repeatedly told Linda that Doris needed daily care. **RA** 114. But Linda insisted: "the doctors are wrong;" Doris is not confused but has a **yeast infection** attributable to incontinence; and there is nothing wrong with Aunt Doris. *Id.* Yet in or about November 2006, Linda told Ms. Francis that Doris' **dementia** was not as bad as the doctors said. **RA** 455.

In the fall of 2006, Doris was incapable of handling her several medications, one of which was **Aricept**, prescribed for **dementia and Alzheimers disease**. **RA** 454-55. She often would not eat and meals prepared or left by Ken Fowler in the late afternoon

***14** would be found the next morning untouched or in the trash. **RA** 113.

While under her most recent 2002 will, Linda and George were to get about a third of her roughly million dollar estate, and while at the February 2006 meeting with attorney O'Day, she attended with both Linda and George, there was no discussion about changing her 2002 will, sometime prior to Thanksgiving 2006, Doris explained to Ms. Francis that under her existing will she had left all to Linda. **RA** 455.

Linda and George visited Doris for the Thanksgiving 2006 weekend.⁴ **RA** 112. That Sunday Linda ***15** called Ken Fowler and informed him that for much of the long weekend Doris had complained of pain. *Id.* So on their way back home to Vermont

on Sunday afternoon, Linda and her husband had taken Doris to, and left her at, Cape Cod Hospital. *Id.* Doris had suffered broken ribs from a fall just prior to Linda and George's weekend stay. **RA** 456. That Sunday night when Ken Fowler visited her at the hospital, Doris was hallucinating and cursing like a sailor. **RA** 112. During her three day hospitalization, Doris was medicated with **Haldol**, an antipsychotic medication. **RA** 112, 456-57. Ms. Francis informed Linda that Doris was drooling at the mouth and appeared in a zombie like state. **RA** 456-57. Ms. Francis suggested that Doris was overmedicated, but Linda refused to question Doris' treatment. *Id.*

Doris was discharged to the Pleasant Bay rehabilitation center where she stayed for almost six weeks. **RA** 457. During the day Ken Fowler's wife or Ms. Francis would visit and, unless away on business, Ken Fowler would come by late afternoon. **RA** 112. While ***16** there, Doris frequently did not eat her dinner unless Ken Fowler fed her. *Id.*

Pleasant Bay's discharge recommendation for the nearly 93 year old Doris was for 24 hour in home care or at a very minimum no less than 12 hour care. **RA** 457. However Linda told Ms. Francis that Doris could not afford such care. *Id.* Ms. Francis then told Doris that she would do better with more care than the part time care Ms. Francis was providing. *Id.* After reportedly speaking to Linda, Doris told Ms. Francis that she could not afford to pay for the increased care. *Id.* Yet Doris' large property close to the beach was mortgage free. See **RA** 28-30,715-719.

Beginning either in November 2006 or in January 2007, at night, home alone, Doris had to be locked into her house to prevent her from wandering out of her house. **RA** 465-66.

After her fall and broken ribs, and months shy of her 93rd birthday, Doris required supervision of her medications, diet and personal safety, as well as assistance with basic activities of daily living: dressing, bathing, cooking, grooming and walking up stairs. *Id.*; **RA** 454-55.

***17** In January and February 2007, Ms. Francis cared for Doris usually twice a day sometimes for five days a week. **RA** 454. Ken Fowler generally saw Doris daily in January and except for February 14-15, 18 to 27, and those days when George and Linda visited, every day in February. **RA** 112, 113, 456,460-61.

According to both Ken Fowler and Lisa Francis over the first two plus months of 2007, Doris had deteriorated significantly and her mental and physical condition was each significantly worse than before her hospitalization. **RA** 112-13, 457-58,460,465. Her confusion was greater and to Ms. Francis she appeared significantly more demented. **RA** 457.

Yet sometime in January 2007 the dosage strength of the **Aricept** apparently was reduced. **RA** 454-55.

In January and February 2007, Doris did not understand the consequences of her actions: she would not eat; she threw her medications into the trash; and, she left on the oven and/or cooking range, creating a fire hazard. **RA** 112,113, 457-58, 465-66. While she saw Ken Fowler almost every day in February 2007, there were times Doris would not recognize him and mistook him for his father, his deceased grandfather or her neighbor Carl. **RA** 113.

***18** In January and February, 2007 Doris was unable to manage her affairs as she had done in her limited way prior to her broken ribs. **RA** 457-58. While before she would not do so, Doris signed blank checks when requested to do so by Ms. Francis. *Id.* While in 2006 Doris could make arrangements for her windows to be washed, in January and February 2007 she could not recognize someone who had just done some chore and would not know why the person was at her house. *Id.*

There is sworn evidence that Linda exercised domination over Doris. Doris would tell Ken Fowler she wanted to go for ice cream but when Linda disapproved Doris would change her mind. **RA** 462-464. Doris loved Christmas and Christmas decorations and every year she directed Ken Fowler's five-children in decorating her Christmas tree and sometimes did this before Thanksgiving. *Id.* Every time Linda came for a visit for the holidays, she would take the decorations down; and after Linda and George left,

Doris would ask the Fowlers to put them back up. *Id.* While Doris wanted to sell her car to an immigrant workman who had worked for several months at her house, when Linda insisted Doris sell the car to her brother Russell for less money, Doris agreed. *Id.* In *19 January 2007 when she was discharged from Pleasant Bay, Doris agreed that Ken Fowler's proposal to remodel the first floor bathroom to install a shower was "a good idea" because she would not have to go up the stairs to bathe. *Id.* But then Doris told Ken Fowler: "Linda said it was not a good idea." *Id.* In February 2007 in Ken Fowler's presence, Doris was often on the phone with Linda; while grimacing and rolling her eyes Doris always would say: yes Linda, ok Linda you're right, etc. **RA** 114. When the call ended Doris said to Ken Fowler: "That Linda, I love her but all she wants is my house and my money." *Id.*

In January and February 2007, Doris repeatedly would not eat food that Ken Fowler had left for her. **RA** 465. She told Ken Fowler she did not want to eat but when Ken Fowler sat with her and told Doris to eat, she would do so. *Id.* Similarly when told by Ken Fowler, Susan Duenas, Ms. Francis or Gloria Fowler that it was important to her health that she take her medications, in January and February 2007, Doris would say she would do so and then later the medications would be found in the trash. *Id.* Yet, when Ken Fowler told her to take her prescriptions and stood and watched, Doris would comply. *Id.*

*20 According to Lisa Francis, Doris always did what Linda said to do, sometimes contradicting herself or changing her mind so as to agree with what Linda said. **RA** 455,458. After her discharge from Pleasant Bay, according to Ms. Francis, Doris would more frequently contradict her prior statements or change her story particularly to agree with what Linda had said. **RA** 458.

On January 23, 2007, Linda called attorney Roger O'Day's office, leaving a message that Doris wanted Linda and George to live in Doris' home after her death and wanted to review her will. **RA** 486,674, 683. Linda scheduled the meeting for February 9, 2007. *Id.* O'Day knew Linda and George were fiduciaries (**RA** 67980) and that he should be "concerned about undue influence." **RA** 682. O'Day knew it was Linda and not Doris who had informed him of the purpose of the meeting, to discuss changing Doris' will to leave her house to Linda and George. **RA** 674, 683.

Roger O'Day had prepared wills for Doris in 1998 and in 2002. **RA** 489-487. A solo general practitioner, O'Day has practiced law since 1973, and has prepared more than 500 wills for mostly older or **elderly** clients. **RA** 607-08, 117-18. Yet, attorney O'Day has *21 never heard of, and has no familiarity with, the [Massachusetts Rules of Professional Conduct, Rule 1.14](#) "Client with Diminished Capacity." **RA** 657-659.

O'Day considered Doris "**elderly**" in 1998 when he first prepared a will for her. **RA** 610-11. But he never asked her how old she was. **RA** 657. There is no evidence in the record that he ever asked about her health status or hospitalizations.

Doris was a widow with no children. **RA** 612. Attorney O'Day understood the object of Doris' bounty to be "a combination of family and friends." *Id.* On February 9, 2007, Linda and George brought Doris to O'Day's office. **RA** 571, 628. Doris, Linda and George met with O'Day in his inner office for about an hour. **RA** 628, 486-87. The purpose of meeting was "to discuss changes that Doris desired to make to her [2002] will." **RA** 486-87. On cross, O'Day admitted that "it was all three of them in my inner office" when the drafting of the 2007 will was discussed. **RA** 684-85.

O'Day usually makes, and retains in his file, notes of estate planning meetings. **RA** 674. He also testified that his custom and practice, in this *22 situation, did not require him to make and keep a record of who said what to whom. **RA** 664.

According to O'Day's office notes of the February 9th meeting, there was a detailed discussion of Doris' assets, including the assessed and fair market value of the house, \$600,000.00 and \$755,000.00, respectively, and "liquid" assets at Morgan Stanley of \$245,000.00. **RA** 715-19. The revised plan discussed was for Rogers and Gloria Fowler to be reduced from just less than one third of a million dollars to \$20,000, and to devise the house to Linda and George, on the condition they pay Russell Field one half the value of the house and the nearly quarter million dollar residuary estate to be split, one half to Linda and George and one half to Russell Field. *Id.* The notes memorialized that the meeting was with Doris, Linda and George. *Id.*

Neither O'Day's affidavit nor his February 9, 2007 notes state or reference that Doris said anything at the meeting.⁵

*23 There is no evidence O'Day took any precautions at the meeting to explain whose interests he represented. It is not O'Day's practice to memorialize in his estate planning meeting notes the reasons for decisions to change a will "in similar situations." RA 668-69. O'Day had no discussion with Doris about his fees. RA 665-66.

O'Day made no record of any discussion at the February 9th meeting of the reason or reasons for decreasing the share of the Fowlers. RA 669.

On Thursday February 15, 2007, O'Day mailed a draft will to Doris. RA 487.

While Ken Fowler was familiar with all of Doris' appointments, he had no knowledge of Doris having any meeting with a lawyer after her discharge from Pleasant Bay.⁶ RA 461. Ken Fowler and his son Bradley had dinner with Doris on Friday February 16th and asked Doris whether there were any plans for Linda and *24 George's school vacation week visit beginning that weekend. Doris said there were no plans. *Id.*

On Tuesday, February 20, 2007, Linda called O'Day informing him that Doris had reviewed the will and found it fine, and that Linda would bring Doris to the office to sign the will. RA 487,636.

The next morning Linda and George brought Doris to O'Day's office. RA 571, 575-76, 638. Doris was using a cane. *Id.*

There were only two chairs in Mr. O'Day's small inner office. RA 556,600, 601. The Kulhowicks helped Doris into O'Day's inner office and into the big blue chair in front of the desk and O'Day sat on the one behind his desk. RA 600. Anyone else in the room would be standing near or "hovering over" Doris. RA 601, 605. O'Day asked Doris if she had reviewed the will; she said, "yes." RA 637. He reviewed the will again and then asked Doris if she had any questions. *Id.* She said no. *Id.* "The timeframe was very quick.[O'Day then] got up from ... [his] desk" went out, came back in followed by the witnesses. RA 641. With all now in his small inner office, O'Day (RA 641-42)

asked Doris to date and sign the will And then I asked her, "Is this your last will and testament? And do you request that it be witnessed for you?". *25 And then she said, "Yes." So, I then asked Kathleen and Carol to witness the will.... A After Kathleen and Carol had witnessed, I said, "Do you, Doris, on oath swear and state to me, in the presence of the witnesses to this will, that this is your last will; that you willingly signed it; and that you've executed it for the free and voluntary act for the purpose therein expressed?" Then she said, "Yes." And then I said to the two witnesses, "Now, do both of you, as witnesses to this will, on oath swear and state to me, in Doris' presence, that you saw her sign; and to the best of your knowledge, she signed knowingly; and that she is 18 years of age or older, of sound mind, and under no constraint or undue influence?" Then I notarized both Doris' signature, as the testatrix, and the witness' signature.

Once the two witnesses came into the inner office, there was no conversation prior to the signing ceremony. RA 576.

Ms. Schofield has no recollection of the will signing and did not know Doris. RA 550. Other than hearing Doris twice say "yes" to her husband's questions, all that Ms. O'Day observed was that Doris "was very pleasant and smiling, her handwriting never wavered" and that Doris needed the assistance of George and Linda after the will signing to get up from her chair to leave. RA 576, 578, 593-94, 604.

On February 28, 2007, upon his return from his family's school vacation trip, Ken Fowler visited Doris. **RA** 461. When asked what she did during Linda and George's visit, Doris told him "we went to see a *26 lawyer." **RA** 115. When Ken Fowler asked how come, Doris said: "I don't know." *Id.*

Despite Pleasant Bay's recommendation for around the clock in-home care upon Doris' discharge in January 2007, and notwithstanding the urging of more care by Doris' primary care nurse practitioner Susan Duenas, Lisa Francis and Ken Fowler, Linda would not budge and there was no material increase of care. **RA** 112, 113,457,464-66.

Linda declined to purchase of a chair lift for Doris to safely go upstairs when alone. **RA** 454.

In January and February 2007 and other times, when Ken Fowler came to Doris' house in the late afternoon or early evening, he would discover the stove or cook top left on, and sometimes her medications on the floor. **RA** 465-66.

Even after Doris signed the February 2007 will leaving the house to Linda and George, Linda still declined Ken Fowler's entreaties to increase the care for Doris. **RA** 464-66. She continued to refuse Ken Fowler's offers to personally pay for the extra care. *Id.*

In or about July 2007 Lisa Francis was replaced by a series of in home health aides/nurses who *27 initially provided care for three hours a day, three days a week. **RA** 127-142.

Linda instructed the aides to leave Doris' medications, including *Ativan*, on the table for Doris to take by herself. **RA** 114, 129-30, 135. The aides and Ken Fowler upon arriving in the morning would often find the medications on the floor, in the trash and elsewhere. *Id.* Ryan Lovett told Linda that *Ativan* put Doris at an increased risk of falls, but Linda said the *Ativan* helped to ease Doris' agitation. ⁷ **RA** 129-30.

Despite being told it was not safe to do so, Linda instructed the caregivers to take Doris upstairs for a shower each day they came. **RA** 129,135. The stairs were very steep, had only one hand railing and the length or depth of the stair tread was quite short **RA** 129, 131, 135, 145, 148-49.

*28 Linda repeatedly declined Ken Fowler's offers to install a shower in the first floor bathroom at his expense. **RA** 110,465.

Despite persistent reports that Doris would not eat meals left out for her, Linda continued to refuse requests by several of the aides and Ken Fowler to increase the level of care (**RA** 129,133-34), even at Ken Fowler's expense. **RA** 116.

Doris was incontinent. **RA** 130,136-37. Upon arriving in the morning, the aides would often find Doris completely naked, naked from the waist down, or wearing urine soaked pajamas. *Id.* Doris would sometimes put her soiled, urine soaked pajamas on the heating duct creating potential fire safety risks and potentially harmful fumes. *Id.* While informed this unhealthy and potentially unsafe conduct was attributable to Doris' *dementia*, Linda expressed no concern and refused to increase the level of care. **RA** 137.

Linda told Ms. Rupani on a number of occasions from 2007 until January 2009 that she wanted to keep Doris at home as long as possible and that "we are *29 trying to keep her money going for as long as possible." *Id.*

From the summer of 2007 until January 2009 Ken Fowler was so concerned about Doris having only part time care that on a number of occasions he stayed overnight at Doris' house to watch over her. **RA** 115.

While she insisted Doris be left alone for extended periods, Linda refused to take inexpensive, simple but necessary precautions to protect Doris from unnecessary risks of falls from the two sets of stairs in the house, one upstairs to the full bathroom and one downstairs to the basement. **RA** 115-17,131,136.

When left alone Doris could go upstairs unattended. **RA** 131. Linda had provided a toddler, accordion style barrier, which Doris would simply unlatch and go upstairs. **RA** 115-17,131,136.

Despite requests from the aides and Ken Fowler, Linda refused to put padlocks on the basement door and to the accordion barricade. *Id.*

On January 1, 2008, Ken Fowler came to pick up Doris to bring her to his family's holiday party. **RA** 115,130-31. He found her on the kitchen floor. *Id.* *30 Apparently sometime in the prior 12 or more hours, Doris had gone down the basement stairs, fell, breaking her wrist and crawled back upstairs where she remained on the kitchen floor until Ken Fowler arrived. *Id.*

In all of 2007 and 2008, the aides and Ken Fowler repeatedly urged Linda to provide more home care but she refused even despite Ken Fowler's repeated offers to personally pay for the additional in-home, or even nursing home, care. **RA** 116.

Even after her New Years Eve 2008 fall and broken wrist and the aides' reported concerns about her safety, Linda continued to insist Doris be taken upstairs for a shower. While the single hand rail was on the same side as the broken wrist no second handrail was installed until Heidi Rupani took it upon herself to arrange its installation. **RA** 131,136.

Still again when Ms. Rupani told Linda that Doris' dementia symptoms were worse and that she should not be left alone, Linda again told Ms. Rupani that she did not know how long Doris, then 94, would live, that she and George wanted Doris to be at home *31 as long as possible at the least possible cost. **RA** 139.

Finally in early January 2009 Heidi Rupani sought advice from a physician at an extended care facility and without mentioning Doris by name, told her that an elderly woman she cared for suffered from dementia, was not safe, that she required round the clock care and that the person holding the Power of Attorney refused to take action. **RA** 140. Upon information and belief this doctor who had asked to be told the name of Doris' primary care provider, called Susan Duenas who then informed Linda of the report. *See id.*

In January 2009 Linda investigated a number of extended care facilities, but decided they were too expensive. **RA** 140-41. Admitting to Ms. Rupani that Doris needed 24/7 care, Linda told her, the nursing homes were too expensive, that she wanted to keep Doris at home but could not afford to pay the going rate. *Id.*; **RA** 131.

When Ms. Rupani refused Linda's request to hire a high school girl to stay overnight with Doris, Ms. Rupani enlisted her sister in law and mother in law *32 and together with Ryan Lovett, all four provided around the clock in home care for Doris for \$10.42/hour. *Id.*

Into 2009 despite reports of near falls, Linda continued to insist the now 95 year old Doris be taken upstairs for a shower. **RA** 145-46,148-49. By April Doris needed a wheelchair to get to her medical appointments and to get outside in the warmer weather. **RA** 141-42,148. Because she did not want to lay out the money, Linda did not provide a wheelchair for five or six weeks. *Id.* In April and July 2009 Linda continued to press the caregivers to take Doris upstairs for a shower. **RA** 148-49.

With breathtaking bad taste, from July 2007 until October 31, 2009, Linda and George refused to timely provide funds for Doris' s food. **RA** 137-38,146,149.

IV. ARGUMENT.

A. THE DECREE IS VOID FOR LACK OF JURISDICTION AND A FAILURE OF DUE PROCESS.

The Probate Court erred as a matter of law in failing to vacate the April 6, 2010 decree. It is void, as a matter of law.

*33 A Probate Court is without jurisdiction to enter a decree where the unauthorized citation upon which the decree rests is void; such decree requires reversal. *Baker v. Blood*, 128 Mass. 543 (1880).

On her death Doris Rogers was domiciled in Barnstable County. *Mass. Gen. Laws ch. 215, § 3* granted subject matter jurisdiction over her physical property in that county to the Barnstable County Probate Court. In 2010, *Mass. Gen. Laws ch. 192* and the Probate Court rules, adopted by the SJC in accordance with statutory authority (*Mass. Gen. Laws ch. 215, § 30*)⁸ and within its inherent supervisory authority, prescribed the precise methodology for the exercise of that court's jurisdiction to issue decrees.

Probate Court Rule 6 (2010) provided:

If it shall appear from the petition that there is anyone interested who is outside the Commonwealth in any part of the United States, ... *34 service of any citation shall be given by mailing by registered or certified mail fourteen days at least before the return day;... If all persons interested appear to be within the Commonwealth service of any citation shall be given by delivering or mailing by certified, registered or ordinary first class mail...

Kulhowick's petition listed nine heirs, including both George and Linda Kulhowick, who resided out of state. Rogers Fowler, a legatee under the will, resided part of the year, including the winter months, in Florida. **RA 415**. The March 6, 2010 citation specified regular mail. Rogers Fowler and two other interested persons did not receive the mailed citation and did not have actual notice of the petition. **RA 42-44**.

Because it specified first class mail, the March 6, 2010 citation was unauthorized and therefore the April 6th decree founded thereon, is void for lack of jurisdiction. That the Probate Court found compliance with the unauthorized citation is immaterial.

[T]he form of the citation, and the mode of its service thus fixed, cannot in any material respect be departed from without destroying the validity of all proceedings founded thereon.

Baker, 128 Mass. at 545-46. See also *In re Lucey*, 331 Mass. 292, 293 (1954) (alteration of approved form of petition).

*35 B. ROGERS FOWLER PRESENTED SUBSTANTIAL AND MERITORIOUS CLAIMS OF LACK OF TESTAMENTARY CAPACITY, UNDUE INFLUENCE AND **ELDER ABUSE**.

1. Standard for Review.

This Court must

review the evidence and reach a decision in accordance with ...[its] own reasoning and understanding, giving due weight to the findings of the trial judge, which will not [be] reverse[d] unless they are plainly wrong, and [independently] find[] ... any additional facts justified by the evidence.

In re Estate of Moretti, 69 Mass. App. Ct. 642, 650 (2007). See *Paine v. Sullivan*, 79 Mass. App. Ct. 811, 812, review denied, 460 Mass. 1115 (2011).

2. Having held service of the citation defective, the Court abused its discretion in failing to vacate the decree on one of three bases.

It was an abuse of discretion for the judge to have failed to vacate the decree for lack of jurisdiction. See *Tucker v. Bowen*, 354 Mass. 27 (1968).

Second, it was undisputed Rogers Fowler was waiting for the citation (RA 212-13,224, 227-28). The affidavits, understandably filed only after entry of the decree, provided first hand percipient evidence: (i) overcoming any presumption of testamentary capacity; (ii) demonstrating both a trial worthy cause of action for undue influence and that as fiduciaries *36 it was the burden of Linda and George Kulhowick to demonstrate the absence of undue influence; and, (iii) demonstrating a prima face case of **elder** abuse by Linda and George Kulhowick warranting the removal of George Kulhowick and the appointment of an independent administrator.

Because of the mistake by the Court in the original proceeding coupled with sworn allegations that are “worthy of judicial inquiry,” it was an abuse of discretion for the Probate judge to have failed to have vacated the decree. *Tucker*, 354 Mass. at 33.

Finally, because there was an error of law apparent on the record and new evidence of meritorious claims, which given the defect of service was not uncovered in time to file an affidavit of objections, there were good grounds for a bill of review. *Boston & MRR v. Greenfield*, 253 Mass. 391, 397 (1925). See *Kennedy v. Simmons*, 308 Mass. 431, 433 (1941). Because the mistake was by the Court, the Probate judge should have vacated the April 6, 2010 decree.

3. The Court's findings of no evidentiary support for any of the three claims are plainly wrong.

(a) Standard for Adjudging Testamentary capacity.

*37 While fact witnesses may provide evidence of facts relevant to capacity, only witnesses to the will, the treating physician...and... experts in the knowledge and treatment of mental diseases... may give opinions of testamentary capacity.

Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240(2008).

Whenever the issue of testamentary capacity is raised, the dominant question is: At the time the will was executed could the decedent recall to his mind not only the nature and the amount of his property but also those persons who, to use a common phrase, had claim on him? ... Or Had the decedent the ability “to understand, and carry in her mind, in a general way, the nature and situation of her property, and her relations to those persons who are about her; to those who would naturally have some claim to her remembrance; to those persons in whom, and those things in which, she has been mostly interested... the nature of the act she was doing, ... and free from any delusion which was the effect of disease, and which would or might lead her to dispose of her property otherwise than she would have done if she had known and understood correctly what she was doing”?

Daly v. Hussey, 275 Mass. 28, 29(1931).

The proponent has the burden of proof on the issue of testamentary capacity. ... In sustaining that burden, he is aided by a presumption that the testator had the requisite testamentary capacity. However, the presumption has effect only until evidence of want of capacity appears.

O'Rourke v. Hunter, 446 Mass. 814, 827 (2006).

The affidavits of Lisa Francis and Ken Fowler present evidence of want of capacity in January and *38 February 2007. Doris was taking a number of medications including Aricept for either dementia or Alzheimers disease. After six weeks of hospitalization and rehabilitation, Doris' discharge recommendation was for round the clock care. She was often confused and could not manage her medications or diet without supervision. She had to be locked in at night. She could not drive and when she went to her medical appointments either Ms. Francis or Ken Fowler would not just accompany her, the medical people would report directly to them and explain to them diagnoses and/or recommendations. Sometimes in the doctor's office Doris would ask why she was there. Doris was unable to manage her finances. Even before her November 2006 fall and broken ribs, Doris did not know who was getting what under her then will. In January the dosage of the drug believed to have been prescribed to ameliorate Doris' dementia or Alzheimers disease symptoms was reduced. Doris did not understand the consequences of her actions, and if not supervised sometimes would not take her medications, would not eat and would leave the stove or cooktop on.

*39 Don J. Lewittes, Phd., a clinical and forensic psychologist who has testified in more than 150 trials, and has more than 30 years' experience of testing, assessing, treating dementia and supervising the care of patients with dementia, filed an expert witness affidavit. RA 468-81. Dr. Lewittes is familiar with the legal standards and clinical standards of mental capacity, including the standards for testamentary capacity of the American Bar Association Commission on Law and Aging and the American Psychological Association, Assessment of Older Adults with Diminished Capacity. RA 471.

Dr. Lewittes' expert opinion "beyond a reasonable degree of psychological certainty" is that Doris Rogers lacked testamentary capacity when she executed the February 21, 2007 will. RA 472.

The foregoing evidence adequately rebuts the presumption of testamentary capacity. *Paine, 79 Mass. App. Ct. at 818.*

To address his burden to prove testamentary capacity, George Kulhowvick offered the affidavits and testimony of attorney O'Day, his wife Kathleen O'Day and Carol Schofield. Ms. O'Day and Ms. Schofield had signed the will as witnesses.

*40 In neither her affidavit nor testimony did Carol Schofield present any percipient knowledge of Doris' testamentary capacity on February 21, 2007.

Ms. O'Day's January 17, 2011 affidavit did not address, much less attest to, any personal knowledge of Doris' testamentary capacity on February 21, 2007. Instead (RA 482) she swore that she

would never serve as a witness to the execution of a document if I did not believe the person executing the document possessed the capacity necessary to execute the document.

On January 21, 2007, Ms. O'Day testified she did recollect the will signing (RA 575-76):

Doris was - came in on a cane this time. And - and she came in with - with George and Linda Kulhowvick. And - and they went into Roger's office. I- I said the - you know "George and Linda and - and - Doris Rogers are here." And then they went into - into his office with - him.

On cross when asked if she remembered Doris going into her husband's office, she testified (RA 583-84) :

A Yes, I do. Q-- Mr. O'Day's office? A Yes, I do. Q And is it fair to say that George and Linda were with her? A Yes. Oh, yes, they were. Yes. Yes.

Q And do you remember how long they were together?

A Oh, it doesn't take very long to do a will; to do a will signing and witnessing.

After she and Ms. Schofield came into the office to witness the will, there was no conversation “between Doris and anyone in the room prior to the signing of” the *41 will. **RA 576**. Ms. O’Day heard Doris twice say “yes” to her husband’s questions. **RA 594**.

While she heard or saw no more, when asked about evidence of the lack of undue influence, Ms. O’Day testified (**RA 577-78**):

She-she - she knew what she wanted, I - I - I guess. And - and - and all - all I was - I was doing was witnessing. Nobody was twisting her arm or - or helping her to sign the - the will or anything like that, you know. No one was stand - standing over her like I’ve seen people do in the past, you know.

When Judge Ryley asked Ms. O’Day about “no undue influence” she testified (**RA 591**):

I’ve watched this little old lady sign different wills ... Nobody took - took her like into her head or - or - or helped her sign or anything like that.

When asked about Doris’ “mental competence,” Ms. O’Day answered (**RA 578**):

Oh, yes. Yes, she was -she was very pleasant and smiling. And - and - and she - and her handwriting never wavered, you know.

Attorney O’Day’s affidavit stated that he “found Ms. Rogers lucid, with the testamentary capacity” on February 21, 2007. **RA 487**. The record does not contain any office notes for the will execution. When asked if he had “me[t] with Miss Rogers alone anytime *42 on the 21st of February,” attorney O’Day stated: “I can’t specifically recall.” **RA 639-40**.

When Judge Ryley asked O’Day to distinguish between his “inner office” and the “entire office,” he testified that the Kulhowicks “were in my inner office.” *Id.* When the judge asked him if he recalled “asking them to step out for any reason,” O’Day testified (**RA 640**)

more often than not, in situations like that, I would. But I can’t recall specifically. I just can’t.

On cross, O’Day testified that on February 9, 2007, he knew Linda and George were Doris’ fiduciaries and admitted that “George and Linda were in the room when the will was signed.” **RA 684**. O’Day also admitted that “it was all three of them in my inner office” when he discussed the drafting of the 2007 will. **RA 684-85**.

The Probate judge credited attorney O’Day statement that he “would not allow a client ... to execute a will if he believed that person had diminished capacity.” **RA 723**.

However, O’Day believes someone might have told him Doris had been hospitalized. **RA 686**. And, the Kulhowicks kept the attorney in the dark about Doris’ *43 dementia, that she had been recently medicated with Haldol, that Doris was incapable of living independently, that Doris could not understand what her doctors told her, and that she was locked in at night so that she would not wander off. **RA 685-89**.

O’Day provided no evidence to support his conclusory, inadmissible opinion that Doris had testamentary capacity on February 21, 2007.

As a matter of law it was error for the Probate judge to credit O’Day’s evidence as to capacity. This was not a case where there is a clash of competent evidence, and where the fact finder may rely on the evidence of a careful and prudent drafting attorney. [Paine, 79 Mass. App. Ct. at 819-20](#).

There is no competent evidence in the record that it is more probable than not that Doris possessed testamentary capacity on February 21, 2007.

The Probate judge's finding of no evidence of lack of testamentary capacity is clearly erroneous.

(b) Standard for Adjudging Undue Influence.

Four considerations are usually present in a case in which a supportable finding of undue influence has been made. These involve showings that an (1) unnatural disposition *44 has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.

In re Estate of Moretti, 69 Mass. App. Ct., 654-55 (2007).

While ordinarily resting with the party contesting the will, the burden of proof shifts to fiduciaries who took part in the will making process and who benefit from the new will. *Cleary v. Cleary*, 427 Mass. 286, 294-295 (1998); *Rempelakis v. Russell*, 65 Mass. App. Ct. 557 (2006).

[W]hile the conditions that render one susceptible to undue influence may not reach to unsoundness of mind ... the condition of a testator's mind has a material bearing on the question of whether [s]he was in fact susceptible to undue influence.

Dayton v. Glidden, 303 Mass. 268, 269 (1939).

The power of... [Linda's] strong will over...[Doris] weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities... When the donor is enfeebled by age or disease, although not reaching to unsoundness of mind, and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny. In such an inquiry all the attributes, sensuous, intellectual, ethical and religious, of the individuals concerned are involved. Strength or infirmity of will, natural and cultivated tastes and temperament, and tendencies to passion, resentment, obstinacy, prejudice and calm, all are elements to be considered. A strong sense of justice, determination and steadfastness of *45 purpose are significant considerations, as are also a spirit of domination, persistent desire to rule, and deep-seated selfishness. Age, weakness and disease are always important factors. Relations of intimacy, confidence and affection in combination with other circumstances are entitled to weight.

Neil v. Brackett, 234 Mass. 367, 369 (1920).

Linda and George controlled Doris' physical environment, and controlled her funds and medical decisions. Acceding to the discharge recommendation of the Pleasant Bay rehabilitation center for round the clock care and need for supervision in January 2007 would have been a damaging admission as to Doris' lack of testamentary capacity. Linda's repeated refusal of Ken Fowler's offers to pay for the increased care and supervision is evidence of motive to conceal Doris' deepening dementia and lack of testamentary capacity. While Linda was in control of Doris's medications, the *Aricept* dosage was reduced in January 2007.

Linda set up the appointment with attorney O'Day for the purpose of changing the 2002 will to her benefit. She informed the lawyer that Doris wanted to leave her principal asset, her mortgage free residence, to Linda and George. Linda engaged the attorney who never spoke to Doris about his fees. The *46 two fiduciaries sat with Doris in O'Day's small inner office and discussed the drafting of the new will. Linda and George did not require O'Day to state at the meeting that he represented only

Doris' interests. While Linda believed Doris' dementia was not as bad as her doctors said, the Kulhowicks took no precautions to ensure that the transaction was fair. It was Linda who informed the attorney that Doris had reviewed and approved the will. And Linda and George were with Doris in O'Day's small inner office when the will was signed.

As a matter of law, it is the Kulhowicks' burden to demonstrate the absence of undue influence. [Moretti, 69 Mass. App. Ct. 642 \(2007\)](#).

A drastic change cutting out Rogers and Gloria Fowler of about one third of \$1 Million where Doris was a de facto member of the Fowler family who provided care and companionship for decades is evidence of an unnatural disposition. *Id.* at 657.

There is evidence that in the months preceding the 2007 will, Linda dominated Doris and that Linda exercised her domination for selfish pecuniary *47 motives. Dr. Lewittes' expert opinion is that Doris was susceptible to undue influence. *RA* 472-73.

There is evidence Linda's domination continued after Doris signed the 2007 will. Linda called and spoke to Doris several times a week. *RA* 131,138-39,145,148. During these conversations, while her voice was calm and polite, Doris would often make faces and stick her tongue out. *Id.* Yet the minute she got off the phone Doris often said: "She's after my money" "that bitch all she wants is my money;" "that whore, all's she she's about is my money;" and/or "I am so angry, she's after my money." ⁹ *Id.*

Linda and George had a duty to "be upfront with" Doris and communicate all relevant information about Doris and her mental condition to a mental health professional who would act solely in Doris' interests and determine, among other things, if Doris had testamentary capacity. [Gagnon v. Coombs, 39 Mass. App. Ct. 144, 156 \(1995\)](#). Even assuming a finding of their good faith, it was "a profound breach[] of [their] fiduciary duty" to have not obtained an *48 assessment of Doris' testamentary capacity before she executed a new will substantially in their favor. *Id.* at 157.

The Probate judge's finding that the Kulhowicks satisfied their burden to demonstrate a lack of undue influence is clearly erroneous.

(c) The Probate judge abused his discretion in making credibility determinations.

Where (i) each of the three claims has "genuine support in evidence;" (ii) there was no discovery; (iii) the Court had declined to rule on the procedural issue; and, (iii) there were genuine issues of material fact, it was an abuse of discretion for the Probate judge to have credited the evidence of some percipient witnesses and discredited the evidence of other percipient witnesses and the sworn opinion evidence of an expert forensic psychologist whose qualifications were not challenged. [See Daly, 275 Mass. at 30](#)

(d) Elder Abuse by fiduciaries.

The sworn evidence of five unrelated caregivers and Ken Fowler is that the Kulhowicks, trusted caregivers and fiduciaries, **financially exploited** *49 Doris, withheld needed care, and knowingly and intentionally put Doris in harm's way, resulting in a broken wrist and Doris having to live in unhealthy and unsafe conditions. Linda's penny pinching admissions to Ms. Rupani and refusal to accept funding by the Fowlers for Doris' care, shout of motive to maximize her expected inheritance. Obligated to act solely in Doris' best interests in disregard of their personal desires and expectations, the Kulhowicks' actions are shameful, and constitute actionable **elder** abuse. Mass. Gen. Laws ch. 19A.

The Probate judge's finding of "no evidence" of **elder** abuse is clearly erroneous.

V. CONCLUSION.

Rogers Fowler respectfully requests the Court to reverse the Probate Court's February 24, 2011 decisions, remand to the Probate Court and to make the following findings, and enter the following Orders:

1. The April 6, 2010 decree allowing the February 21, 2007 will of Doris Rogers late of Dennis and appointing George Kulhowvick executor is vacated.

*50 2. On this record there is no competent evidence that Doris Rogers possessed testamentary capacity on February 21, 2007.

3. There are trial worthy grounds of undue influence; and the Kulhowvicks have the burden of proof at trial.

4. The Probate Court is to appoint an independent administrator of the estate of Doris Rogers who is to investigate pursuing claims of **elder** abuse against the Kulhowvicks.

5. The Probate Court is to issue an Order to show cause why the Kulhowvicks should not be ordered to disgorge to the estate some or all of the attorneys fees expended on their behalf in this case.

Footnotes

1 In his pre and post hearing briefs, among other things, Rogers Fowler argued the decree was void for lack of jurisdiction for failure to have complied with Probate Court Rule 6. RA 318-19, 405-10.

2 Each of Rogers and Ken Fowler are of independent means. RA 109,462.

3 See note 4 infra.

4 The parties dispute the time period in which this Thanksgiving fall, subsequent hospitalization and rehabilitation occurred and no discovery was permitted. In his August 23, 2010 affidavit, Ken Fowler stated that Doris' fall occurred around Thanksgiving of 2006, and at that time a woman whom he believed to be named Lisa Francis was caring for Doris. RA 109-117. Six months later, George and Linda Kulhowvick each submitted affidavits attesting that Doris' broken ribs, and resulting hospitalization, rehabilitation and continuing care by Lisa Francis at home was in 2005 and into early 2006; and that after terminating Ms. Francis in July 2006, Linda had hired Ryan Lovett and Heidi Rupani to provide in home care for Doris. RA 492-506. The August 2010 affidavits of Heidi Rupani and Ryan Lovett attest that Linda hired them in July 2007. RA 127-142. Lisa Francis' January 14, 2011 affidavit attests that Doris' fall, hospitalization, and lengthy stay at Pleasant Bay was Thanksgiving 2006 into January 2007 and that she gave her notice in the late spring of 2007. RA 456-459. The Kulhowvicks also alleged that Ms. Francis was terminated for padding her time. RA 496,502. The Kulhowvicks do not reference the daily log maintained by Ms. Francis and left at the house. RA 458.

5 Yet, with his notes in front of him on the stand, O'Day testified that it was Doris who explained in detail the value of her home and her liquid assets and how Linda and George had to pay Russell one half of the house's value. RA 629-35.

6 The practice of Ms. Francis, Ken Fowler, his parents and the Kulhowvicks was to post Doris's appointments on the refrigerator door or the kitchen counter. RA 461. Ken Fowler always checked the refrigerator and counter for notes from Ms. Francis about evening medications or appointments. *Id.*

7 While Linda did not change her instructions to leave the medications on the table for Doris to take herself, when their schedules permitted, the caregivers concealed the medications and gave them to Doris when appropriate to do so. RA 130, 135. While Linda told Ryan Lovett she would engage a service to remind Doris to take her medications at the designated time, she never did so. RA 130.

8 [Mass. Gen. Laws Ann. ch. 215, § 30](#) provides,

[t]he ...probate courts shall make rules requiring notice of any hearing, motion or other proceeding before said courts to be given to parties interested ...”

9 None of the caregivers ever heard Doris swear or get angry at any other family member. RA 131,139.