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In the Matter of the Estate of Joan H. McBride, deceased.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION PROBATE PART BERGEN COUNTY DOCKET No. BER-P-187-16 OPINION

Argued: January 9, 2018
Decided: January 11, 2018

Honorable Robert P. Contillo, P.J.Ch.

Brendan Judge, Esq. Appearing on behalf of the third-party plaintiffs, Stephen A. McBride and James V. McBride (Connell Foley LLP).

Joseph B. Fiorenzo, Esq. appearing on behalf of the third-party defendant, Charles Omsberg (Sills Cummis & Gross, P.C.).

OPINION

I. Statement of the Case

Before the Court is the Motion of Defendant/Third-Party Defendant Charles Omsberg ("Defendant" or "Charlie") for Summary Judgment, Dismissing the Third-Party Plaintiffs' Complaint ("Complaint"), filed on November 22, 2017. The Complaint was filed on July 11, 2016 and sets forth three counts: (i) to invalidate all lifetime transfers because "[a]ny and all asset transfers the Decedent and/or Third-Party Defendant effectuated during the time period from 2005 through the Decedent's death are invalid and the product of Third-Party Defendant's

improper conduct and undue influence"; (ii) to remove Charlie as a Co-Executor to Decedent's Will because "Third-Party Defendant has breached his fiduciary duty to the Third-Party Plaintiffs by improperly procuring the Decedent's property with the use of undue influence upon the Decedent";[1] and (iii) to require Charlie to account for his actions as Decedent's Power of Attorney because "Third-Party Defendant shared a confidential relationship with the Decedent, such that a presumption of undue influence arose . . . [and Charlie] must account for his acts and actions as Power of Attorney for the Decedent Third-Party Plaintiffs."[2] Exhibit A to Fiorenzo Cert., ¶¶ 31-41. Third-Party Plaintiffs (Stephen A. McBride "Stephen", and James V. McBride "Jamie" or "Plaintiffs") filed Opposition on December 14, 2017.[3] Charlie filed a Reply on December 18, 2017. Plaintiffs filed the Leave to Amend Order on December 21, 2017. Plaintiff filed a response to that letter on the same day. Oral argument on the Summary Judgment Motion was held on Friday January 9, 2017, and the Court reserved decision

On October 5, 1991 Daniel J. McBride ("Daniel Sr.") died, leaving a Last Will and Testament ("Daniel Sr. Will") that provided for his estate to be distributed in two equal shares: the first to his wife, Joan McBride ("Joan" or "Decedent", a/k/a Joan McBride-Omsberg), and the second to his four sons: Daniel McBride ("Danny"), Sean McBride ("Sean"), Jamie, and Stephen. Third Party Defendant Statement of Material Undisputed Facts ("Defendant Facts"), ¶¶ 1-2. In April 1992, Danny, Sean, Jamie, and Stephen all executed disclaimers of their inheritance and accepted $75,000 in lieu of what they were entitled to receive under the terms of

[1] Third-Party Plaintiffs also allege that Charlie has a conflict of interest and "can not be objective in regard to bringing the lifetime transfers of the Decedent's property that the made to himself back into her estate." Complaint, Exhibit A to Certification of Joseph B. Fiorenzo, Esq. ("Fiorenzo Cert"), ¶ 34.
[2] The request for an accounting has been withdrawn.
[3] The Third-Party Plaintiffs' Verified Complaint was filed on July 11, 2016. Exhibit A to Joseph B. Fiorenzo in Support of Third-Party Defendant's Motion for Summary Judgment ("Fiorenzo Cert."). Plaintiff Daniel McBride filed a Verified Complaint as well on May 20, 2016. Exhibit E to Fiorenzo Cert.

the Daniel Sr. Will. Id. at ¶ 4; Exhibit D to Fiorenzo Cert. The residuary estate of Daniel Sr. therefore passed to Joan in the total amount of $3,340,028. Id. at ¶ 8.[4]

After the death of Daniel Sr., Joan began dating Charlie and the two were engaged in 1995; married in December 1997. Id. at ¶¶ 11, 13. Prior to the marriage, but subsequent to the engagement, in 1996 Joan sold her home in Franklin lakes and purchased real property located at 440 Weymouth Drive, Wyckoff, New Jersey, which would ultimately become the home of Joan and Charlie (the "Marital Home"). Id. at ¶¶ 16-18. Charlie lived in a home located in Oakland, New Jersey prior to the marriage and retained ownership over that property during the marriage. Id. at ¶ 18.

Joan's Health

Joan was diagnosed with cancer in 1998, but was ultimately declared cancer-free after five years of treatment. Id. at ¶¶ 20-21. After that diagnosis, Joan retired from the McBride Agency (where Charlie also worked). Id. at ¶ 22. In 2003 Joan began to exhibit symptoms of what would ultimately be diagnosed as multiple system atrophy (MSA) in 2009, a slowly-progressing disease for which there is no cure. Id. at ¶¶ 23, 27.[5] Joan's symptoms began with dizziness and progressed to nausea in 2007. Id. at ¶¶ 24-25. The parties agree that the MSA ultimately caused Joan to be confined to a wheelchair, but they disagree as to when she required

[4] The total residuary estate totaled $3,640,028, with $300,000 being directed to the four sons, each, Danny, Jamie, Sean, and Stephen as consideration for their disclaimers of inheritance. The purpose of these disclaimers was to reduce the tax burden on Daniel Sr.'s estate. The four sons would have received a total of $1,820,014 ($455,004 each) if they did not disclaim their inheritances. Id. at ¶¶ 5-10.

[5] MSA "is a progressive neurodegenerative disorder characterized by a combination of symptoms that affect both the autonomic nervous system (the part of the nervous system that controls involuntary action such as blood pressure or digestion) and movement. The symptoms reflect the progressive loss of function and death of different types of nerve cells in the brain and spinal cord . . . . Symptoms tend to appear in a person's 50s and advance rapidly over the course of 5 to 10 years, with progressive loss of motor function and eventual confinement to bed." Multiple System Atrophy Fact Sheet, National Inst. Of Neurological Disorders and Stroke, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Multiple-System-Atrophy.

the use of the wheelchair. Id. at ¶ 26.[6] Notwithstanding her physical limitations, the parties agree that Joan retained some independence in her life (although they disagree as to when Joan became dependent upon Charlie). See id. at ¶ 28 ("Joan remained relatively independent until the last few years of her illness."); see also Third-Party Plaintiffs' Response to Charles Omsberg's Statement of Material Facts Not in Dispute ("Plaintiff Facts"), ¶ 28 (stating that on November 3, 2005 Joan decided to permit Charlie to become a signatory on her account at Hudson United Bank, which later became TD Bank ("TD Bank Account")). It is undisputed that Joan had physical ailments including nausea and dizziness from 2007 onward, but the parties disagree as to when Joan's speech became impaired. See Defendant Facts, ¶ 31 ("stating that Joan's speech was not affected until 2009 or 2010, "but it was not until the last year or two of her life that her speaking became difficult to understand."); but see Plaintiff Facts, ¶ 31 (stating that Joan's speech was affected as early as June 2007). At his deposition, Danny testified that between 2006 and 2009 his mother did not exhibit any "worrisome" signs of physical deterioration. Id. at ¶ 29; Exhibit F to Fiorenzo Cert., 47:3-49:3. Danny further testified that Joan's health did not decline in a "meaningful way" until the spring of 2014. Id. at ¶ 32; Exhibit F to Fiorenzo Cert., 60:13-61:1. The parties agree that Charlie retired in 2005 and from that point onward spent his time taking care of Joan as her health "slowly deteriorated." Id. at ¶ 35; see Third-Party Plaintiffs' Brief in Opposition to Summary Judgment ("Plaintiff Brief"), 4-5 (outlining Charlie's role in Joan's medical appointments from 2005 onward).[7] In connection with those efforts, Defendant states that he and Joan pooled their assets. Defendant Facts, ¶ 37;

[6] Charlie states that Joan only regularly used started to use a wheelchair regularly in 2009, Defendant Facts, ¶ 26. Plaintiffs argue that the wheelchair use was as early as 2006. Third-Party Plaintiffs' Response to Charles Omsberg's Statement of Material Facts Not in Dispute ("Plaintiff Facts"), ¶ 26.

[7] Pages 3 to 27 of the Plaintiff Brief are a "Counter Statement of Facts".

but see Plaintiff Facts, ¶ 37 (denying that there was an effort to pool, and contending that all efforts were based upon Joan's trouble writing and signing checks).

Danny visited Joan two to five times per week between 2005 and her death, and had "unfettered access" to visit Joan as Charlie never interfered with his visits, unless Joan was feeling particularly ill one day. Defendant Facts, ¶¶ 47, 48, 51. Defendant states that while Joan's physical health did in fact continue to deteriorate "she remained mentally stable and of sound mind until the very end of her life[,]" and that this is corroborated by the testimony of Danny, where he indicated that Joan was of sound mind until approximately 2014. Id. at ¶¶ 53, 58; but see Plaintiff Facts, ¶ 53 ("Deny. Dr. Igor Sobol noted as early as November 2010 that Joan was dizzy, "loopy, foggy in the head.") In addition to Danny's testimony, both Stephen and Jamie testified that Joan was of sound mind when she was giving them gifts throughout her illness, including the $500,000 they both received in December 2012. See Defendant Facts, ¶¶ 62-63. Furthermore, "Stephen testified that Joan was of sound mind through 2009 and, from 2010 until the last year or so of her life, she was able to coherently communicate." Id. at ¶ 61; but see Plaintiff Facts, ¶ 61 (stating that "[t]he cited provisions [in Stephen's testimony] reflect Joan's difficulty in communicating.")[8]

Aside from family members, a number of individuals also provided testimony and certifications as to Joan's mental capacity during the time in question. In connection with various estate planning meetings with attorney Joseph Scorese ("Scorese") (discussed below), in 2005, 2010, and 2011, Scorese described Joan as competent in all of those meetings. Id. at ¶ 64.

[8] The cited testimony of Stephen reflects a timeline as to Joan's mental health and her ability to communicate coherently. Stephen's testimony sets forth an account of Joan's speech becoming increasingly challenged with a "marked difference between '09 and '10". Exhibit I to Fiorenzo Cert at 105:22-23. Stephen testified that he understood his mother when speaking with her "for the most part" in 2010. Id. at 108:4. Stephen further testified that he was mostly able to understand his mother when she spoke in 2011 but testifies that she was not always able to communicate and increasingly relied on gestures. See id. at 116:12-117:3.

Darren Hugo ("Hugo"), Joan's financial advisor, testified that Joan was "definitely with it mentally" during estate planning meetings that he attended an that "Joan understood [him] perfectly fine", even towards the end of her life. . Id. at ¶¶ 65-66. On September 7, 2007, Dr. David Zee of Johns Hopkins Medicine wrote of Joan that she "was an affable individual and actually a bit jocular" and further that she "was oriented with good recent memory and gave a coherent history." Id. at ¶ 67; Exhibit P to Fiorenzo Cert. On December 4, 2009 Drs. Era Hanspal and Cheryl Waters of Columbia University wrote that Joan "was alert, awake, and oriented times three. She could relay the details of her history well. Attention and concentration were intact." Id. at 70; Exhibit QQQ to Fiorenzo Cert. On December 21, 2011 Dr. Amrit Grewal of the Neurology Group of Bergen County wrote Joan was "alert and oriented to person, place and time," and she had "normal recent and remote memory." Id. at ¶ 71; Exhibit Q to Fiorenzo Cert. On May 29, 2012, Dr. Robert Bliecher of North Jersey Gastroenterology wrote that Joan was "health appearing, in no distress," and was "oriented with appropriate mood and judgment." Id. at ¶ 72; Exhibit R to Fiorenzo Cert.

Defendant provides factual information as to Joan's health and estate planning up until mid-2012. Plaintiffs provide the court with additional medical information and factual assertions for the period of 2011 to 2016. See Defendant Brief, 22-27. "In 2011 Mr. Omsberg transferred an astounding $2,484,951.00 into the Joint TD Account beyond the Baseline Living Expenses . . . [including] the proceeds of a sale of a condominium in Maine that Joan had purchased in her name in September 2005 using her personal account." Id. at 22 (arguing that Charlie caused Joan to wire these funds to the joint TD Bank Account). Generally speaking, Plaintiffs state that Charlie "continued to increase the value of the trust (and thereby enhanced himself) by transferring an additional $55,500 from Joan's accounts into the Trust Account. Id. at 23.

Plaintiffs state that from 2012 onward Charlie continued to "loot" Joan's funds to his own advantage. Ibid. Plaintiffs further argue that Charlie demonstrated "utter indifference to Joan's pain", referencing an alleged refusal to provide Joan with morphine and improper feeding of solid foods to her. See id. at 24-27.[9] Joan ultimately died on January 2, 2016. Id. at 27.

Joan's Estate Planning

On June 3, 2010 Joan executed what proved to be her Last Will and Testament ("2010 Will"), a trust agreement ("2010 Trust") and a power of attorney ("Power of Attorney"), appointing Charlie as her attorney-in-fact. Id. at ¶ 73. Under the terms of the 2010 Will, the 2010 Trust was to be set up for Charlie's benefit during his lifetime and certain assets would be placed in the trust, and upon Charlie's death, the trust assets would go to Joan's sons. Id. at ¶¶ 74, 75. Joan's sons were also to receive all assets not otherwise disposed of under the 2010 Will. Id. at ¶ 76. Both parties agree that "[t]hese were Joan's wishes and she intended for her estate to be distributed in this manner at the time she signed the 2010 Will and 2010 Trust." Id. at ¶ 77; accord Plaintiff Facts, ¶ 77.[10]

Prior to the execution of the 2010 Will and Trust, Joan executed a 2006 Will and Trust ("2006 Will" and "2006 Trust"). Joan met with Scorese on May 19, 2005 ("May 2005 Meeting"), in which the two discussed creating an *inter vivos* irrevocable trust for Charlie's lifetime benefit. Defendant Facts, ¶ 83. Mr. Scorese certifies that Joan stated she wanted to ensure Charlie had money available to him so that he would be taken care of. Id. at 84; Certification of Joseph Scorese ("Scorese Cert."), ¶ 4. Under the 2006 Trust, Charlie was

[9] Plaintiffs rely upon a Visit Note Report which quotes Charlie as stating he would not provide Joan with morphine "until she howls". The Report goes on to state that Charlie preferred to continue treatment with lorazepam (medication used to treat anxiety and to produce "a calming effect." Lorazepam, WebMD https://www.webmd.com/drugs/2/drug-8892-5244/lorazepam-oral/lorazepam-oral/details.) Exhibit 38 to Judge Cert., V0673. Charlie denied ever making this statement during his deposition. Defendant Brief, 27.

[10] Third-Party Plaintiffs do not bring a challenge against the 2010 Will or against the 2010 Trustand concede to its validity as to its formation and as an accurate reflection of Joan's intention.

entitled to the trust income for his lifetime, together with the ability of the trustees to invade the corpus for his maintenance in "reasonable comfort and good health" in their discretion. Id. at ¶ 98. The 2006 Will directed the Marital Home and other tangible personal property be put in the 2006 Trust. Id. at ¶ 99. The 2006 Will also included a statutory elective share provision, which Scorese explained to Joan had the effect of setting a minimum as to what Charlie could receive under the 2006 Will and Trust in accordance with the elective share statute. Id. at ¶¶ 100-02; Scorese Cert, ¶ 8. The parties agree that "[w]ith regard to the portion of her estate allocable to her sons, Joan confirmed her earlier discussions with Scorese that she wanted her residuary estate to be divided into two equal parts." Id. at ¶ 104; accord Plaintiff Facts, 104. Joan opted to use this structure to provide a "now and later" structure for her sons' inheritances, and she believed such was appropriate "given their financial immaturity". Id. at ¶ 107; Scorese Cert. ¶ 10; accord Plaintiff Facts, ¶ 106. The parties further agree that the "structure of the 2006 Will and 2006 Trust was consistent with Joan's discussions with Scorese, and accurately reflected Joan's wishes as she explained them to Scorese during their meetings." Defendant Facts, ¶ 109.[11] None of Joan's sons had knowledge of the 2006 Will or Trust at the time they were prepared. Id. at ¶ 112.

On April 10, 2008 Joan had executed another will ("2008 Will"), which was largely identical to the 2006 Will, except that it increased bequests to Joan's nieces and made other minor corrections. Id. at ¶ 120. Joan's sons also had no knowledge of the 2008 Will. Id. at ¶ 121.

On May 11, 2010 Joan and Scorese met at her house ("May 2010 Meeting"). Id. at ¶¶122-23. "At the May 2010 Meeting, Joan told Scorese that she did not want Danny, who was

[11] Plaintiffs therefore agree that the 2006 Will and 2006 Trust accurately reflected the testamentary wishes of Joan, and was consistent with the conversations between her and Scorese, as to the use of a statutory elective share as a *minimum*.

nominated co-executor under the 2008 Will and a nominated successor co-trustee under the 2006 Trust, to serve, because she felt he might create disharmony with Charlie, his co-fiduciary." Id. at ¶ 124. The 2006 Trust had never been funded so Joan asked to start over with the trust agreement. Id. at ¶ 125; Scorese Cert., ¶ 14. In addition to altering the fiduciaries selected, Joan also indicated that she wanted to eliminate the now-and-later provisions contained in the prior wills for her sons' inheritances.[12] See id. at ¶ 138. In accordance with Joan's instructions, Scorese drafted the 2010 Will, and Trust, which were signed on June 3, 2010. Id. at ¶ 142. "Scorese testified that the amounts Charlie was to receive under the 2010 Will and 2010 Trust, and outside the estate through his right of survivorship in connection with various joint assets Joan and Charlie held, was . . . roughly equivalent to what Charlie would have received [under] the statutory elective share" . . . and that this bolstered Scorese's conclusion that Joan had not been unduly influenced by Charlie or anyone else. Id. at ¶ 148-49. All three sons testified that they had no knowledge of any facts or evidence that Charlie influenced Joan in any way in connection with the 2010 Will and Trust. Id. at ¶¶ 161, 163, 165. Joan also signed the Power of Attorney on the same day, June 3, 2010, but Charlie states that he only used it rarely, and indeed on only three occasions. See Id. at ¶¶ 170-71; but see Plaintiff Facts, ¶¶ 170-71 (denying that Charlie only used the power of attorney on these occasions and alleging that he used it order multiple transfers from Joan's personal accounts).

In June 2010 the 2010 Trust remained unfunded. Joseph Scorese states that he spoke with Frank Centrella ("Centrella"), Joan's accountant about the need to fund the trust. Id. at ¶ 172. Scorese states that Centrella indicated that he had spoken with Charlie and Joan as to the need to fund the trust and the value of including the Marital Home in the trust; and that Scorese

[12] The now and later provision provided for Joan's sons to receive a portion of their inheritance immediately, and for the remaining inheritance to be received a later date in time. Id. at ¶¶ 106-08.

and Centrella spoke about Danny's financial troubles and the possibility that such may cause him to interfere in the administration of Joan's estate. Id. at ¶¶ 173-74; Scorese Cert., ¶ 24.[13]

Scorese ultimately met with Joan on September 14, 2011 ("September 2011 Meeting") to sign a deed (previously prepared by Scorese, and in response to Joan's directions) to transfer the Marital Home to the 2010 Trust, and to further discuss the funding of the trust. Id. at ¶ 175. Scorese met with Joan in her car based upon Joan's physical limitations. Scorese Cert., ¶ 25. "Because I was concerned about a possible future dispute, I memorialized our conversation in a memorandum later that day." Id. at ¶ 25. That memorandum, prepared on September 14, 2011 states in pertinent part:

> Joan confirmed that she understood the difference between the effect of moneys from her UBS accounts in the trust (which will be used for Charlie's benefit but at his death will pass to her sons) versus moneys in a joint account passing outright to him. We reviewed that the amounts were decided upon at our meeting *after* taking into account moneys which were already in the Schwab account (a significant portion of which had originated from Charlie) and that had those asset not been present, the initial gift from Joan's UBS accounts would have been larger.
>
> Joan again confirmed to me that her wishes were to have Charlie's trust funded with the Wyckoff home plus $2,500,000 worth of securities from her UBS holdings (with specific selections to be agreed upon between them and Darren) *and* that Charlie should inherit by survivorship all of the Schwab account assets, including those contributed by her as a surviving owner. Charlie offered to step outside of the car, but Joan did not think it necessary. I again asked Joan if she understood the overall plan with respect to the trust, and she said she did, and that she had no questions. I confirmed with her that the trust is irrevocable.

[13] Plaintiffs filed a letter with the Court on December 21, 2017 ("Leave to Amend Letter") seeking leave to amend the Opposition. The letter states that Centrella has since been deposed on December 19, 2017 and in his testimony he indicates that he does not recall any such conversation with either Joan or Charlie as to the need to fund the trust but does recall speaking to Scorese as to Danny's financial troubles and the potential impact on the estate. Exhibit A to Leave to Amend Letter, 13:21-14:14; 24:9-25:17. Centrella also testified that he has no recollection of ever meeting with or discussing any matters with Joan. Exhibit A to Leave to Amend Letter, 14:13-14.

> The overall meeting lasted about 20 minutes. At all times I found Joan to be alert, articulate and decisive in her responses.
>
> Exhibit B to Scorese Cert, 1-2.

In accordance with UBS procedures, Joan submitted a letter of authorization to UBS on October 4, 2011, authorizing the transfer of the assets from her UBS Account, which she held in her own name, to the 2010 Trust. Defendant Facts, ¶ 179. Based upon the UBS Account and the Marital Home (deeded to the 2010 Trust on September 14, 2011, Id. at ¶ 175), the 2010 Trust was funded with a total of $2,242,746.04. Id. at ¶ 180. The sons admitted that they had no knowledge as to the funding of the 2010 Trust or any conversations had in connection with it. See id. at ¶ 185.

In addition to the UBS Account, which Joan held solely in her name and which was directed to the 2010 Trust, Joan held two joint accounts with Charlie: the TD Bank Account and the Schwab Account. In 1998, Charlie opened a joint brokerage account with DLJ Direct with the purchase of 100 shares of IBM. Id. at ¶ 191. DLJ Direct ultimately became E-Trade in or around 2006. Id. at ¶ 192. On January 2, 2008 the Schwab Account was opened. Id. at ¶ 194. Charlie states that Joan and he funded the joint Schwab Account with $2 million in funds from the joint E-Trade Account, which both Joan and Charlie contributed to. Id. at ¶ 194-96. Plaintiffs contest this assertion, and argue that the evidence demonstrates that the Schwab Account could not have been funded with the joint E-Trade Account as Charlie indicates, and the funding of the Schwab Account must have originated from Joan's personal accounts. See Plaintiff Facts, ¶ 195.[14] Plaintiffs state that the E-Trade Account had a balance of less than $33,000 on January 1, 2008 and therefore could not have been used to fund the Schwab Account. Plaintiff Facts, ¶ 195 (citing Exhibit S to Gould Cert. (showing a joint E-Trade account ending in

[14] The Court further discusses this dispute below.

9201 having a balance of $32,905.40). Plaintiffs also state that their forensic accountant concluded that "the financial information available contradicts Mr. Omsberg's claim regarding his alleged transfers into the Joint Schwab Account from the E-Trade account." Ibid; Exhibit E to Gould Cert, p. 3. Defendant maintains that the E-Trade account ending in 9201 is a different account and that the E-Trade account ending in 6100 is the source of the Schwab Account. See Reply Brief, 4; See also Exhibit HH to Fiorenzo Cert. (showing an E-Trade account ending in 6100, with Charlie's name and described as a joint account); Exhibit JJ to Fiorenzo Cert. (showing an account statement for the Schwab Account for January 1-31, 2008 and with handwritten notes that read: "1/02/2008" "E-Trade (joint)").

The joint TD Bank Account was originally Joan's personal account but on November 3, 2005 Joan added Charlie as a signatory to the account with a right of survivorship. Defendant Facts, ¶ 205. "Charlie was added to the account as part of his and Joan's decision to pool certain of their assets, and because Joan's handwriting had started to deteriorate and it would be helpful for Charlie to be able to write checks to pay their living expenses." Id. at ¶ 206; but see Plaintiff Facts, ¶ 206 (alleging that there was no effort to pool assets and that the only reason Charlie was made a co-signatory was based upon Joan's handwriting difficulties). The parties agree that "Joan directed Darren Hugo, Joan's financial advisor, to transfer $20,000 per month from the UBS Accounts to the TD Bank Account years before she became ill and before any alleged undue influence occurred." Defendant Facts, ¶ 207; Plaintiff Facts, ¶ 207. These amounts were to be used for the living expenses of Joan and Charlie. Defendant Facts, ¶ 208. According to Defendant, Joan retained the ability, and indeed did review the TD Bank Account on a number of occasions and never objected to any of Charlie's transfers. Id. at ¶ 210. As to the transactions between Joan's UBS Account and the joint TD Bank Account, "Hugo testified that Joan was the

decision maker with regard to the UBS Accounts and that he took his direction from Joan. Hugo met with Joan many times in the course of a year, and had up to two dozen phone calls with her per year." Id. at ¶¶ 215-16.[15] Conversely, Plaintiffs state that from 2010 until the end of Joan's life, Charlie caused great sums of money to be deposited into the TD Bank Account and used these sums beyond baseline living expenses including ATM withdrawals and deposits, payment of credit card bills, deposits into his personal accounts, loans to friends of him and Joan, and further funding of the 2010 Trust. See generally Plaintiff Brief, 21-27.[16]

Joan was very generous to all three of her sons during her lifetime, providing her sons approximately $70,000 from the sale of her house in Franklin Lakes in 1995. Id. at ¶ 224. Each son also received checks from Joan and Charlie annually as gifts from 2005 to 2015. Id. at ¶ 225. In total, Jamie received $385,813.08, Stephen received $334,000.00 and Danny received $584,000.00. Id. at ¶ 226. In December 2012 Joan gave $1.5 million to her three sons, with each receiving $500,000.00. Id. at ¶ 227. In addition to other gifts, the parties agree that the sons received the following amounts in total from Joan in the form of gifts from 1996 to 2015: $972,173.07 for Jamie, $973,214 to Stephen, and $1,655,030 to Danny; for a total of $3,600,417.17. Id. at ¶¶ 230, 239. Under the 2010 Will the sons are to receive a total of $3,074,501.92 in various securities, $300,676.86 as beneficiaries to Joan's IRA accounts, and the remaining balance of the 2010 Trust after the death of Charlie (current principal balance of the 2010 Trust is $2,552,492.17 including the Marital Home). Id. at ¶¶ 231-236. It is estimated that the ultimate inheritances of the three sons will be $2,329,390.32 (subject to depletion of the Trust). Id. at ¶ 239. This inheritance amount, coupled with the lifetime gifts the three sons have

[15] Plaintiffs state that Hugo also testified that he took certain directions from Charlie as well. Plaintiff Facts, ¶ 215.
[16] Exhibit E to Gould Cert. is a report by a forensic accountant that reviews, *inter alia*, funds expended from Joan's accounts in excess to her and Charlie's baseline living expenses.

received amounts to approximately $10.6 million with each son receiving the following amounts: $3,301,563.39 to Jamie, $3,302,604.32 to Stephen, and $3,984,420.32 to Danny. Id. at ¶ 239.

II. Procedural History

On May 20, 2016 Danny filed a Verified Complaint as to the 2010 Will, citing undue influence and lack of testamentary capacity. Id. at ¶¶ 241-42; Exhibit E to Fiorenzo Cert. At his deposition, Danny acknowledged that his brothers do worse under the terms of the 2008 Will than the 2010 Will in the event his claims are successful. Id. at ¶ 245. Counsel for Danny has advised the Court that he will dismiss his Verified Complaint, Id. at ¶ 247, and indeed Danny's Complaint challenging the will was dismissed on December 15, 2017.

On July 11, 2016 Third-Party Plaintiffs Jamie and Stephen (hereinafter "Plaintiffs") filed a Verified Complaint to Invalidate Lifetime Asset Transfers and Return those Assets to the Estate. Id. at ¶ 248; Exhibit A to Fiorenzo Cert. Plaintiffs filed an Order to Show Cause for an Order preliminarily enjoining Charlie from, *inter alia*, using the Trust Accounts and the Schwab Account to pay his legal fees. This Court denied the Order to Show Cause on September 22, 2017, and in doing so the Court acknowledged the physical afflictions Joan suffered from, but noted that Plaintiffs had not, at that time, provided a basis in the record to demonstrate that Joan was not cognitively competent prior to the very end of her life. Id. at ¶ 251, Exhibit N to Fiorenzo Cert.

Third-Party Defendant Charlie filed the current Motion for Summary Judgment on November 22, 2017, seeking to Dismiss the Third-Party Plaintiffs' Complaint. Third- Party Plaintiffs Jamie and Stephen McBride filed Opposition on December 14, 2017.[17] Charles filed a Reply on December 18, 2017. Plaintiffs filed the Leave to Amend Order on December 21, 2017.

[17] The Third-Party Plaintiffs' Verified Complaint was filed on July 11, 2016. Exhibit A to Joseph B. Fiorenzo in Support of Third-Party Defendant's Motion for Summary Judgment ("Fiorenzo Cert."). Plaintiff Daniel McBride filed a Verified Complaint as well on May 20, 2016. Exhibit E to Fiorenzo Cert.

Plaintiff filed a response to that letter on the same day. Oral argument on the Summary Judgment Motion was held on January 9, 2017, and the Court reserved decision. Trial is scheduled for February 20, 2018.

III. Third-Party Defendant's Argument for Summary Judgment

Defendant brings forth five arguments in support of the Motion for Summary Judgment. In sum, Defendants argue that "no triable issues of fact with regard to [any] transfers [exist], and the Court should dismiss Jamie and Stephen's claims to invalidate them. There is similarly no triable issue of fact with regard to the transfers into the TD Bank Account." Defendant Brief, 3.

First, Defendant takes the position that any transfers between Joan's UBS account and Joan and Charlie's joint TD Bank Account do not constitute inter vivios gifts and therefore are not subject to claims of undue influence. Id. at 2. Defendant argues that the transfer of funds to the TD Account do not constitute *inter vivos* gifts as a matter of law because Joan did not relinquish "ownership and dominion over the funds." See Id. at 34. Defendants state that an *inter vivos* gift requires three elements: (i) an unequivocal donative intent on the part of the donor, (ii) an actual or symbolical delivery of the subject matter of the gift, and (iii) an absolute and irrevocable relinquishment by the donor of ownership and dominion over the subject matter of the gift. Ibid; (citing In re Dodge, 50 N.J. 192, 216 (1967)). Moreover, Defendants argue that "proof of each of these elements must be 'clear, cogent, and persuasive.'" Ibid. (quoting Lebitz-Freeman v. Lebitz, 353 N.J. Super. 432, 437 (App. Div. 2002)). Defendants contend that there is no evidence presented that demonstrates that Joan "absolutely and irrevocably relinquished her ownership and dominion over the assets transferred from her UBS Accounts to the TD Bank Account." Ibid. Because Hugo testified that the funds transferred to the TD Bank Account were

used primarily for the living expenses of Charlie and Joan, and further for the making of gifts to Joan's sons, there is no basis to conclude that Joan forfeited ownership and dominion. Ibid.

Defendant further argues that the transfer of assets from Joan's UBS Account to the joint TD Bank Account does not qualify as an *inter vivos* gift under the Multi-Party Deposit Account Act ("MPDA"), N.J.S.A. §§ 17:16I-1 to -17, "which governs joint accounts with rights of survivorship." Id. at 35. "Under the MPDA, 'during the lifetime of all parties, a joint account belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless the terms of the contract indicate a contrary intent or there is a clear and convincing evidence of a different intent at the time the account was created." Ibid. (quoting N.J.S.A. § 17:16I-4(a)) (internal quotations omitted). "The creation of a joint account, with a right of survivorship, in a bank or other financial institution does not, by itself, constitute an *inter vivos* gift by the party depositing assets into the account to the other named party." Ibid. (quoting Lebitz-

Freeman, 355 N.J. Super. at 436).

Defendant argues that Jamie and Stephen's entire claim – as to transfers from Joan's solely owned UBS Account to the joint TD Bank Account with Charlie – is predicated on a finding that these transfers were gifts. Id. at 36. However, because these transfers do not constitute gifts, Defendant contends that Summary Judgment should be entered as to the Third-Party Plaintiffs' Complaint, as the principles of undue influence do not apply.

Defendant argues that even if the transfers to the TD Bank Account constitute *inter vivos* gifts, Summary Judgment is still appropriate because no evidence of undue influence has been presented. Defendant summarizes case law correctly identifying the standard for undue influence: "a mental, moral, or physical exertion of a kind and quality that destroys the free will

of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will or inter vivos transfer in lieu thereof." Ibid. (quoting In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008)). Defendants argue that the contestant has the burden of proof, however a presumption of undue influence will arise and switch the burden of proof where a confidential relationship is demonstrated by a preponderance of the evidence. Id. at 37. Defendants rely upon Estate of Ostlund v. Ostlund, and define a confidential relationship as "a reposed confidence and the dominant and controlling position of the beneficiary of the transaction . . . [t]he dominance must be of the mind and the dependence must be upon the mind, rather than the physical." Ibid. (quoting 391 N.J. Super. 390, 402 (App. Div. 2007)). "Once the relationship is shown and the presumption arises, the donee can rebut the presumption by showing by clear and convincing evidence that no deception was practiced in connection with the gift, that no undue influence was used, that all was fair, open and voluntary, and that the gift was well understood by the donor." Ibid. (referencing Pascale v. Pascale, 113 N.J. 20, 31 (1988)).

Defendant argues that Stephen and Jamie cannot establish a confidential relationship by a preponderance of the evidence. Id. at 38. Defendants state that the indisputable evidence, including the Deposition of Darren Hugo, Joan's financial planner,[18] confirms that Joan was the financial decision maker with regard to her UBS Accounts and that he took his directions from her. Hugo indicated that he had continuing contact with Joan as to what actions should be taken, and to the extent Charlie made requests to Hugo, he would make such a request by stating "I spoke with Joan; Joan would like a transfer." Id. at 39; Exhibit O to Fiorenzo Cert., 38:14-23. Based upon Joan's direction to Hugo, asking him to transfer $20,000 a month from the UBS Account to the joint TD Bank Account, coupled with the fact that Charlie did not have input on

[18] Exhibit O to Fiorenzo Cert.

other matters including Joan's condo in Maine, Charlie contends that "[t]he evidence thus shows that Joan, not Charlie, was in a dominant position in connection with the transfers from the UBS accounts into the TD Bank Account, as well as the deposit of the proceeds of the Main condo into the TD Bank Account." Id. at 40. Charlie therefore argues that no confidential relationship can be inferred on the motion record. Id. at 40-41.

Even assuming that a confidential relationship exists, Defendant argues that the evidentiary record still lacks any basis for finding Charlie unduly influenced Joan. See id. at 41. Defendants reassert the position that Joan was the decision maker, and that the Deposition of Darren Hugo supports that position. Ibid. "Joan even continued to meet with Hugo until the end of her life, when Hugo would visit her in her bedroom." Id. at 41-42 (citing Exhibit O to Fiorenzo Cert. at 66:17-68:11). "The Sons at deposition could not provide evidence that Charlie unduly influenced Joan in connection with any transfers into the TD Bank Account between 2005 and Joan's death, and indeed had no knowledge of the circumstances surrounding any such transfers or who initiated them." Id. at 42. Based upon the foregoing, Defendants take the position that the Third-Party Plaintiffs cannot present a basis for an undue influence claim as to transfers from the UBS Account to the TD Bank Account as a matter of law, and further that there is no genuine issue as to undue influence for these transactions. Id. at 42-43.

Second, Defendant maintains that Charlie is entitled to Summary Judgment as to Third-Party Plaintiffs' claim that the 2011 transfer of (i) the Marital Home, and (ii) $2.2 Million from Joan's UBS Account, for purposes of funding the 2010 Trust, were executed under Charlie's undue influence. See id. at 44. Defendant reasserts the position that Stephen and Jamie bear the burden of demonstrating an undue influence or to demonstrate that a confidential relationship existed. Ibid. "Assuming, however, that a confidential relationship existed and the presumption

of undue influence arises, the record indisputably shows that Joan knowingly and intentionally transferred the $2.2 million to the 2010 Trust in October 2011, and that she was not influenced by anyone in doing so." Ibid.

Defendant states that on September 14, 2011 (i.e. the September 2011 Meeting) Joan decided, in consultation with her estate planning attorney Scorese, to transfer the Marital Home and approximately $2.2 million in securities from her personal brokerage account, the UBS Account, into the 2010 Trust. Id. at 45. The Marital Home was deeded to the trust that same day, and the UBS Accounts were transferred to accounts set up for the 2010 Trust a month later. Id. at 2. Defendant argues that "[t]his transfer was the culmination of a years-long deliberative process that Joan had undertaken with respect to her estate plan in consultation with her professional advisors, including her (1) accountant, (2) financial advisor Hugo, and (3) attorney Scorese." Ibid. Defendant maintains that Joan was the decision maker as to these transfers and that no individual unduly influenced her. Ibid. Defendant relies upon the Certification of Joseph Scorese to establish that Charlie did not exert any undue influence over Joan, vis-à-vis her estate planning. Scorese certifies that he met with Joan in May 2010 for purposes of forming the 2010 Will and 2010 Trust. Scorese Cert., ¶ 13.

> Although Charlie was present in the house at the May 2010 Meeting, Charlie did not sit with us and had no influence on Joan in these discussions. At all times in the preparation and signing of those documents, I found Joan to be alert, articulate and decisive in her responses.
>
> Id. at ¶ 21.

Scores further certifies that on June 3, 2010 Joan came to his office to execute the 2010 Will and Trust, and that she was "alert and clear about what she was signing." Id. at ¶ 22. Similarly, Scorese states that Joan executed a power of attorney on June 3, 2010 as well, which appointed

Charlie as her attorney-in-fact, and although Charlie was present, he had "no influence on Joan." Id. at ¶ 23.

Joan ultimately met with Scorese on September 14, 2011 (September 2011 Meeting) for the purpose of funding the 2010 Trust, where Scorese met with Joan in her car based upon Joan's physical limitations. Id. at ¶ 25. "Because I was concerned about a possible future dispute, I memorialized our conversation in a memorandum later that day." Id. at ¶ 25. That memorandum, prepared on September 14, 2011 states in pertinent part:

> Joan confirmed that she understood the difference between the effect of moneys from her UBS accounts in the trust (which will be used for Charlie's benefit but at his death will pass to her sons) versus moneys in a joint account passing outright to him. We reviewed that the amounts were decided upon at our meeting *after* taking into account moneys which were already in the Schwab account (a significant portion of which had originated from Charlie) and that had those asset not been present, the initial gift from Joan's UBS accounts would have been larger.
>
> Joan again confirmed to me that her wishes were to have Charlie's trust funded with the Wyckoff home plus $2,500,000 worth of securities from her UBS holdings (with specific selections to be agreed upon between them and Darren) *and* that Charlie should inherit by survivorship all of the Schwab account assets, including those contributed by her as a surviving owner. Charlie offered to step outside of the car, but Joan did not think it necessary. I again asked Joan if she understood the overall plan with respect to the trust, and she said she did, and that she had no questions. I confirmed with her that the trust is irremovable.
>
> The overall meeting lasted about 20 minutes. At all times I found Joan to be alert, articulate and decisive in her responses.
>
> Exhibit B to Scorese Cert, 1-2.

Defendant argues that the memorialization made by Scorese on the day in question is consistent with the Deposition of Danny and Joan's caretaker Tammy,[19] both of who spoke to the strong willed nature of Joan who was not one to be easily pushed around. Defendant Brief, 46.

[19] Exhibit L to Fiorenzo Cert. is the Certification of Natela Jgenti ("Tammy").

Defendant states that "Joan's sons all testified that they had no knowledge of any facts suggesting that Charlie unduly influenced Joan in connection with her estate plan in any way." See ibid. Scorese testified that under the terms of the 2010 Will and Trust, Charlie was due to receive "an amount roughly equivalent to what he would have received under the statutory elective share" and therefore he did not have any concern as to undue influence. Id. at 46-47 (citing Deposition of Scorese, Exhibit Y to Fiorenzo Cert., 146:14-147:19).

Defendant further states that no genuine issue of material fact exists here based upon the statements made by various individuals:

> Danny testified that Joan was of sound mind until approximately 2014. Stephen testified that Joan was of sound mind in 2011, and certainly in December 2012 when Joan gave him (and each of his brothers) a gift of $500,000. Jamie also testified that Joan was of sound mind as she provided him with gifts throughout her illness, including the $500,000 gift in December 2012. Hugo testified that Joan was "definitely with it mentally" during an estate planning meeting he attend and that "Joan understood [him] perfectly fine" up until the end of her life. Charlie also testified that Joan's decision making was not affected by her illness, that she did not have episodes of confusion, and she was not forgetful. Further, a report dated December 21, 2011 by one of Joan's neurologists, Dr. Grewal, stated that Joan was "alert and oriented to person, place and time," and had "normal recent and remote memory." In May 2012, her gastroenterologist, Dr. Bleicher wrote that Joan was "health appearing in no distress," and "oriented with appropriate mood and judgment."
>
> See id. at 47 (internal citations omitted).

Based upon the memorialization on the date of September 14, 2011, the various medical and lay person descriptions of Joan's cognitive functions, coupled with the fact that Joan's sons remained beneficiaries to the Estate and remainder beneficiaries to the 2010 Trust upon the death of Charlie, Defendant argues that there is no genuine issue as to Third-Party Plaintiffs' claim of undue influence vis-à-vis the funding of the 2010 Trust.

Third, Defendant argues that Third-Party Plaintiffs' Complaint should be dismissed on Summary Judgment insofar as the Complaint seeks to invalidate transfers made between the joint E-Trade Account to the joint Schwab Account. Id. at 50. Defendants argue that this summary judgment is appropriate as there is no legal basis for the claim, and there is no evidence of undue influence in connection with these transfers. Ibid. As discussed, in January 2008 approximately $2 Million dollars was transferred from the E-Trade Account to the Schwab Account. The assets in the E-Trade account originated from joint brokerage account, opened by Joan and Charlie in 1998 with DLJ Direct. Ibid. (explaining the corporate transition between DLJ Direct and E-Trade). Defendant maintains that both Charlie and Joan contributed to the joint DLJ/E-Trade Account. Ibid. Arguing that the transfer from the E-Trade Account to the Schwab Account concerns funds that were equally contributed to in 1998, Defendant states that no undue influence claim can succeed as there is no contention in the record that Charlie allegedly unduly influenced Joan this early. Id. at 50-51.

Defendant argues that Joan fully understood the right of survivorship associated with the Schwab Account, and that the same was confirmed by her in September 2011 as part of her meeting with Scorese as to how to fund the 2010 Trust. Id. at 51. Defendant also argues that Joan's sons testified that they had no knowledge as to this transfer or to the accounts generally. Ibid. "There is not a scintilla of evidence in the record even hinting that the funds in the Schwab Account did not come from joint brokerage account that Joan and Charlie had contributed to since 1998, or that there was any undue influence in connection [with this transfer]." Id. at 51-52. Defendant therefore surmises that the summary judgment is proper as to this issue and Third-Party Plaintiffs'' claim should be dismissed accordingly. Id. at 52.

Fourth, Defendant argues that Summary Judgment is appropriate as to the claim that Charlie should be removed as co-Executor of the 2010 Will. Defendants state that under New Jersey law an executor may only be removed when the fiduciary:

> (a) After due notice of an order or judgment of the court so directing, neglects or refuses, within the time fixed by the court, to file an inventory, render an account, or give security or additional security; (b) After due notice of any other order or judgment of the court made under its proper authority, neglects or refuses to perform or obey the order or judgment within the time fixed by the court; (c) Embezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary; (d) No longer resides nor has an office in the State and neglects or refuses to proceed with the administration of the estate and perform the duties required; (e) Is incapacitated for the transaction of business; or (f) Neglects or refuses, as one of two or more fiduciaries, to perform the required duties or to join with the other fiduciary or fiduciaries in the administration of the estate for which they are responsible whereby the proper administration and settlement of the estate is or may be hindered or prevented.
>
> Id. at 53 (citing N.J.S.A. § 3B:14-21).

Defendant argues that Third-Party Plaintiffs have not shown any conduct that would qualify as proper grounds to remove Charlie as co-executor. Id. at 54. Defendant maintains that to the extent it is argued that Charlie cannot be objective in his duties, that even if that was true Charlie is one of three co-executors named under the Will and he cannot act unilaterally. Ibid. Moreover, Defendant argues that Third-Party Plaintiffs have not brought a claim that the 2010 Will or Trust are the product of undue influence, and that Danny "recently dismissed his challenge to the 2010 Will after recognizing in discovery that there was no basis for his claims that it was the result of undue influence." Ibid. Therefore, Defendant contends that summary judgment is appropriate on the removal claim.

Fifth, Defendant argues that the Third-Party Plaintiff's claim that seeks to require Charlie to perform an accounting for all actions taken with power-of-attorney should be dismissed as well. Id. at 56. Defendant argues that there are only three instances in which the Defendant exercised the power-of-attorney: (i) to provide it to Hugo when his bank requested it for his records; (ii) in connection with registering Joan for hospice toward the end of her life; and (iii) to write $14,000 checks on Joan's behalf as gifts to Jamie, Stephen Kim, Danny and Kerry. Ibid. "Given the inconsequential use made of the Power of Attorney, and lack of additional information to provide, Jamie and Stephen's claim for an accounting should be dismissed." Ibid.

IV. Third-Party Plaintiffs' Opposition

Third-Party Plaintiffs make three principle arguments in the Opposition: (i) the transfers of Joan's assets into the joint TD Account and joint Schwab Account are Subject to an undue influence analysis as a matter of law; (ii) clear questions of fact regarding Charlie's undue influence over Joan's decisions exist; and (iii) due to Charlie's undue influence, which caused Joan to transfer millions of dollars to his benefit, he should be removed as trustee to the 2010 Trust.

Plaintiffs first argue that the joint bank accounts, i.e. the TD Bank Account and Schwab Account "are subject to the same undue influence standard as any *inter vivos* transfer and Third-Party Plaintiffs are not required to demonstrate that the creation of the joint accounts qualified as *inter vivos* gifts for this standard to apply." Plaintiff Brief, 29 (referencing In re Estate of DeFrank, 433 N.J. Super. 258, 267-68 (App. Div. 2013). Plaintiffs argue that DeFrank applied the confidential relationship test to the creation of joint accounts without regard to whether plaintiff could demonstrate the creation of the accounts meets the test for an *inter vivos* gift. Ibid. Furthermore "[a]s a matter of law – based on case law relied upon by Mr. Omsberg for the

reverse proposition – the statutory presumption of survivorship on joint accounts in the MPDA "is rebuttable, and may be overcome with evidence showing that undue influence was used in the creation of the joint accounts[.]" Id. at 29-30 (quoting DeFrank, 433 N.J. Super. at 267-68). Plaintiffs contend that DeFrank held that when a party's state of mind, intent, knowledge or credibility is in issue relative to an undue influence analysis, summary judgment is inappropriate and that the trial court should not have granted summary judgment to either party as a confidential relationship may have existed between the joint account holder and the decedent." Id. at 30. Therefore, Plaintiffs argue that irrespective of whether the transfer of funds to the joint accounts constitute *inter vivos* gifts, the Plaintiffs still have a cognizable claim for undue influence as to those transactions and summary judgment should be denied accordingly. Ibid.

Second, Plaintiffs argue that genuine issues of material fact exist, such that Charlie's Motion for Summary Judgment should be denied. See id. at 30. For instance:

> When two individuals, i.e. a donor and a donee, are involved in a transfer and the donor is mostly dependent upon the donee, as Joan was upon Mr. Omsberg, courts of equity consistently hold that the weaker party, i.e. Joan, must be protected, and they routinely set aside any gifts made if the dependent individual did not have proper advice independently.
>
> Id. at 31 (referencing In re Estate of Fulper, 99 N.J. Eq. 293, 307 (P.J. Perog Ct. 1926).

Plaintiffs also rely upon the Fulper decision as the court held, "a showing of mental weakness or mental incompetence is by no means a necessary circumstance." See ibid. (quoting Fulper, 99 N.J. Eq. at 315). Therefore, Plaintiffs take the position that they need not show that Joan was mentally incapacitated nor that the "transfers were the product of undue influence . . . [but] [b]ecuase Stephen and James' claims of undue influence relate to inter vivos transfers, they merely have to either prove that the donee dominated the will of the donor *or* that a confidential

relationship existed between donor, Joan, and donee, Mr. Omsberg." Ibid (citing to Pascale, 113 N.J. at 30) (emphasis in original).

As to the establishment of a confidential relationship, Plaintiffs argue that within the context of *inter vivos* gifts a presumption of undue influence arises when the contestant "proves that the donee dominated the will of the donor . . . or when a confidential relationship exists between donor and donee." Id. at 32 (quoting Pascale, 113 N.J. at 30). Plaintiffs maintain that the record before the Court demonstrates, under a preponderance of evidence that a confidential relationship existed between Joan and Charlie. "Some factors to consider in determining whether a confidential relationship existed 'include whether trust and confidence between the parties actually exist[ed], whether they [were] dealing on terms of equality . . . whether one side exerted over-mastering influence over the other or whether one side [was] weak and dependent.'" Id. at 33 (quoting Estate of Otslund, 391 N.J. Super. at 402). Plaintiffs further maintain that New Jersey courts have often found a confidential relationships where one individual is dependent upon the other due to physical limitations or challenges. See ibid. (referencing Haynes v. First Nat'l Bank of NJ, 87 N.J. 163, 176 (1981); In re Estate of Folcher, 224 N.J. 496 (2015); Bronson v. Bronson, 218 N.J. Super. 389, 393 (App. Div. 1987)). Plaintiffs argue that courts have also found a confidential relationship exists where one party relies upon the other for management of their financial affairs. See ibid. (referencing Adkins v. Sogliuzoo, 2010 U.S. Dist. LEXIS 11107, *16 (D.N.J. Feb. 9, 2010).

Plaintiffs maintain that the record clearly demonstrates that a confidential relationship existed between Joan and Charlie. Plaintiffs argue that Joan's struggles with MSA required Joan to become completely dependent upon Charlie as early as November 3, 2005, "when Joan permitted Mr. Omsberg to become a signatory" on the TD Bank Account due to her

deteriorating health. Id. at 35. Plaintiffs further argue that Joan's dependence manifests itself through the fact that Charlie participated "in all Joan's medical examinations, communicating with Joan's doctors as her surrogate, interpreting her garbled speech, and even medicating (and deciding not to medicate her)." Id. at 36. Plaintiffs contend that Charlie took complete control of her daily living activities including dressing, grooming, and feeding. See ibid.[20] Plaintiffs therefore analogize the facts of this case with those in Folcher, in which the court held that undue influence can be found between a husband and wife based on a confidential relationship. Ibid. "Indeed, the similarity of the facts in this case to the facts in Folcher compels a finding of a confidential relationship." See Ibid; (noting that both disputes involve a marriage for years, a terminally ill individual, control by the healthy spouse as to the administration of medication for the sick spouse, the use of a wheelchair, and general reliance for basic daily care). Moreover, Plaintiffs argue that the facts here go "well beyond the facts found in Folcher and are more than sufficient for a finding of a confidential relationship." Id. at 37 (noting Charlie's attendance of Joan's doctor appointments, control over her written communications, power of attorney for Joan, attendance at estate planning meetings, etc.)

Based upon these facts Plaintiffs conclude that the existence of a confidential relationship has been shown by a preponderance of the evidence and therefore a presumption of undue influence must be applied; thereby requiring Charlie to prove "by clear and convincing evidence not only that 'no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood.'" Id. at 34, 38 (quoting Pascale, 113 N.J. at 31). Indeed, Plaintiffs take the position that Charlie cannot so demonstrate that undue influence was not exerted, and address that issue in four sub-parts: (i) as to the joint TD Bank Account; (ii)

[20] The record suggests that Charlie did not solely perform all of these functions as both parties agree that Joan had assistance at the home from Tammy, and indeed her sons all indicated their own level of support to their mother throughout her final years.

as to the Schwab Account; (iii) as to the funding of the 2010 Trust; and (iv) as to Mr. Scorese's enabling of Charlie's undue influence. See generally id. at 38-51.

As to the joint TD Bank Account Plaintiffs argue that Charlie "admitted under oath that the only reason Joan added [him] as a signatory to the Joint TD Account was because she was having trouble signing." Id. at 38; Exhibit 2 to the Certification of Brendan Judge, Esq. ("Judge Cert.), at 60. Plaintiff states that Charlie's references to the desire to "pool" the assets of Joan and Charlie is misleading and contradicted by the evidence. See ibid. Plaintiffs rely upon the fact that "to Mr. Hugo's knowledge, Joan was never made aware of the amounts that were transferred from Joan's individual accounts into a joint account." Id. at 39; Exhibit B to Gould Cert. at 39. Lastly, Plaintiffs argue that Charlie cannot explain "the hundreds of thousands of dollars of transfers annually, [and] [f]urther the terms of Joan's Will demonstrate that she intended that [Charlie] receive [ ] only an amount equal to the spousal elective share of her assets in trust and nothing more." Ibid. These monies, according to the Plaintiffs represent checks from the TD Bank Account to himself, cash, credit card payments, maintenance expenses on his Oakland house, and various loans and gifts to his family members and others. Id. at 40.

As to the Schwab Account, Plaintiffs argue that financial information indicates that the account could not have been funded jointly from the E-Trade account he and Joan shared, and Charlie therefore exerted influence by failing to explain to Joan that those monies would not pass to her sons upon her death. See Id. at 40-41.

> Mr. Omsberg's assertion [that the Schwab Account was funded with the E-Trade Account] is completely refuted by the account statements for the joint E-Trade Account immediately before the claimed transfer of over $2 million from that account. Specifically, the E-Trade account statement shows an opening balance of $32,839 on January 1, 2008, the day before Mr. Omsberg claims that $2,046,902.65 was transferred from that

> account into the joint Schwab Account. (Gould Cert., Ex. S at E-Trade 000052 and 00050).
>
> Id. at 40.

Plaintiffs state that the report a third-party forensic accountant confirm that the explanation provided by Charlie is refuted by the financial documents. Ibid; Exhibit E to Gould Cert. at 3. For these reasons, Plaintiffs conclude that Charlie cannot clearly and convincingly show that no undue influence was exerted, and genuine issues of fact remain, such that summary judgment should be denied.

With regard to the funding of the 2010 Trust Plaintiffs suggest that the trust remained unfunded because "Joan was not comfortable funding it." Id. at 41. Plaintiffs apparently find a basis for that interpretation in their reading of the following testimony by Darren Hugo:

> Q: Okay. Now, the concept of funding the trust was being discussed for four years. Correct?
> A: Yes.
> Q: Was an amount ever discussed?
> A: No, that was something that Joan wanted to get comfortable with, whatever that amount was going to be.

Ibid; Exhibit B to Gould Cert., at 62. Plaintiffs also state that the funding of the trust was prompted by a number of "transfers" which Charlie executed under his authority of power-of-attorney and in conjunction with Mr. Hugo. Id. at 41-42. Plaintiffs interpret the following testimony of Darren Hugo to support that argument:

> Q: Ok I believe you testified that in or about 2012, Charlie began making the phone calls to direct the transfers. Correct?
> A: Correct.
> Q: At that point, do you know whether Joan had any involvement in the decisions to make those transfers?
> A: According to Charlie, when he called, he would say, "I spoke with Joan; Joan would like a transfer."
> Q: Okay. Would you do anything to confirm that?
> A: Not having the power of attorney, we wouldn't be required to.

Id. at 42; Exhibit B to Gould Cert., at 38-39. Plaintiffs surmise that these "transfers", which occurred in 2012 (whereas the funding of the 2010 Trust was completed in 2011) demonstrate undue influence by Charlie as to the funding of the 2010 Trust.

Plaintiffs further argue that a genuine issue exists as to the undue influence claim based upon "Mr. Scorese's unwitting enabling of Mr. Omsberg's undue influence." See id. at 42. Plaintiffs contend that the certification and testimony of Mr. Scorese actually confirms that Joan's decisions were the product of undue influence. Id. at 42-43. Plaintiffs state that Mr. Scorese confirms Charlie's presence at various meetings, and because Mr. Scorese knew that Joan was dependent upon Charlie, he "either ignored or failed to recognize the red flag" that was Charlie's undue influence. Id. at 43. Based upon the presence of Charlie at a number, if not all of Joan's estate planning meetings, Plaintiffs take the position that a genuine issue of material fact persists as to the undue influence claim. See id. at 43-45.

Plaintiffs question why the trust remained unfunded for years, and assert that this question creates a genuine issue of material fact. Id. at 44. Plaintiffs argue that Mr. Scorese "failed to discuss with Joan that the funds in the Joint TD Account and the Schwab Account would pass automatically to Mr. Omsberg upon Joan's passing. Indeed, prior to August 15, 2011, Mr. Scorese never discussed that topic with Joan." Id. at 45; (Exhibit C to Gould Cert, 110-11 and 127-28).[21] Plaintiffs raise suspicion as to the September 14, 2011 meeting with Mr. Scorese, referring to the meeting in the car to discuss the funding of the 2010 rust as "highly unusual." Id. at 46. Plaintiffs raise further suspicions as to why Mr. Scorese's colleague left the car before the end of the meeting. Ibid. Plaintiffs sate that Charlie's offer to leave the car was a

[21] In fact on page 109 of the testimony Mr. Scorese states the following: "I don't have a specific recollection, but I have a general recollection that we discussed [the right of survivorship associated with joint accounts and the implications to the estate planning] it at least once, and that she understood that a joint account with right of survivorship would pass to Charl[ie]." Exhibit C to Gould Cert., 109.

"meaningless gesture" and that the subsequent memorialization of the meeting by Mr. Scorese was "an overt attempt to cover his own interests." Id. at 47.

Even more, Plaintiffs argue that Mr. Scorese improperly jointly represented Joan **and** Charlie in connection with the creation of Joan's estate plan and argue that a "lawyer cannot serve two masters in the same subject matter if their interests are or may become actually or potentially a conflict." See id. at 47-48 (quoting In re Chase, 68 N.J. 392, 396 (1975)). Plaintiffs note that Mr. Scorese failed to obtain written consent from either Joan or Charlie in connection with the joint representation, as required under New Jersey Rule of Professional Conduct 1.7, and that Mr. Scorese further failed under his obligations under RCP 1.14. Id. at 48. Based upon all of these issues related to the funding of the 2010 Trust, "[a]t the very least there are certainly factual issues as to whether Mr. Omsberg was unduly influencing Joan." Id. at 51.

Third and finally, Plaintiffs argue that Charlie's undue influence provides a basis for removing him as trustee to the 2010 Trust, pursuant to N.J.S.A. 3B:14-21(c) which provides ground for removal when a fiduciary "embezzles, wastes or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary." Id. at 51.

V. Third-Party Defendant's Reply

In Reply Third-Party Defendant reasserts the following:

> All three sons admitted at deposition that they knew of no facts or evidence of undue influence in connection with the transfers, and the rest of the evidence is consistent with that testimony. The lack of undue influence by Charlie is further underscored by the fact that Joan gave her sons at least a combined $3.6 million in gifts during her life and left approximately two-thirds of her estate to them, while leaving about one third to Charlie. As Scorese testified, this distribution scheme parallels Charlies' rights under the elective share statute, and compels the conclusion that Charlie did not unduly influence Joan.

Reply Brief, 1.

Defendant states that the Plaintiffs have abandoned their claims in the Second and Third Counts of the Complaint, to remove Charlie as a co-executor and for an accounting, respectively, and the Court should likewise dismiss those claims. Id. at 2. Defendant argues that Plaintiffs grossly misrepresent the amount of funds that have been withdrawn from various accounts to the TD Bank Account. See id. at 2-3. As to the issue raised by Defendants on the transfer of funds from the E-Trade Account to the Schwab Account, Defendant states that the "the account statement [Plaintiffs] point to is for an E-Trade checking account with account number ending in -9201, and is not for the E-Trade Account with [an] account number ending in -6100 [which is the account] that the funds were actually transferred from." Id. at 4.

Defendant states that Plaintiffs Opposition is replete with medical opinions made by Plaintiffs' counsel, and that the Plaintiffs have not in fact provided any medical expert. Id. at 5. "Th[is] Court correctly observed at the September 22, 2017 hearing on the Order to Show Cause that there was nothing in the record suggesting that Joan was unaware or incapable of making decisions until the very end of her life." Ibid; Exhibit N to Fiorenzo Cert., 17:22-18:6. Defendant also notes that the Opposition does not contest or mention the gifts that Joan bestowed upon her children from 1996 to 2015, totaling $3.6 million to the three children. Id. at 6-7.

Notwithstanding the merits of the case, Defendant first argues that the Opposition violates R. 1:6-6 as it presents alleged facts without providing supporting affidavits. See id. at 7-8. To that end, "[t]he Opposition Brief violates this Rule because, as noted . . . it is replete with statements of opinion by counsel regarding Joan's medical condition and reports. But counsel has no personal knowledge regarding Joan's medical condition, and counsel's medical opinions constitute inadmissible hearsay." Ibid.

Defendant maintains that the transfers made from Joan's personal accounts to joint accounts held with Charlie do not constitute *inter vivos* gifts. Id. at 8-9.

> [Plaintiffs] instead seek to confuse the issue by pointing to cases involving the creation of joint accounts and the issue of whether such accounts were intended to have survivorship rights. However, the only issue before the Court and the only claim pleaded in the Third-Party Complaint, is whether certain transfers of Joan's personal assets to the TD Bank Account were *inter vivos* gifts obtained through undue influence.
>
> Id. at 10.

Defendant argues that Plaintiffs have not provided a sufficient basis to raise a presumption of undue influence and place the evidentiary burden on Charlie because the arguments made in furtherance of that position rely upon inadmissible medical evidence (for the reasons set forth above), and are untrue insofar as they assert Charlie took complete control of Joan's finances. Id. at 10. Irrespective of which parties carries the evidentiary burden, Defendant reasserts the position that the deposition of Danny, Jamie, and Stephen confirms that none of them have any evidence as to what undue influence Charlie allegedly exerted over Joan. Id. at 9-10. The lack of undue influence, according to Defendant, is further evidenced by the amount of money Joan gifted her sons during her life, and the amount they stand to still receive under the terms of the 2010 Will and 2010 Trust. Id. at 11 (Defendants state that the total the Sons received through gifts and under Joan's estate plain is approximately $10.6 million).

As to the funding of the 2010 Trust, Defendant argues that the previous non-funding of the trust is not suspicious and this Court noted such at the September 22, 2017 Order to Show Cause hearing: "[t]here's lots of reasons people don't fund trusts. Not necessarily because they wanted to or didn't want to." Id. at 13; Exhibit E to Sullivan Cert at 36:24-37:15. Defendants reassert the support provided by Mr. Scorese and state that his memorialization demonstrates that

no undue influence is present here. Ibid. To the extent Plaintiffs seek to discredit Mr. Scorese, Plaintiffs contend that the factual record, including evidence that there was consideration to fund the trust with up to $3 million or $4 million in funding, and that irrespective of any alleged conflict of interest, the standard for undue influence remains unchanged and summary judgment is still appropriate based upon the record here. Id. at 14.

Lastly, Defendant states that the Plaintiffs no longer seek to compel an accounting and otherwise do not address the claim to remove Charlie as a co-executor. Id. at 15. Plaintiff argues that summary judgment dismissing those counts is therefore appropriate. Defendant states that the Plaintiffs' argument to remove Charlie as a trustee "should be rejected because it was not alleged in the Third-Party Complaint and has never been asserted until now." Ibid. On the merits, Defendant states that Plaintiffs have failed to show a basis in law to remove Charlie as a trustee to the 2010 Trust. Ibid.

VI. Further Submissions to the Court

As aforesaid, the court received a supplemental letter submission from Plaintiffs' counsel on December 21, 2017, regarding a recent deposition of Joan McBride's accountant. The substance of that submission is as follows:

> Mr. Omsberg's motion relies heavily on conversations that Joseph Scorese certified the decedent, Joan McBride, had with her accountant, Frank Centrella, including a conversation in June 2011 in which Mr. Centrella allegedly advised Joan of the benefits of funding the 2010 Trust. (Moving Br. At 12, 16, 20-21; Scorese Cert. at ¶¶ 3, 13 and 24). Mr. Scorese further certified that after Mr. Centrella allegedly had that conversation with Joan, MR. Centrella telephoned Mr. Scorese to advise that "the 2010 Trust had not yet been funded and that it should be funded due to Joan's deteriorating health." (Scorese Cert. at ¶ 24; Moving Br. At 20-21).
>
> Mr. Centrella was deposed on Tuesday December 19, 2017, and a true copy of relevant portions of his transcript are attached hereto

> as Exhibit A. As Your Honor can see, Mr. Centrella has no memory of ever meeting or speaking to Joan (Ex. A at 6-7; 8-9; 10-11; 14). He does recall, however, meeting and speaking to Mr. Omsberg on multiple occasions. (Id. at 7-9; 11). He further recalls a telephone conversation with Mr. Scorese in June 2011, but does not recall the details. (Id. at 22-25).
>
> In light of MR. Centrella's testimony, the following factual conclusions are inescablabe: [1] It was Mr. Omsberg, not Joan, who spoke to Mr. Centrella about the benefits of funding the 2010 Trust; [2] It was Mr. Omsberg, not Joan, who wanted the 2010 Trust funded due to Joan's deteriorating health; and [3] It was Mr. Omsberg who was prompting the professionals to prompt Joan to fund the 2010 Trust.
>
> Consequently Mr. Omsberg is certainly not entitled to summary judgment.

Counsel for Charlie submitted a fax dated December 21, 2017, contesting the characterization of Mr. Centrella's testimony:

> In the event the Court elects to consider [Plaintiff's Letter], we respectfully request you consider this response. The Judge Sur-Reply is a complete distortion of Mr. Centrella's deposition testimony. Nothing in his testimony supports their conclusions that it was Charlie and not Joan who wanted the 2010 Trust to be funded and who prompted its funding. Contrary to their assertions, Mr. Centrella did, after having his memory refreshed, recall the details of his conversation with Mr. Scorese in June 2011. Specifically, he recalled discussing with Mr. Scorese that, as Mr. Scorese certified, Danny was having financial difficulties, that he had pressed Joan for money, and that Joan had given him approximately $650,000 in gifts. See Ex. A at 24:9-26:1. Mr. Centrella also recalled discussing with Mr. Scorese at that time the possibility of Joan's sons interfering with the administration of her estate and jeopardizing Joan's wishes to have Charlie live in the Marital Home after her death. Id. at 26:2-23. Mr. Centrella further testified that, to the extent he could not recall specifics of his discussions with Mr. Scorese in May 2005, May 2010, and June 2011, he did not mean to suggest that they did not occur as Mr. Scorese certified to; he merely did not recall. Id. at 21:15-23, 22:13-18, 23:25-24:7. Finally, Mr. Centrella testified that: (i) his interactions with Joan and Charlie were minimal because he had a limited role on his firm's representation of them; (ii) others at his firm, including Emil Baur and Elizabeth Vecchione, were the

> primary client contacts for Joan and Charlie; (iii) he was not involved in discussions regarding the funding of the 2010 Trust; and (iv) his role was primarily to review tax returns, and he was not involved in financial or estate planning for Joan. Id. at 16:23-17:25, 18:13-19, 27:17-28:3, 28:4-18, 29:6-18.
>
> For the reasons stated above, the Court should disregard the unauthorized Sur-Reply. Alternatively, we would request you consider this response.

The Court considered both submissions in addressing the summary judgment application at oral argument, and in deciding the motion.

VII. Analysis

A. Standard of Review for Summary Judgment

The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court may render summary judgment "on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)." Id. When the evidence is so one-sided that one party must prevail as a matter of law, the Court should not hesitate to grant summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record viewed most favorably to the party opposing the motion demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

In making a ruling on summary judgment, the judge does not make credibility determinations but instead affords the non-moving party all favorable inferences of fact. Kopin

v. Orange Products, Inc., 297 N.J. Super. 353, 366. Moreover, "in determining the summary judgment motion, the motion must use the same evidentiary standard of proof that would apply at trial on the merits." Ibid. Accordingly, the court must determine whether "the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533.

While our courts have cautioned the granting of summary judgment in actions that depend upon a determination of a person's state of mind, e.g. Lombardi v. Masso, 207 N.J. 517, 544 (2011), if a court determines that there is no genuine issue of material fact, the court is not precluded from summary judgment, notwithstanding issues involving state of mind. Fielder v. Stonack, 141 N.J. 101, 129-30 (1995); Bower v. The Estaugh, 146 N.J. Super. 116, 121, 369 A.2d 20 (App. Div.) (affirming grant of summary judgment where court discerns "no evidence of undue influence") *certify. denied*, 74 N.J. 252, 377 A.2d 658 (1977).

B. Application of the Undue Influence Doctrine to the Transactions

The parties disagree in the first instance as to whether a claim for undue influence can be brought as a matter of law based upon the transactions here. Therefore, the Court first considers whether an undue influence claim can be maintained, as a matter of law, as to the joint accounts between Joan and Charlie.

Defendant argues that the transfer of funds to the TD Account do not constitute *inter vivos* gifts as a matter of law because Joan did not relinquish "ownership and dominion over the funds." Defendant Brief, 34.[22] Plaintiffs rely upon the DeFrank decision. In re Estate of DeFrank 433 N.J. Super. 258 (App. Div. 2013). DeFrank reiterated the general proposition that, "[i]t is ordinarily improper to grant summary judgment when a party's state of mind, intent,

[22] An *inter vivos* gift requires three elements: (i) an unequivocal donative intent on the part of the donor, (ii) an actual or symbolical delivery of the subject matter of the gift, and (iii) an absolute and irrevocable relinquishment by the donor of ownership and dominion over the subject matter of the gift. In re Dodge, 50 N.J. 192, 216 (1967).

motive or credibility is in issue. . . Thus, it is clear that questions of a party's state of mind, knowledge, intent or motive should not generally be decided on a summary judgment motion." 433 N.J. Super. at 266-67. Moreover, Plaintiffs refer to the Multi-Party Deposit Act ("MPDA") statutory presumption that a right of survivorship attaches to a joint bank account: "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." See N.J.S.A. 17:16I-5(a). More pertinently, the Multi-Party Deposit Account Act ("MPDA")'s statutory presumption as to the creation of the right of survivorship to joint bank accounts, "may be overcome with evidence showing that undue influence was used in the creation of the joint accounts, or that the accounts were solely for the convenience of the depositor." Id. at 267-68. Plaintiffs argue that the Appellate Division did not consider whether the transfers in DeFrank constituted *inter vivos* gifts but nevertheless considered the plaintiff's claim of undue influence. Therefore, Plaintiffs argue that undue influence is not strictly limited to those transfers that strictly comply with the three elements of an *inter vivos* gift, and can be present, and remedied, in the context of creation and utilization of a joint account. The Court agrees.

While the DeFrank decision contemplates the creation of a joint account, and not the maintenance of the account thereafter, the Appellate Division plainly held that "where a confidential relationship exists between a defendant and [the decedent], a defendant has the burden of showing that she did not use undue influence and that her mother understood the legal effect of *the transfer of assets into the joint accounts*, namely that her assets would pass to defendant rather than in accordance with the terms of her Will." Id. at 269 (emphasis added).

Accordingly, DeFrank is authority for the proposition that Plaintiffs' undue influence claim can be maintained as a matter of law under the facts of this case.

Additionally, Defendant fails to point to any legal authority that stands for the proposition that the doctrine of undue influence has no applicability in the context of creating joint accounts, or adding a person to an account in which that person had no prior ownership interest. One can unduly influence a failing loved one to add one to an account that will inure to the benefit of the undue influencer upon the failing loved one's passing. And if the confidential relationship persists, and the pernicious undue influence is exerted up till the death or incapacity of the failing loved one, undue influence can be established, notwithstanding that the failing loved one technically continued to possess the legal authority to withdraw the jointly-titled funds. The added party here was entitled in law to withdraw all funds immediately upon being added. The gift analysis is appropriate to such sets of circumstances, in the Court's view.

The MPDA provides for a *rebuttable* presumption of right of survivorship is created through a joint account. See N.J.S.A. 17:16I-5(a). Indeed, the presumption would hardly be rebuttable if a litigant was not able to maintain a cause of action for undue influence to refute a decedent's intent as to the joint account. Furthermore, the transfers at issue in this litigation concern funds that could or would have been part of the estate, but for the right of survivorship associated with Joan and Charlie's joint accounts. Therefore, the undue influence claim relates to the underlying estate litigation and is properly pled.

Accordingly, Plaintiffs undue influence claim is not unsustainable as a matter of law and the Court will proceed to the merits of said claim, in the context of Defendant's motion to dismiss it.

C. The Existence of a Confidential Relationship, a Presumption of Undue Influence and the Accompanying Evidentiary Standard

In a will contest predicated on undue influence, the burden of proving undue influence rests upon the contestant unless (i) the will benefits one who stood in a confidential relationship with the decedent, and (ii) there are additional suspicious circumstances. In re Rittenhouse's Will, 19 N.J. 376, 378-79 (1955). Where both of those criteria are met "the law raises a presumption of undue influence and the burden of proof is shifted to the proponent." Ibid. However, this litigation arises within the context of *inter vivos* transfers. "[With] respect [to] an *inter vivos* gift, a presumption of undue influence arises when the contestant proves that the donee dominated the will of the donor, or when a confidential relationship exists between donor and donee[.]" Pascale, 113 N.J. at 30. The contestant still carries the burden of proving by a preponderance of the evidence that a confidential relationship exists, i.e. establishing that a confidential relationship was "more likely than not." See In re Estate of Ostlund, 391 N.J. Super. 390, 402-03 (App. Div. 2007).

"A confidential relationship is difficult to define, but encompasses all relationships 'whether legal, natural or conventional in origin, in which confidence is naturally inspired, or, in fact, reasonably exists.'" Id. at 34 (quoting In re Fulper, 99 N.J. Eq. at 314). Stated differently, a relationship may be deemed confidential when "the relations between the parties are of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other and that consequently they did not deal on terms of conditions of equality." Estate of Ostlund, 391 N.J. Super. at 402. The classification of the relationship can span a wide scope:

> It comprehends all cases where "the relations between the [contracting] parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on

> the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; or on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable."
>
> Pascale, 113 N.J. at 34 (quoting In re Fulper, 99 N.J. Eq. at 314; Cowee v. Cornell, 75 N.Y. 91, 99-100 (1878)).

Although a confidential relationship naturally exists between spouses, "[t]he courts are extremely hesitant to shift the burden of proof upon [one spouse] to show that [he or] she was not guilty of exercising undue influence even where [suspicious] circumstances exist." In re Livington's Will, 5 N.J. 65, 72 (1950). Nevertheless, where a contestant demonstrates the existence of a confidential relationship by a preponderance of the evidence, a presumption of undue influence is applied. Under that presumption "the donee has the burden of showing by clear and convincing evidence not only that 'no deception was practiced therein, no undue influence was used, and that all was fair, open and voluntary, but that it was well understood.'" Pascale, 113 N.J. at 31 (quoting In re Dodge, 50 N.J. at 227).

Here, viewing the motion record in the light most favorable to Plaintiffs, the relationship between Joan and Charlie was clearly confidential and dependent, even more so than might exist between spouses where one person is not plagued with debilitating physical limitations. Charlie was not only Joan's spouse but was also a fiduciary for her financial affairs and the primary care giver for Joan's extensive medical needs during the last decade or so of her life. For example, Charlie was granted a Power of Attorney for Joan, to assist her in managing her affairs, added as a co-signatory to the TD Bank Account, and provided handwriting assistance when Joan signed checks, attended and/or participated in financial meetings, and paid bills on behalf of both of them. Moreover, the parties agree the active role Charlie played in managing Joan's medical affairs, and as a conduit of information from Joan (or allegedly from Joan) to her accounting and

legal advisors. Charlie retired in 2005 for the purpose of assisting Joan with her slowly deteriorating health. Charlie drove Joan to countless doctors appointments and exercised his Power of Attorney to provide for hospice care to Joan in her final years.

As stated, a "confidential relationship" cannot be precisely defined, and therefore must be decided on a case by case basis. However, a confidential relationship has been generally been found to exist where the parties do not deal on equal terms, due to "either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; *or* on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable." In re Fulper, 99 N.J. Eq. at 314; Cowee v. Cornell, 75 N.Y. 91, 99-100 (1878) (emphasis added). Although Charlie may not have had an over-mastering influence due to superior knowledge, he did in fact have a fiduciary relationship with the Joan as demonstrated by the Power of Attorney and designation as a co-owner to the TD Bank Account. Moreover, the parties agree that Joan was afflicted with terrible physical ailments such that, for purposes of summary judgment, the fact finder could conclude rendered her increasingly dependent upon Charlie. It also appears uncontested that Joan increasingly and naturally put her faith and trust in her husband due to that dependence, above and beyond the level of trust and dependence commonly attendant to parties to a marital bond. Indeed, it appears as though at least one of the motivations for Charlie being designated as a co-owner and holding a Power of Attorney was due to Joan's deteriorating health and weakness. Joan relied upon Charlie to pay bills and run the financial affairs for both of them as her MSA continued to worsen.

The current motion before the Court is Defendant's Motion for Summary Judgment. Accordingly, Plaintiffs are entitled to every reasonable inference of fact. The fiduciary and caregiver role that Charlie occupied in Joan's life, coupled with this Court's obligation to afford

Plaintiffs every reasonable inference of fact, requires this Court to find that Charlie was in confidential relationship with Joan. Plaintiffs have demonstrated by a preponderance of the evidence that Joan's MSA caused her physical afflictions that rendered her to be in a progressively weakened physical state, with her mobility and ability to communicate materially compromised, yielding a circumstance – for summary judgment purposes – of trust and dependence: i.e. a confidential relationship.

Based upon the demonstrated weakened physical state of Joan, coupled with her demonstrated reliance upon and trust in her husband Charlie, Plaintiffs have demonstrated that Charlie occupied a confidential relationship with Joan.[23]

D. Undue Influence

As discussed, where a confidential relationship is shown, "the donee has the burden of showing by *clear and convincing evidence* not only that 'no deception was practiced therein, no undue influence was used, and that all was fair, open and voluntary, but that it was well understood.'" Pascale, 113 N.J. at 31 (quoting In re Dodge, 50 N.J. at 227) (emphasis added). Moreover, when making a ruling on summary judgment a court must apply the evidentiary standard that would apply at trial. Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 366. Accordingly, Defendant must show that there is no genuine issue of fact, such that it has clearly and convincingly been shown that the transactions were fair, open, voluntary, and well understood. Moreover, a court is to refrain from making credibility determinations, and where credibility determinations must be made, summary judgment should not be granted. See Riccardi v. Weber, 350 N.J. Super. 453, 470 (App. Div. 2002).

[23] There is no evidence in the record that would empower a finder of fact to infer or conclude that Joan lacked the **capacity** to enter into the challenged *inter vivos* transactions, only that she was of **diminished** capacity to formulate and implement same, and vulnerable to undue influence.

"An adult donor is generally presumed to be competent to make a gift." Pascale, 113 N.J. at 29; accord Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981) (holding that in any will contest, the law presumes that the testator was of sound mind and competent when he executed the will.) Undue influence is "a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind." In re Estate of Stockdale, 196 N.J. 275, 303 (2008) (citing Haynes, 87 N.J. at 176). Motive and opportunity to exercise undue influence are not sufficient. See In re Gotchel's Estate, 10 N.J. Super. 208, 213 (App. Div. 1950). Coercion or domination must be exerted upon the testator's mind to a degree sufficient to supplant the testator's wishes. In re Will of Liebl, 260 N.J. Super. 519, 528 (App. Div. 1992).

Plaintiffs' claim of undue influence concerns three sub-issues: (i) the funding of the 2010 Trust with Joan's UBS Account and the marital home; (ii) the creation and funding of the joint Schwab Account in 2008; and (iii) Joan's transfer of funds from her UBS account to the Joint TD Bank Account from 2005, when Charlie was made a co-signatory on the account, until Joan's date of death of January 2, 2016 (above the $20,000 per month allotted to living expenses and the gifts received by Joan's three sons).

In sum, the facts presented to this Court demonstrate that Charlie's involvement in Joan's affairs increased as her physical ailments worsened over the course of a number of years. In light of that increased role, Charlie was present at a number of financial and estate planning meetings. Charlie was called upon to become a fiduciary, to pay bills on behalf of the two of them, guide her hand when signing checks, and even act as an interpreter for Joan in the later years of her life. Joan's MSA diagnosis required Joan to become increasingly dependent upon her husband. This Court is cognizant of the extent to which Mr. Hugo and Mr. Scorese

interacted with Joan throughout the later stages in her life. The Court acknowledges the strength and plausibility of Defendant's argument that Joan long aimed to achieve balance in dividing her assets between her children and her husband, and in crafting an overall gifting and estate plan, mindful of her husband's elective share rights. However, at this stage in the proceedings, the circumstances of those arrangements and meetings, and the making and implementing of the decisions regarding these *inter vivos* transfers, allow an inference that Charlie's involvement and/or presence at them *could* have applied undue pressure to Joan to make certain financial and estate planning decisions in Charlie's favor, amounting not just to influence but to undue influence. The Court is also mindful that undue influence is frequently proven, not by overwhelming direct evidence or admissions, or particular personal knowledge of those alleging it, but through circumstantial evidence and logical inferences therefrom. While all parties agree that Joan was a strong-willed individual who achieved a great deal of success in her life, the record is replete with examples of both the extent to which she relied upon Charlie, and further, the extent to which Charlie became increasingly involved in her financial affairs and estate plans. In light of Joan's dependence and Charlie's fiduciary and care-giving role, genuine issues of material fact persist. When, as here, a presumption of undue influence is applied, Charlie is required to show that the various transactions made by Joan were the product of open, fair, voluntary decisions that were also well understood, in the face on all inferences from the facts going against him. That burden is not met on this record.

The Court further considers these three sub-issues in turn below.

i. *The Funding of the 2010 Trust*

First, genuine issues persist as to whether the manner in which Joan funded the 2010 Trust was truly open, fair, voluntary, and well understood by her.

It is undoubtedly true that the funding of the trust had been contemplated as part of Joan's estate planning as early as the 2006 Will and Trust. Indeed, the parties agree that the creation of the 2010 Trust was entirely consistent with Joan's testamentary intent. However, the means by which that trust and the subsequent 2010 Trust would be funded are contested. Defendant points to the fact that Joan was represented by counsel, Mr. Scorese, and maintained regular contact with her financial advisor, Mr. Hugo, during the time in which the 2010 Trust was funded. Plaintiffs point to evidence that the occurrence of the September 2011 Meeting was prompted in part by certain communications between Charlie and Mr. Centrella, without Joan. Plaintiffs also point to the fact that the meeting took place within a car. The Certification of Mr. Scorese also explicitly acknowledges that his colleague was not present for the entirety of that meeting, though Charlie was. Moreover, Plaintiffs point to the fact that Mr. Scorese represented both Charlie and Joan, and therefore argue that Scorese's counsel was not truly independent.

For purposes of summary judgment, Plaintiffs are entitled to every reasonable inference of fact. While receiving every adverse inference, Charlie is required to clearly and convincingly demonstrate that no undue influence was exerted as to the funding of the trust. Based upon the facts discussed above, coupled with all reasonable inferences being afforded to the Plaintiffs, the Court finds that Charlie is unable to meet his exceptionally high evidentiary standard at this juncture.

Summary Judgment as to the funding of the 2010 Trust is therefore denied.

ii. *The creation of the joint Schwab Account*

Second, material issues of genuine fact survive as to the funding and creation of the joint Schwab Account.

In reference to the Schwab Account, the parties offer different descriptions of how the account was funded. Plaintiffs and Defendant point to different joint E-Trade accounts, and the Court lacks the requisite evidentiary basis to decide definitively where the money originated from. While the Defendant attaches a purported copy of the E-Trade account with an alleged handwritten note from Charlie, the Plaintiffs also provide a forensic accounting that raises a genuine dispute as to which joint E-Trade Account (either the account ending in –9201 or –6100) truly funded the Schwab account.

To the extent Charlie seeks to rely upon his own deposition in support of his position, the Court is unable to make credibility determinations at this time. Therefore, although the Court may fully credit Charlie's testimony at trial as being natural and supported and truthful, it is unable to do so here. Here, the Court recognizes that the facts may not support Plaintiff's undue influence claim, vis-à-vis the Schwab Account, under a preponderance of the evidence standard, at this joint account apparently simply evolved out of a prior joint account. Nevertheless, and as discussed above, sufficient evidence exists that a confidential relationship existed between Charlie and Joan, and Charlie is therefore required to overcome the presumption of undue influence. Thus, while the factual predicate is thin, it is thin in both directions, and Charlie cannot clearly and convincingly show that there was no undue influence exerted as to the creation and funding of the Schwab Account, in the context of a summary judgment motion.

Based upon these material disputes, and in the context of summary judgment, the Defendant has not clearly and convincingly demonstrated that the transfers associated with the Schwab Account resulted from an open, fair, and voluntary decision by Joan.

iii. *Joan's transfers from her UBS Account to the joint TD Bank Account*

Third, material issues exist in connection with the various transactions between Joan's UBS Account and the joint TD Bank Account.

In the first instance, the parties disagree as to why Charlie was added as a co-signatory to the TD Bank Account and further disagree as to whether the funds expended from that account were in accordance with Joan's instructions to Mr. Hugo that $20,000 was to be used per month for living expenses. Charlie maintains, in reliance upon the testimony of Mr. Hugo, that Joan retained access to the TD Bank Account and was kept up to date as to the transactions being undertaken by Charlie and through Mr. Hugo. Plaintiffs offer conflicting factual assertions: (i) that Joan's eyesight became impaired (allegedly as early as 2006) and that would have frustrated her ability to truly review the TD Bank Account transactions; (ii) that Charlie had a Power of Attorney for Joan and spoke to Darren Hugo on her behalf, thereby prompting Mr. Hugo to act without further confirmation from Joan; and (iii) the expenditures from the TD Bank Account exceed the amount (as determined by $20,000 per month) that Joan decided was appropriate for the living expenses of Charlie and herself.[24]

Based upon these facts, in consideration of the high bar evidentiary standard Charlie is required to meet, the Court finds that summary judgment as to Plaintiffs' claim that Charlie exerted undue influence over Joan, as manifested by the transactions from her UBS Account to the TD Bank Account, must be denied.

The Court notes that there is a substantial body of evidence in this record that would and may support a finding that Joan was acutely involved in a voluntary and informed way in the formulation of her financial affairs – including not just as to her Will and both also as to *inter*

[24] Indeed, Plaintiffs argue that even when considering the amounts of money that were gifted to the sons from 2005 until 2016, excess sums of money were still expended from the TD Bank Account, over and above the monthly stipend for living expenses.

vivos arrangements – and that she skillfully calibrated these matters over many years, balancing her desires and intentions for lovingly and generously providing for her sons while at the same time providing lovingly and generously for her long-term, albeit second marriage partner. Thus, Defendant may well be able to ultimately succeed on the merits of the case. But the above stated reasons require this Court to find that Defendant has not demonstrated that there is no genuine issue of material fact, such that it has been clearly and convincingly shown that the various transfers at issue in this litigation were not the product of undue influence. [25]

VIII. Conclusion

For the foregoing reasons the Court will deny Defendant's Motion for Summary Judgment. An Order accompanies this decision.

_____

ROBERT P. CONTILLO, P.J.CH.

Cc: Patrick C. DeMarco, Esq. (w/encl) – **VIA FAX AND MAIL**

[25] As the court has declined to dismiss the claims of undue influence, (Count One), the court will not dismiss the claim seeking Charles' removal as Trustee (Count Two). The claim for an accounting (Count Three) was withdrawn.