FILED, Clerk of the Appellate Division, July 25, 2023, **A-001838-22**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

IN THE MATTER OF THE ESTATE OF LYNDA NATHANSON SUTTON, DECEASED	:	**DOCKET NO. A-001838-22-T4**
	:	**ON APPEAL FROM:**
	:	**TRIAL COURT/STATE AGENCY** **Superior Court of New Jersey** **General Equity, Probate Part** **Atlantic County**
	:	**TRIAL DOCKET-P-127920-21**
	:	**SAT BELOW** **Hon. M. Susan Sheppard, P.J.Ch.** **Hon. John C. Porto, Acting P.J.Ch (Motion Judge)**
	:	**CIVIL ACTION**

PETITIONER'S AMENDED BRIEF SUPPORT OF APPEAL

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PROCEDURAL HISTORY

On May 6, 2021, Lynda Nathanson Sutton (hereinafter "Decedent") died from complications of Covid, leaving behind her spouse of 29 years, Petitioner Roy F. Sutton (hereinafter "Petitioner")(P[1] 120a, 373a). Petitioner received a copy of his wife's will and was shocked to find that it disinherited him and named his stepdaughter, Sandra Williams (hereinafter "Respondent"), as sole beneficiary. (7T[2] 168:14-23; 169:20-23).

After Petitioner was advised that no original wills were located, on May 28, 2021, Petitioner filed a Verified Complaint and an Order to Show Cause for a declaration that the Decedent died intestate, for his appointment as administrator of the estate and for a constructive trust over one half of the estate assets. (P87a to 98a).

On June 17, 2021, Respondent filed an Answer and Crossclaim averring *inter alia,* that she possessed the original Will from the Decedent and attached a photocopy of a document titled "Ante-Nutial Agreegment[3]"(sic)(hereinafter "Photocopy") and claiming Petitioner waived his right to any Estate assets. (P 99a to P104a; P100a at 17). Petitioner filed an amendment to his Complaint to add claims of undue influence or in the alternative, for an elective share of the Decedent's Estate. (P121a to 131a). Petitioner never signed the Photocopy and claimed it was a forgery that failed to comply with the New Jersey Premarital Agreement Act. (P121a to 131a; 8T62:15-21).

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[1] Pa means Petitioner's Appendix in Support of Appeal

[2] 7T means Transcript of Trial dated August 29, 2022.

[3] The photocopy is titled "Ante-Nutial Agreegment"(sic) but for purposes of this appeal, it is referred to as the "Photocopy." P110a.

Patricia McDougall, the Deputy Surrogate for Atlantic County (hereinafter "Deputy McDougall"), reviewed the pleadings filed in this case and advised Respondent's attorney that she recognized the signature of Ralph Perone above his typed name on the signature pages. (10T[4] 13:12-14; 10T 15:19-25; 10T 33:2-5; 10T 16:1-10). Around February 4, 2022, Deputy McDougall asked the Surrogate of Atlantic County if she could serve as a witness in this case, who stated that he would talk to the Motion Judge who then had this case. (P 354a; 10T18:6-17. P 354a, 352a; 10T 19:6-10; 19:11-15). On June 16, 2022, Respondent identified Deputy McDougall as a witness in this case. (10T 20:4-12; P356a).

In the meantime, the Court made rulings that precluded the Petitioner from obtaining needed discovery. On May 20, 2022, on Petitioner's motion to Compel Discovery from Respondent, the Motion Judge, *sui sponte*, ruled that three of Petitioner's interrogatories to Respondent "were irrelevant to this probate matter" that requested Decedent's discussions with Respondent about her financial matters (P62a at No.8); her filing for bankruptcy protection, (P63a at No.9) and the men who had a relationship with Respondent. (P63a at No. 10; P53a to P67a; P174a-P 181a; P62a). Respondent had not previously objected to these interrogatories on the basis of relevance. (P213a to 214a; P213a to 214a; 4T3:2-7). On June 21, 2022, when Petitioner filed a motion to compel Respondent to re-appear for deposition to answer the

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[4] 10T means Transcript of Trial dated September 1, 2022.

questions about Respondent's discussions with the Decedent about finances, her live-in boyfriend, the Brigantine publication about her live-in boyfriend, and her bankruptcy filing, the Court[5] denied the motion finding the subject matters were previously found to be irrelevant. (P84a; P236a, P238a at p. 20; P240a at P91; P241a at p. 93, P243a at p.105- 106; P 245a at 124. 5T[6]13:7-15).

Petitioner filed a motion *in limine* to bar the testimony of the Deputy McDougall's recollection as to the signature of Ralph Perone that was from at least 20 years ago. (P336a at 12; P337 at 13; P335 a to 339a). The Court denied the motion but recognized that Deputy McDougall worked with her in the Courthouse. (7T:6:2-18;7T6:12-18).

A bench trial began on August 29, 2022. Decedent's former friend, Kathleen Whelan (hereinafter "Ms. Whelan") testified that she received text messages from Respondent when the case started, telling her what the case was about and Respondent's positions. (10T 113:5-8; 10T128:15-17). The Court denied Petitioner's request to review the text messages as an invasion of privacy. (10T128:17 to 129:7).

On September 19, 2022, after six days of testimony, before closing arguments were provided, the Court granted Respondent's motion for a directed verdict, dismissing Petitioner's claims of undue influence in Counts 1 and 3 of his Amendment

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[5] The case was transferred from the Honorable John Porto, J.S.C., to the Honorable Susan Sheppard, P.J.Ch. shortly before this motion.

[6] 5T means Transcript of Motion dated Jully 5, 2022.

to Complaint. (12T177:5 to 178:11; 191:15-22). The Court found that the Petitioner failed to overcome the presumption for undue influence under the Will by clear and convincing evidence. (12T177:14-17).

The Court filed an Order and Final Judgment dated February 7, 2023 (hereinafter "Opinion") that found that the Photocopy was valid and constituted a waiver of the Petitioners' spousal share of the Estate. (P7a, P42a). The Court granted, in part, Count Two of Petitioner's Complaint, finding that a constructive trust should be imposed on the Home, granting Petitioner a life estate without the power to alienate his interest in that property. (P7a, 43a-44a). The Court also denied Petitioner's motion for a spoliation inference arising from the loss of Decedent's estate file. (P30a).

STATEMENT OF FACTS

Petitioner is a 100% disabled veteran who retired from his job as a medical buyer with the Department of Defense, Logistics Agency (DLA) in December 2020. (7T37:6-14; 7T41:10-14). He married Decedent on November 22, 1992, and remained married to her for 29 years, until her death on May 6, 2021. (7T40:13; 7T42:14). When they married, Decedent had a child, Respondent, who was then 12 years old. (7T42:22-25).

Throughout his 29-year marriage, Petitioner resided at 436 Lafayette Blvd, Brigantine NJ (hereinafter "Home"). (7T36:16-19; 8T[7]21:1-4). The Home had been purchased by Decedent a month before the marriage. (7T210:1-16; 8T21:9 to 22:13).

[7] 8T means Transcript of Trial dated August 30, 2022.

Before Petitioner married the Decedent, they did not discuss finances and Petitioner did not know the total of Decedent's assets. (7T43:11-18; 9T40:8-10). Neither ever asked the other to sign a prenuptial agreement. (7T43:8-10; 8T92:6-8). On November 21, 1992, the day before their wedding, Petitioner had no contact with Decedent, and he had not yet met Ralph Perone. (7T43:25 to 44:4). Petitioner did not see any lawyers that Saturday and spent the day furnishing and decorating a newly constructed room in a friend's home for the wedding and reception while Decedent stayed at home preparing food for 65 guests. (7T43:14-24; 7T48:16 to 49: 7).

After being married, Decedent advised Petitioner that she needed to keep the bank accounts separate for child support purposes. (7T49:15-21). Throughout the next 29 years, Decedent handled all the finances exclusively. (7T55:3-5; 7T228). During their working life, Petitioner and Decedent each received, on average, $65,000 per year. (P606a to P655a; 8T8:10-16).

When bills came to the Home, Decedent paid them, either through her bank accounts, or she asked Petitioner to give her a check from his. (7T49:12-21). At times, Decedent endorsed and deposited checks made to Petitioner into her account. (7T51:7-18; 7T52:6-17; 7T53:10-25). Also, when Petitioner worked in the food and beverage industry, Decedent took, as needed, the "tips" he brought home. (7T50:9-14). In 2009, after Petitioner took a job with the DLA, he gave Decedent a debit card that gave her full access to that account. (7T50:17-20; 9T18:5 to 19:2; 8T29:21 to 30:7). Decedent

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also had Petitioner's credit card that she used to purchase items that she wanted. (11T90:17-22; 7T229:1-7). Respondent acknowledged that Decedent never had any problems making ends meet and "always did well for herself." (12T[8]12:11-17).

For the first seventeen years of marriage, Decedent and Petitioner worked as a team and built a sizeable estate together. Decedent worked for Avon recruiting and supervising sales representatives in a territory that went from Cape May County to Tuckerton. (7T56:5 to 57:25;7T58:1-18). Petitioner worked at a nightclub as a manager and bartender, and during his three days off each week, he assisted the Decedent with her Avon position. (7T56:13 to 58:6; 7T 59:4-9).

Before the internet was widely used, Petitioner drove hundreds of miles throughout Decedent's territory collecting and then delivering Avon sales orders to its headquarters in Newark Delaware, assisting with monthly meetings, delivering campaign catalogs and products to the sales representatives.(7T56:13 to 58:6; 11T[9]155:20 to 156:12). Petitioner was not paid by Avon for any of the services he performed but rather, Decedent received all the pay from Avon which she deposited in her account. (7T58:7-15).

Petitioner also improved their Home over the years and in doing so, it was essentially remodeled. (7T71:4-22;7T73:18 to 74:3; 7T65:9 to 66; 7T112:16 to

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[8] 12T means Transcript of Trial dated September 19, 2022.

[9] 11T means Transcript of Trial dated September 2, 2022.

113:18). Petitioner built a large shed in back yard and a large office off the laundry room and made the home energy efficient. (7T65: 9-22; 7T67:1-15; 7T68:19 to 70:8; P468a-P481a; P511a).

On October 16, 2002, Petitioner underwent heart surgery and was granted partial Veterans Administration (VA) disability. (7T60:4-7 See P-66). While convalescing, Decedent encouraged Petitioner to return to college, after learning that VA paid the tuition and a monthly stipend. (7T60:2-15). In 2003, Petitioner enrolled at Widener University for paralegal studies, commuting between his Home and Wilmington, Delaware for the next four years. (7T60:13-19).

In December 2007, Petitioner graduated from Widener with a bachelor's degree and was offered a number of positions. (7T61;10-18; 7T37:16-20). Decedent insisted that Petitioner take the DLA position, although that required that he work in Philadelphia. After accepting the DLA position, Decedent thanked him:

I know you will do well with your new position. Relax… and don't be too hard on yourself. Roy, thank you for all that you do. I am very mindful that you always have my best interest at heart. My life is so much richer because you are in it. Please know that I will always be there for you, too and want to share our lives together. Loving and missing you. Lynda, See you soon!

(P482a-483a; 7T62:14 to 64:12). Beginning in 2009, Petitioner rented a small apartment near his office and returned to his Home in Brigantine whenever he was off from work. (7T61;10-18; 7T37:16-20;7T39:1-20; 7T39:2-13; 11T82:20 to 83:4).

Petitioner and Decedent had a good marital relationship, frequently traveling together for vacations, attending dancing lessons, attending showers, weddings, receptions, shows, and often dined out together. (7T119:8 to 121:7; 7T137:5-11; 9T92:1-6; P484a, P709a to P735a). Respondent stated that Decedent told her that she was happy to be married to Petitioner, he helped her with what she needed around the house. (12T15:1-7; 12T16:4-14; 11T83:15 to 84:10).

Decedent repeatedly demonstrated her love and affection for Petitioner. (P375a to P467a). Decedent organized a 75th Birthday Party for Petitioner in 2016 with 60 of his friends. (P599a, 12T16:18-25; 12T17:1-11). When Petitioner retired from the Department of Defense in December 2020, Decedent put together an electronic video file for Petitioner with testimonials from his coworkers. (9T96:5-13).

Decedent often expressed her love and affection for Petitioner, writing, *inter alia*, “Thank you for loving me as you do. You make me very happy& I love you.” (P377a). Decedent also wrote “Roy, I can't imagine my life without you in it. Love You. (P391). “I’m so glad to have you in my life.”(P467) See also (P374a to P465).

In or around 2010, Decedent was diagnosed with cancer requiring that she receive regular chemotherapy (7T150:21-24; 7T152:15 to 154:10). The next year,

Decedent retired from Avon. (9T[10]22:22-23). In October 2012, Superstorm Sandy hit Brigantine causing substantial water damage to their Home. (8T22:4-12).

Decedent applied for a NJ Stronger Rehabilitation Grant (REMM Grant) from the State of New Jersey to repair the damage from Superstorm Sandy but was placed on a wait list. (P490a; 7T78:11-25; 7T79:22-24). In the summer of 2014, just a couple months before the October 16, 2014 Will was made, Petitioner joined in the REMM Grant as a co-applicant after being advised that Petitioner's Veteran status increased their chances for approval. (P493a to P496a; 7T80: 18 to 82:4). Petitioner's income from the DLA was also needed to qualify for the grant. (P501a; 7T82:14-197T83:5 to 84:1).

The REMM Grant application was approved for $150,000. (7T86:5-10). During an inspection, asbestos was discovered in the Home so the building had to be demolished. (7T89:17-21). In 2015, Petitioner and Decedent were granted a $155,000 mortgage from PNC for the construction of a new structure. (P512a to P513a). Another $29,000 was awarded from the REMM grant after Petitioner's doctor submitted a letter stating Petitioner needed an elevator in the Home to accommodate his disability. (7T86:19 to 87:13; P508). Petitioner was completely involved in the Home construction, which was completed in 2017. (P518a to 535a; P97a to P110a).

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[10] 9T means Transcript of Trial dated August 31, 2022.

Decedent was hospitalized in March 2021 with Covid and never recovered. (7T158:7-12). She passed away on May 6, 2021. (P120a). At the time of her death, Decedent held title to the Home, the residuary estate to a home at 1301 Quimet Rd. Brigantine, NJ, two IRA accounts with $273,000 (P702a), and a mortgage to Respondent's home in the sum of $350,000[11] (P656a; 9T234:22 to 235:23). In contrast, the Petitioner was a disabled veteran on a fixed income who owned no real estate or vehicle and who owed over $13,000 in credit card debt. (9T19:2-8).

When Decedent died, Respondent had an immediate and compelling interest in having a will made by Decedent upheld that named her as sole beneficiary. Decedent gave Respondent a will dated October 14, 2014 (hereinafter "2014 Will") which she kept in a safe in her home. (11T111:10-15). Respondent testified that Decedent and their attorney Timothy Maguire, Esquire[12] of Maguire & Maguire PC (hereinafter "Mr. Maguire") discussed their worry that Petitioner would bring litigation over the 2014 Will. (11T115:20-22; 11T161:3-7; 11T116:6-10). Therefore, its terms were concealed from Petitioner until after Decedent's death. (7T190:1-3).

The 2014 Will is contrary to Decedent's longstanding testamentary intentions. Decedent told Petitioner when he showed her his will that revealed she was his sole

[11] Decedent paid $445,000 to construct Respondent's home. (P566a to P570a).
[12] While this litigation was pending, Timothy Maguire, Esquire was appointed to serve as Chief Judge of the Central Municipal Court of Atlantic County. He is referred to as Mr. Maguire, given his role as attorney and scrivener of the will during the time relevant to this matter.

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beneficiary, "that's how things should be between spouses." (7T118:15-22). Decedent also stated on multiple occasions that any money she left for Respondent would be placed in a trust, given Respondent's history with money and her romantic relationships with drug addicts and criminals. (7T 178:16-22; 7T180:12 to 181:9; 7T189:17-22).

In 2005, at the age of 25, Respondent quit her job in New York, moved into the Home and entered a romantic liaison with Joe C., who had a bad reputation in the community due to his involvement in narcotics and a jail record. (7T146: 3 to 147:20; 12T64: to 65:7). Respondent moved in with Joe C in 2006 and not surprisingly Respondent also became addicted to drugs. (12T25:5-10). In 2008, after Respondent stole one of Decedent's family heirlooms, Decedent went to the local bank and opened a safety deposit box for her valuables. (7T155:24 to 156:8; 7T154:20 to 155:18; 11T104:15 to 106:2; P571a to P572; P596a).

Decedent was anxious and worried about Respondent's drug problems. (7T146:15 to 147:20; 11T102:21-25; 7T1927-16; 7T193:15-21). Respondent's friend base changed, and she was bringing "friends' to the Home who had criminal background and drug issues. (11T100:24 to 101:8; 11T102:9-14; I2T63:20 to 64:12).

Respondent relationship ended with Joe C shortly before she was ordered to enter the Rehabilitation Program at Maryville Adult Treatment Center in December 2008. (11T107:6-9).While at Maryville ATC, Respondent developed another romantic liaison with another addict (hereinafter "JZ"), who had a criminal background.

(11T108:4-11; 12T70:9-12). When she was discharged in 2009, Respondent and JZ moved into the Home (although Decedent did not approve of JZ) but concealed it from Petitioner by moving out on weekends when Petitioner was Home and returning when Petitioner was working. (12T2-71:9-16; 11T41 to 42:16; 11T436-12).

Respondent proclaimed at trial that her longstanding goal was to be a millionaire. (11T103:23 to 104:11). In 2013, Respondent obviously knew that her goal was not likely to be achieved. Respondent was working as a waitress and living with her live in boyfriend, JZ (with whom she had two children) who was actively using and selling drugs and stealing to support his habit. (9T65:24 to 67:8; 12T77:20-22). Therefore, in 2013, Respondent turned her attention to Decedent and moved just a few blocks from the Home and spoke with Decedent multiple times daily about personal and private matters. (9T57:2 to 58:25).

Melissa Young Tucker (hereinafter "Ms. Tucker"), regularly observed Respondent interact with Decedent from the time that Respondent moved next door to her in 2013 until Respondent moved into her own home in late 2019. (9T58:3-25). Ms. Tucker found that Respondent was always butting heads with Decedent, intimidating Decedent and manipulating her to get what she wanted. (9T64:9-16; 9T61:9-11; 9T75:24 to 76:17; 9T63:11 to 64:5; 9T65:11-22).

Ms. Tucker observed that Decedent and Respondent fought constantly, with Respondent regularly yelling at Decedent, bringing her to tears. (9T65:14-20; 9T65:4-

17). Ms. Tucker heard that Respondent often referred to the Decedent as a "bitch." (9T63:23-25). Petitioner also observed Respondent bully, yell and disrespect Decedent. (9T63:13-22: 9T73:2-11; 9T759 to76:17; P573a).

On frequent occasions, Petitioner advised Decedent that she needed to set boundaries and to just say "no" to Respondent. (7T191:21 to 192:6; 7T193:15 to 193:22). Decedent responded that she could not do that, explaining that she didn't want to make Respondent angry. (7T191:21 to 192:6).

Decedent advised Ms. Tucker that she was paying for Respondent's phone, had assisted her with the purchase of a new Nissan pathfinder in late 2013 (7T199:23 to 200:5) , as well as paid its insurance, and provided Respondent with substantial funds to purchase land in Brigantine. (9T69:17 to 70:4). Decedent also funded the construction of a large home for Respondent. 7T198:19-21; 7T200:24 to 201:19; P566a to P570). While the home was being constructed, Ms. Tucker heard Respondent say she wanted an elevator in the home, which Decedent resisted, but which Respondent got by the time the home was completed. (9T70:6-11).

On October 3, 2014, the Brigantine Times newspaper published that the Brigantine Police had arrested JZ and charged him with theft and credit card theft. (P563a). When news of JZ's arrest was circulating throughout the small community of Brigantine, Decedent was distraught in light of JZ's continuing, five-year relationship with Respondent. (12T79:14 to 80:10). Decedent expressed worry about Respondent'

reputation and standing in the community. (12T79:25 to 80:6). Thirteen days later, during this period of distress and embarrassment, Decedent made the 2014 Will that benefited Respondent. (P105-P109a; 7T181:5-24: 7T182:17-19; 186:19 to 187:19).

The Court found that "Respondent fought with her mother because her mother wanted her to leave JZ." P20a. Ms. Tucker testified that Decedent expressed her dislike for JZ. (9T70:12 to 71:3). After the 2014 Will was made, Decedent advised Ms. Tucker that JZ was barred from Respondent's home and asked Ms. Tucker to alert her if JZ came around Respondent's home. (9T73:2-11). The facts suggest that Respondent agreed to bar JZ from her home[13] if Decedent made Respondent the sole beneficiary of her estate. Respondent took the 2014 Will and placed in her safe at home and it was never disclosed to Petitioner until after Decedent's death. (7T190:1-11)

Before Decedent's death, Respondent called Mr. Maguire at his office and told him that the Decedent was "extremely ill." (11T112:25 to112:17). Mr. Maguire remarked, don't worry about that now, she will be fine and if anything happens, we will talk then. (11T112:13-17). By the time of that phone discussion, Respondent was fully aware of the terms of Decedent's will, testifying that they all discussed their worry that the Petitioner would bring litigation over the 2014 Will. (11T161:2-8; 12T54:5-10).

[13] Respondent failed to comply with that arrangement, as JZ continued to be in the home for the year that followed. See P690a.

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Within days of Decedent's death, Respondent and her good friend Gail Snyder (hereinafter "Snyder") appeared at the Home, and they searched its rooms and removed several boxes of documents. (7T161:6 to 162:16). Later that night, Snyder went through the documents and found the Photocopy. 11T52:1 to 52:10; 55:25 to 56:12). Snyder gave the Photocopy to Respondent so she could give it to her attorney. (11T56:15-24).

A couple of days after Decedent's death, Respondent contacted Mr. Maguire and asked him to represent her. (9T244:12-14). Maguire met with Respondent, and they exchanged documents. (9T244:12 to 245:6; 9T246:1-20). Respondent signed a retainer agreement and thereafter, Mr. Maguire testified that Respondent contacted him frequently, by cell phone and in person and complained to him about Petitioner. (9T:244:15-22). Respondent gave Mr. Maguire all the pleadings filed in this case and saw Respondent in the local Wawa food stores and at the ballfield and would talk to Mr. Maguire about Petitioner and the litigation. (P537a; 9T246:22 to 247:15).

Mr. Maguire testified that when Decedent was making the will, he had meetings with Decedent, prepared a draft will that Decedent reviewed and requested changes to, he mailed her invoices, received payments from Decedent and received a prenuptial agreement but could not recall when. (9T242:12-19; 9T261:10-18; 9T240:240:15).

During discovery when Mr. Maguire responded to a subpoena that demanded that he produce Decedent's testamentary documents to a deposition, Mr. Maguire

produced copies of all the pleadings that had then been filed in this litigation, but did not produce any notes of his meetings with Decedent, no drafts of wills, and no invoices or cancelled checks from Decedent. (9T243:11-25; 9T246:11-15). In addition, the only prenuptial agreement that Mr. Maguire produced pursuant to the deposition subpoena was the Photocopy that contained the words "Exhibit B" hand written on the bottom of the first page. (9T239:15 to 240:1)

Before trial, another subpoena was served on Mr. Maguire, demanding that he produce at trial the **original** file he maintained for Decedent. (9T237:23 to 238:1). At trial, Mr. Maguire testified that he could not find the Decedent's client file. (9T238:2-3). Mr. Maguire explained that when he received a subpoena for the deposition, he did not have a client file for Decedent and so he and Respondent's attorney recreated the file. (9T269:4-7). Respondent's attorney gave to Mr. Maguire the Photocopy upon which he had written "Exhibit B" on the bottom of the first page when he attached it to the Answer and Crossclaim. (9T271:6-12). Therefore, when Mr. Maguire produced to Petitioner the Photocopy pursuant to the deposition subpoena, it had the words "Exhibit B" written on the first page. (9T239:20-240:1; 9T271:19-24).

At trial, Mr. Maguire testified about events that took place nearly eight years earlier about the making of the 2014 Will, relying solely on his memory and the Will. 9T243:20-25. The Court denied Petitioner's motion for an adverse inference due to Mr.

Maguire's failure to preserve the evidence surrounding the making of the Decedents' will. (P30a).

LEGAL ARGUMENT

POINT ONE

THE COURT'S FAILURE TO APPLY THE PRESUMPTION OF UNDUE INFLUENCE ON RESPONDENT WAS A MISAPPLICATION OF THE LAW, WARRANTING REVERSAL (P35a; 12T117:4 to 178:11; 12T183:14-19)

A. The Standard of Review on a Motion for Judgment is De Novo.

On a motion for judgment, or directed verdict pursuant to Rule 4:40-1, the Appellate Division applies the same standard of review as the trial court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). The grant of a directed verdict will be reversed if, accepting as true the evidence presented by the non-moving party and affording that party all favorable inferences, reasonable minds could differ. Luczak v. Twp. Of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998); Verdicchio v. Ricca 179 N.J. 1, 30 (2004); Est of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000); Smith v. Millville Rescue Squad, 225 N.J. 373, 380 (2016).

B. The Court Erred By Placing the Burden on Petitioner To Prove Undue Influence by Clear and Convincing Evidence. (12T191:15-23; 12T183:14-19)

At the close of the evidence, before closing arguments were made, the Court granted Respondent's motion for a directed verdict and dismissed Petitioner's claims of undue influence in Count Three of his Amendment to Complaint. (12T 177:11 to 178:11). When dismissing Petitioner's claim, the Court failed to apply the appropriate

legal standard of proof and rather, found that Petitioner had a heavy burden of proving the presence of undue influence by clear and convincing evidence:

> Petitioner "tried to do that by circumstantial evidence that [Respondent] was influencing her mother; as an only child, that just goes without saying. But I see no reason that the will is any undue influence by clear and convincing evidence, by any evidence whatsoever, that the will was not a valid instrument." 12T178:5-11; 12T177:15-17.
>
> * * *
>
> I've granted the directed verdict as to the Will…By clear and convincing evidence, I cannot find that [Respondent] in any way, had undue influence on [Decedent] in 2014, or ever, other than she's an only child, which I guess has its effect." 12T191:15-23.

The heavy burden that was placed on Petitioner, to prove undue influence, is erroneous as a matter of law. To support an undue influence claim, the challenger of the will is to prove the existence of a confidential relationship by the preponderance of evidence, that is, the existence of a confidential relationship is more probable than not. Estate of Ostlund v. Ostlund, 391 N.J. Super 390, 403 (App. Div. 2007). Once a confidential relationship is demonstrated, suspicious circumstances need only be "slight" to shift the burden to the proponent of the will. In re Will of Blake, 21 N.J. 50, 55 (1956).

Here, holding Petitioner to a clear and convincing standard of proving undue influence was erroneous as a matter of law and resulted in the dismissal of his undue influence count, warranting that the directed verdict be reversed.

C. The Court Applied the Wrong Standard When It Failed To Subject the Circumstances Surrounding the Making of the Will to Careful Scrutiny or Afford Respondent Any Reasonable Inferences (12T177:7 to 178:11)

When granting Respondent' s motion for a directed verdict, the Court failed to apply the standards governing motions under R.4:40-1, and disregarded all the evidence presented by Petitioner and failed to afford Petitioner any favorable inferences. (P9-P35). The Court also limited its review of the facts to the very narrow period time that the will was executed:

I find that Judge Maguire's testimony and Michele Maguire's testimony very credible as to the making of the will and how the will was made and the timing of the will. I haven't found any evidence at all that there was any undue influence by [Respondent] as to the making of that will. The will was signed. Its properly notarized. It's witnessed by two people. Its proper and it's authenticated under the law.

(12T 177:14 to 178:11).

The narrow scope of review was erroneous as a matter of law. It is not necessary to prove that undue influence was exercised at the exact time of execution of the will. <u>In re Raynolds' Estate</u>, 132 N.J. Eq. 141, 151-52 (Prerog. Ct. 1942), aff'd, 133 N.J. Eq. 344 (E. & A. 1943). "Whenever exerted, whether months or years before, [the undue influence] must still be operative upon the testator's mind in the very act of executing the instrument and be an effective cause of the disposition made therein." <u>Id.</u> at 152.

A will which on its face appears to be validly executed, can be overturned if it is tainted by "undue influence." <u>Haynes v. First Nat'l State Bank</u>, 87 N.J. 163, 175-76 (1981). Here, in contravention of the standards governing a directed verdict, the Court

failed to subject all the evidence presented at trial to careful scrutiny to determine if suspicious circumstances were present. Rather, the Court presented an Opinion that disregards the competent, substantial and credible evidence in the record and rather, relies on hearsay and lay opinions without foundation that it cherry picked to support its predetermined rulings. P9a to P35a.

D. The Court Erred as a Matter of Law When It Found No Suspicious Circumstances Were Present (P34a)

"Undue influence" has been defined as 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...." In re Estate of Folcher, 224 N.J. 496, 512 (2016). Undue influence is exerted where there is importunity which cannot be resisted and is yielded for the sake of peace. In re Weeks, 29 N.J. Super. 533 (App. Div. 1954) citing Trumbull v. Gibbons, 22 N.J.L. 117, 136, 158 (Sup Ct. 1849). The influence must be such that, instead of following the dictates of his own mind, the testator accepts instead the domination and influence of a person he is unable to resist or overcome. See Pascale v. Pascale, 113 N.J. 20, 30 (1988). The clarifying test is whether the testator's mind, when he made the will, was such that, had he expressed it, he would have said: "This is not my wish, but I must do it." In re Weeks, 29 N.J. Super. 533 (1954), citing Wingrove v. Wingrove, 11 P.D. 81 (High Court 1885).

Two elements are required to raise a presumption of undue influence. First, there must be a "confidential relationship" between the testator and the beneficiary. Estate of Stockdale, 196 N.J. 275, 302-03 (2008); see Haynes, supra, 87 N.J. at 176. Generally, parent and child relationships are "among the most natural of confidential relationships." Estate of Ostlund v. Ostlund, supra, 391 N.J. Super. at 401.

Second, the presence of 'suspicious' circumstances" must exist. Stockdale, supra, 196 N.J. at 303; see Haynes, supra, 87 N.J. at 176. "Suspicious circumstances" are those circumstances that "require explanation." Id. at 175-76. Such suspicious circumstances "need only be slight." Stockdale, supra, 196 N.J. at 303 (citing In re Rittenhouse's Will, 19 N.J. 376, 379 (1955). It is well recognized, as against a beneficiary "having a testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural and unjust disposition of his property, the law wisely presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will, he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator." In re Blake's Will, 21 N.J. 50 (1956) citing Carroll v. Hause, 48 N.J. Eq. 269 (Prerog. 1891); Haynes, supra, 87 N.J. at 177-78; In re Catelli's Will, 361 N.J. Super. 478, 487 (App. Div. 2003); Stockdale, supra, 196 N.J. at 303.

In its Opinion, the Court found that Respondent had a confidential relationship with the Decedent and that they confided with each other. (P33a). That finding was supported by the evidence. (12T35:24 to 36:8; 9T:119:23 to 120:9; 9T122:9-20; 9T125:to 128:8). The Court also recognized that suspicious circumstance include (a) the person allegedly committing the undue influence is the sole beneficiary (b) the beneficiary conceals the execution of the will or trust and takes possession of the document; (c) secrecy and haste surrounding the making of the will or (d) an unexplained change in the testator's attitude towards those for whom he had previously expressed affection. (P34a citing In re Will of Catelli, 361 N.J. Super 478 (App. Div.2003)). Although each of these elements were demonstrated at trial, the Court found "there were NO suspicious circumstances." (P34a Emphasis in original).

The Court's finding that no suspicious circumstances existed is based on its failure to consider adequate, substantial and credible evidence in the record. P34a. Instead, the Court disregarded any evidence that was contrary to its predetermined rulings and interposed its own personal bias. Indeed, if Petitioner was a woman, it is likely that there would have been a different result.

Here, the Court found that it was not "suspicious" for a spouse of 29 years to be disinherited, reasoning that "a mother would take care of her child over a spouse who had failed to contribute financially and emotionally to the marriage." (P34a). In reaching its conclusion the Court relied solely on Respondent's self-serving testimony

about Decedent's finances despite her lack of foundation, and disregarded Decedent's own words of affection towards the Petitioner and her gratitude for all that Petitioner did for her. P381a, P383a, P385a. The Court also disregarded Respondent's acknowledgments at trial that Decedent told her she was happy to be married to Petitioner and he helped her with what she needed around the house. (11T83:15 to 84:10. P-5, P-78. 12T15:1-7; 12T16:4-14).

The Court also failed to consider that before this litigation, Respondent portrayed Decedent's marriage to Petitioner very differently than she described at trial. Indeed, Respondent described 10 years of Petitioner's marriage as being "great" and the 20 years of Petitioner's marriage as being "wonderful." (P663a, P665a). Respondent also regarded Petitioner as a "blessing" and a helpful, supportive member of the family, stating: "You always go above and beyond to make our lives easier, and we appreciate it more than you know. You always make us laugh, smile and are there to lend a helping hand. We love you." (P675, P673a P662a). On 6/18/2017, Respondent wrote to Petitioner "You are a blessing and I am so grateful to have always had you in my life[14]." (P661a; See also P669-686). The stark difference between how Respondent described Petitioner before this litigation and Respondent's self-serving, hearsay testimony at

[14] Respondent's characterization of Petitioner before trial as "a blessing in her life" is in stark contrast to her unsupported and disparaging accusation at trial that Petitioner had something to do with an event where she woke up one morning undressed, which had nothing to do with this litigation but which was advanced solely to inflame and antagonize the Court. See P16a n.3

trial, coupled with Petitioner's disinheritance constitutes suspicious circumstances that required explanation. The Court's finding that "no suspicious circumstances were present is contrary to the competent, credible facts in the record and the applicable law. Stockdale, supra, 196 N.J. at 303.

The Court, in its Opinion, also interposed its own biases and personal opinions. For example, the Court excused Respondent's abusive behavior towards Decedent, rather than recognizing that it demonstrated that Respondent dominated and controlled the Decedent. Specifically, when summarizing the testimony of Respondent's neighbor, Ms. Tucker, the Court notes "she testified as to her experience living next to Respondent when she was struggling in the relationship with the father of her children who had substance abuse issues." (P25a). The conduct Ms. Tucker described took place during the precise time that Decedent made the 2014 Will, which the Court disregards.

Ms. Tucker is an independent fact witness who was the only witness, other than Petitioner, who observed Respondent' relationship with Decedent during the time the 2014 Will was being made. Ms. Tucker found that Respondent manipulated Decedent to get what she wanted, using anger as her weapon. (9T63:13-22: 9T73:2-11; 9T759 to76:17; P573a). Decedent spoke to Ms. Tucker often told her that she was paying the cell phone for Respondent, had purchased a car for her, and purchased a real estate lot for Respondent. (9T69:13 to 70:11; P561a-562a, P566a-570a; P600a-605a) Ms. Tucker observed Respondent repeatedly bully and harangue Decedent to get what she wanted,

openly referring to Decedent as a "bitch." (9T63:13-22: 9T73:2-11; 9T759 to76:17; P573a). On many occasions, Ms. Tucker could hear Respondent openly argue with Decedent and frequently brought her to tears. Id.

On October 3, 2014, the Brigantine Times newspaper published that the Brigantine Police had arrested JZ and charged him with theft and credit card theft. (P546a; 7T186:16-18). When news of JZ's arrest was circulating throughout the small community of Brigantine, Decedent was distraught in light of JZ's continuing relationship with Respondent and Decedent expressed worry about Respondent' reputation and standing in the community. (7T181:5-24: 7T182:17-19; 7T 186:19 to 187:19). During this period of distress, Decedent made the 2014 Will. (P108a).

The 2014 Will is contrary to Decedent's longstanding testamentary intentions. Decedent remarked to Petitioner that when a spouse died, the way it should be is that other spouse gets the assets. (7T118:15-22). Decedent also told Petitioner on multiple occasions that any money she left for Respondent would be placed in a trust, given Respondent's history with money and her romantic relationships with drug addicts and criminals. (7T178:16-22; 7T180:12 to 181:9; 7T189:17-22).

Decedent suddenly and secretly made a will on October 16, 2014 that benefitted only Respondent, thirteen days after the newspaper publication of JZ's arrest was being

circulated in the small community[15]. (P563a;P108a). Ms. Tucker testified that Decedent expressed her dislike for JZ. 9T:70:23 to 71:2. Respondent obviously took advantage of Decedent's distress over the newspaper publication of JZ's arrest on October 3, 2014 as a means to unduly influence Decedent to make a Will on October 16, 2014. The facts suggest that Respondent was named the sole beneficiary in Decedent's will to get Respondent to bar JZ from her home. (9T:70:23 to 71:72:3). Ms. Tucker was instructed by Decedent to alert her if JZ came to the home. (9T 73:7-11).

Respondent's behavior towards Decedent strongly suggested that Decedent, in her testamentary dispositions, submitted to Respondent's domination and influence rather than following the dictates of her own mind. In Estate of Olsen, A-5542-11T1 A-5542-11T1 (App. Div.), cert. denied 220 N.J. 98 (2014) (attached as PB1 to PB10) the Court invalidated a will that gave the bulk of decedent's estate to her son, leaving only small dispositions to her other two children. (PB 2 at p. 5, 21). The court found that the son had a confidential relationship, being the only child who remained in the family business, moving close to the mother and thereafter, having daily contact with her. (PB6 at p. 18). The Court also found ample proof of suspicious circumstances including the decedent's pattern of incrementally benefiting the son and his wife to the exclusion of all others. (PB7 at p. 19). The Court also found proof of the son's bullying,

[15] The Court barred Petitioner from getting discovery from Respondent about Decedent's discussions with her about the newspaper publication about JZ (P84a; P245a at pg. 124, P63a) in contravention of R. 4:10-2(a).

haranguing behavior towards the decedent, strongly suggested that the decedent, in her testamentary dispositions, followed not the dictates of her own mind and will but rather, submitted to the domination and influence of her controlling son. (PB7 at p. 19).

Here, just like the son in Estate of Olsen, A-5542-11T1, Respondent moved in close proximity to Decedent, had daily contact with her, and Decedent engaged in a pattern of incrementally benefitting Respondent with assets during a time Respondent was engaging in bullying and haranguing behavior towards the Decedent. (See, eg, P561a; P656a to P659a). The facts demonstrate that when the 2014 Will was executed, there was importunity that Decedent could not resist and that was yielded by Decedent for the sake of peace. Petitioner recalled that he told Decedent she needed to set boundaries with Respondent and just say "no" to her demands, and Decedent would respond to Petitioner, "I can't do it." (7T191:21 to 192:6; 193:15-22).

The Court disregarded other facts that constitute suspicious circumstances under the law. In its Opinion, the Court found that Snyder "stated that the original Will was in a bag given to Respondent after emptying Decedent's safe deposit box." (P23a). Snyder testified that that information was what Respondent had told her. (11T52:22-25). Snyder testified that after she went into the safety deposit box, she put the items in a bag and when she arrived home, she went through each item and did not find a will. (11T28:12-21; 11T30:16-19). Snyder also appeared for deposition and presented pictures of each item that she stated she collected from the safety deposit box when it

was emptied. (11T32:8-19). Although there are pictures of birth certificates, wedding certificates and other important papers, there are no pictures of any wills. (P574a to P596). Snyder admitted that after she went into the safety deposit box, she told Petitioner that it did not contain any wills. (11T30:16 to 31:14).

The Court overlooked undisputed facts that confirm that Respondent had the Decedent's original will in her possession after it was made. Snyder testified as to her certainty that the first time she entered the Decedent's safety deposit box was the date she surrendered it, on June 21, 2021, a date that was confirmed by Respondent. (11T50:4-6; 11T13:2-4; 11T13:24 to 15:4; P572(a)). Yet, on June 18, 2021, three days before Snyder first entered Decedent's safety deposit box, Respondent had attached a copy of the 2014 Will to her answer and Crossclaim, averred in her Answer to Complaint in Paragraph 17, "the original will was subsequently located." (P100a at 17; P104a to 109a).

The facts confirm that the original 2014 Will was not in Decedent's safe deposit box when she died, but rather, was in Respondent's possession after it was made, which Respondent concealed throughout this litigation and trial. That is obviously because a beneficiary's possession of a will that favors her is a factor that constitutes suspicious circumstances under the law. See In re Will of Catelli, 361 NJ. Super. 478 (App. Div. 2003).

The Court also found that Decedent's discussions over the phone in her final days confirmed her competency. (P22a, P33a[16]). In making that finding, the Court disregarded Respondent's description of the Decedent during a facetime call that she and Petitioner had with Decedent a four to five days before she died. (11T145:20 to 146:2; 12T 24-15). Respondent met Petitioner at his home for that facetime call, as she knew that it was coming in from the hospital. (11T145:20 to 146:18; 12T24:11-18). Respondent stated that she couldn't understand a word Decedent spoke during that call and just heard Decedent moaning, "like in pain." (11T 146:9-18). Likewise, Petitioner recalled that during that facetime call, Decedent just moaned. (7T159:1-10). Respondent took a picture of that Facetime call that she provided to Petitioner. (P708a). Decedent was in no condition to make phone calls the last five days of her life. P120a

The Court disregarded this, among other testimony when finding that there was no evidence that Decedent lost her soundness of mind upon admission to the hospital. P33a. The Court found that during this same time, Decedent spoke to Mr. Maguire and his wife and partner, Michelle Maguire while she was in the hospital. (P30a). Yet, Respondent testified that she was the one who had contacted Mr. Maguire a few days

[16] The Court entered Orders dated May 20, 2022 and August 5, 2022 barring discovery from Respondent about her discussions with Decedent about Respondent's finances as being irrelevant. (See P53a, P62a, P63a, P84a). Precluding Petitioner from obtaining this discovery was erroneous and enabled Respondent to surprise Petitioner with testimony about Decedent's "phone calls," so no telephone statements were available at trial to challenge that testimony.

before Decedent died and told Mr. Maguire that the Decedent was "extremely ill." (11T112:25 to112:17). Mr. Maguire remarked, don't worry about that now, she will be fine, if anything happens, we will talk then." Id.

Mr. Maguire and Michelle Maguire's memory of that phone call had obviously faded over time as that discussion could not have been with Decedent. Respondent stated that early in her hospitalization, Decedent had sores in her mouth and throat and had difficulty breathing and would struggle to speak. 11T 143:10-14. Decedent's condition deteriorated over the course of her hospitalization and Respondent admitted that the last few days before she died, she could not speak at all. (11T146:9-18; P708a). Decedent could not have been talking "normally" her last few days of life due to her medical condition.

Yet, Michelle Maguire testified that less than a week before Decedent died, during the phone call, Decedent was talking normally and spoke about her medical condition, where she was and stated that she needed to talk to Tim because it was important to her that Respondent get everything that she wanted her to get. (10T60:9-23; 10T59:8-19). Likewise, Mr. Maguire said that Decedent was talking normally during his conversation. (9T262:19-21). Decedent was not speaking normally a few days before she died, making it apparent it was Respondent they were speaking to, not Decedent.

The Court's finding, that no suspicious circumstances were present to shift the burden of proof onto Respondent is so manifestly unsupported by and inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice. The Court's ruling is also inconsistent with applicable law that "suspicious circumstances need only be slight. The Court's rulings are erroneous and should be set aside in the interests of justice. See, Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974); see also Beck v. Beck, 86 N.J. 480, 496 (1981).

E A Spoliation Inference Was Warranted Due to The Loss of Decedent's Client File By Mr. Maguire When He Knew of The Likelihood of Litigation (P29a to 30a).

The Court abused its discretion and overlooked other material facts that confirm the presence of suspicious circumstances surrounding the making of the 2014 Will. The loss by Mr. Maguire of the Decedent's client file is suspicious given that Mr. Maguire knew that 2014 Will would likely be the subject of future litigation. A spoliation inference permits the fact finder to infer that the evidence destroyed or concealed would not have been favorable to the spoliator. Jerista v. Murray, 185 N.J. 175, 185 (2005).

A spoliation inference is applicable here given that Mr. Maguire had a duty to maintain and preserve Decedent's Estate file for a period of seven years. RPC 1.15(a). The 2014 Will was made October 16, 2014, requiring that Mr. Maguire maintain Decedent's Estate file at least until October 15, 2021, which is after this litigation was filed, on May 2021.

Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is negligently or intentionally destroyed thereby interfering with the action's proper administration and disposition. Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 364 (App.Div.1998); Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 234, (Law Div.1993). In New Jersey, a duty to preserve evidence arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of litigation; (3) foreseeability of harm to the opposing party, or in other words, discarding the evidence would be prejudicial to them; and (4) the evidence that is lost is relevant to the litigation. Jerista v. Murray, supra 185 N.J. at 185; Aetna Life, supra, 309 N.J.Super. at 366, 707 A.2d 180; Hirsch v. General Motors Corp., 266 N.J. Super. at 250-51, (Law. Div. 1993).

Mr. Maguire was also under a duty to preserve the Decedent's file given his testimony that when he was meeting with Decedent, he understood that Petitioner would be bringing litigation over the 2014 will. (9T225:17 to 226:2). Mr. Maguire testified he had meetings with Decedent, provided her with an invoice and draft will that she wanted changed, and he recalled receiving a prenuptial agreement during one of their meetings but could not recall when. (9T242:12-19; 261:10-18; 9T240:240:15).

During discovery, Mr. Maguire responded to a subpoena that demanded that he produce his Estate file for a deposition. Mr. Maguire did not disclose that he had "lost" the Decedent's client file. Instead, Mr. Maguire produced the Photocopy with the words

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"Exhibit B" printed on the bottom of the first page along with copies of all the pleadings that had then filed in this litigation. (9T271: 9-24).

Before trial in this matter, another subpoena was served on Mr. Maguire, demanding that he produce at trial the **original** file he maintained for Decedent. At trial, Timothy Maguire testified that he did not have the Decedent's original client file, claiming it was lost. (9T238:3-9). Mr. Maguire testified that when he was subpoenaed for the deposition, he reached out to Respondent's attorney, to recreate the Decedent's client file and was given the Photocopy. Respondent's attorney stated at trial that he wrote the words "Exhibit B" on the bottom of the first page of the Photocopy that Mr. Maguire then possessed. (9T271:6-12). The facts demonstrate that the Photocopy that Mr. Maguire presented during his deposition was not given to him by the Decedent, but rather, was provided to him by Respondent.

The Court denied Petitioner's motion seeking a spoliation inference, finding found that "the will satisfies the requirements of self-proving wills so any notes in the file would not demonstrate the invalidity of the Will." (P29a) The Court fails to consider that there were genuine issues at trial as to the documents that the Decedent provided to Mr. Maguire, if any, when making the will, and the original file would have settled that issue. Likewise, Mr. Maguire's client file is relevant to issues of credibility and completeness, particularly since Mr. Maguire provided testimony from memory over 7 years ago, that was neither specific nor complete, being unable to recall the

number of meetings he had with Decedent, the dates of those meetings, if the meetings were in person or on the phone, when he received the Photocopy and what he was given by Respondent. (10T215:23 to 216:4; 217:4-8;217:17-23; 218:11-20;218:21 to 219:8)

The failure to preserve material evidence surrounding the making of Decedent's will has prejudiced Petitioner and the Court erred by finding that the file was irrelevant and that no adverse inference was warranted. At a minimum, the failure to preserve the Decedent's Estate file constitutes suspicious circumstances that warranted that the presumption of undue influence shift to Respondent, and the Court's denial of the Petitioner's Motion for Spoilation is erroneous and should be set aside.

POINT TWO

THE DISMISSAL OF PETITIONERS ALTERNATIVE CLAIMS FOR AN ELECTIVE SHARE OF THE ESTATE ARE INCONSISTENT WITH ACCEPTABLE LEGAL AND EQUITABLE PRINCIPLES AND COMPETENT EVIDENCE PRESENTED AT TRIAL (P36a to 41a)

Under New Jersey law, a surviving spouse "has a right of election to take an elective share of one-third of the augmented estate" of a deceased spouse, under certain limitations. N.J.S.A. 3B:8-1. In accordance with his rights under the law, Petitioner has asserted an alternative claim to take an elective share of one-third of the augmented estate given they were living together as man and wife at the time of the Decedent's death. Respondent alleges that Petitioner waived his right to an elective share in the Photocopy she presented.

A. The Court's Enforcement of the Photocopy Is So Manifestly Unsupported By Adequate, Substantial, Credible Evidence As To Offend the Interests of Justice (P36a to P41a).

On an appeal following a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). A trial judge's findings will not be disturbed unless "'they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Id. at 412; see also Beck v. Beck, 86 N.J. 480, 496 (1981). However, "[w]hether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." State v. Cleveland, 371 N.J. Super. 286, 295, (App. Div.), certif. denied, 182 N.J. 148 (2004). Hence, The Appellate Division reviews the trial judge's legal conclusions de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. "On appeal, a trial judge's statutory interpretation is reviewed de novo." In re Estate of Fisher, 443 N.J. Super. 180, 190 (App. Div. 2015) certif. denied, 224 N.J. 528 (2016).

B. The Court Abused Its Discretion by Admitting the Photocopy Into Evidence (P36a to P37a)

N.J.R.E. 1002, the "Best Evidence Rule," requires an original writing to prove its contents, when the writing's contents are material to the dispute, and production is

not otherwise excused. Here, the contents of the Photocopy are material to Respondent's claim.

The Photocopy contains the waivers that Respondent relies on to defeat Petitioners right to an elected share of Decedent's Estate. See State v. Ruta, 112 N.J.L. 271, 273 (E. & A. 1934) (holding that the best evidence rule required production of conditional sales contract to establish party's right to repossess car sold thereunder); see also 6 Weinstein's Federal Evidence § 1002.05 (2018) (stating generally that "legal transactions that can be reduced to a writing, such as those involving . . . contracts . . . are subject to the best evidence rule because an original is needed to prove content that has legal significance"); JP Morgan Chase Bank, N.A. v. Rabel, 894 N.Y.S.2d 857, 860 (Civ. Ct. 2010) (holding that a bank employee's testimony concerning terms of contract violated best evidence rule). Given that questions arise as to the authenticity of the Photocopy, its admission into evidence was inconsistent with the Best Evidence Rule, N.J.R.E. 1003.

The Photocopy does not reflect that it was ever regarded as anything more than an unenforceable draft. On its face, it is not a final agreement as it contains numerous misspellings and multiple pages that appear to be copied directly from a form book, most of which do not contain copies of the parties' initials or signatures. (P110a-119a).

The Court found that Deputy McDougall authenticated Mr. Perone's signature. P27a. Yet, any personal knowledge Deputy McDougall claimed she once had of Mr. Perone's signature was so faded by the time of trial that it was no longer familiar.

In Storm v. Hansen, 41 N.J. Super. 249 124 A. 2d 601 (App. Div. 1956) the Court laid down the general rule that "in order to qualify to identify handwriting or a signature, a witness must have obtained personal knowledge of the party's handwriting. See also, N.J.R.E. 901 (to authenticate evidence the proponent must present evidence that supports a finding that the item is what its proponent claims).

Here, Deputy McDougall testified that she last observed Mr. Perone's signature when she worked in a law firm, between 1976 to 2001 but could not remember the year. (10T12:19-22; 10T22:17-23). During her deposition, Deputy McDougall was given four signatures on exhibits that she stated were not the signatures of Mr. Perone.(P357a, P359a, P363a, P367a). At trial, Surrogate McDougall compared the same signatures from the deposition exhibits against the recorded documents from which the signatures of Mr. Perone came, and she acknowledged that they matched, they "looked the same." (10T29:6 to 31:15; 10T 27:16-26; P357 to P372a). Deputy McDougall was wrong about Mr. Perone's signature on four separate occasions during her deposition, confirming she lacked familiarity with that signature to authenticate it. The Court's finding to the contrary disregards the undisputed facts which was obviously due to her bias in favor of a co-worker.

Likewise, the Court also found that the Photocopy contained Petitioner's signature, stating that the testimony of John Osborne, Respondent's expert, "is contraindicated" (P37a). The Court overlooked the limits to Mr. Osborne's evaluation. (9T167:11-22). Mr. Osborne acknowledged that because he was working with a photocopy there were certain things he could not examine including the dynamic evidence of the signature using pen pressure. (Id, see also 9T206:20-23). The Photocopy also could not be dated because an original is needed for an ink analysis, which precluded a more conclusive opinion as to the signature. (9T:206:15-25). Mr. Osborn's evaluation was limited to looking at the density and variation of the ink lines to determine if writings appeared similar. (9T188:14-21).

The Court's ruling also disregards that Mr. Osborne admitted that he could not opine that a document had not been fabricated or altered. (9T204:2-4). Mr. Osborne explained that cutting and pasting a signature from one source to another is referred to in the industry as manipulation. (9T202:9-11). Mr. Osborne also stated that it occurs frequently and does not take a great deal of sophistication to appropriately reproduce signatures. (9T197:12-22). Indeed, Respondent's counsel easily transposed signatures of Respondent and her attorney on a copy of the Photocopy using a simple copy machine. (P560a; 9T201:19 to 202:11). Mr. Osborne stated it is possible to take signature from another source and afix it to another using digital technology and leave no evidence of what occurred. (9T204:16-20. 9T203:20 to 204:1; 9T181:15 to 182:2).

That is why he cannot opine that the Photocopy has not been altered or fabricated. (9T204:2-4).

Mr. Osborne recalled a time he had a manufactured document which contained no evidence of manipulation, but because they found the original or copy from where the signature had been taken, they could say the document had to be a fabrication. (9T205:15-24). However, Mr. Osborne said he would need an original or copy of the source document to do that. (9T205:25 to 206:2) Mr. Osborne acknowledged at trial that there was evidence of physical manipulation on the signature line of Lynda Nathanson, stating that there could be a double line under a signature, which is evidence of the signature being taken from another source. (9T198:21-199:1; See P115a). Mr. Osborne stated that he was not to analyze Lynda Sutton's name, just Petitioner's signature. (9T199:1-3).

Petitioner had not seen the Photocopy before this litigation, he did not sign it and believed it was manufactured. No evidence was presented at trial that refutes Plaintiff's portrayal of Saturday, November 21, 1992, the date on the Photocopy, which was the day before Petitioner's wedding. Petitioner had no contact with Decedent that Saturday as he was busy setting up the private venue for the wedding while Decedent was preparing food for 65 guests at their wedding the next day. (7T43:14-24; 7T48:16 to 49: 7). The witnesses at trial who attended the wedding all acknowledged that the venue had been fully set up and decorated for a wedding. (11T7:1-13; 10T91:18 to 92:22).

In addition, no acceptable excuse was provided by Respondent for the absence of the original of the Photocopy. Petitioner claims that no original exists because he never signed the Photocopy-his signature was photocopied on the document. Indeed, during discovery, Respondent presented numerous documents that contained his signature, making it apparent that both Decedent and Respondent had full access to his signatures.

The Court disregarded this evidence and rather, supported its finding that the Original was "lost or destroyed" (P37a) with conjecture and far-reaching assumptions. The Court found that "although the original Antenuptial Agreement could not be found, multiple witnesses have testified to its existence including Respondent, Gail Snyder and Timothy Maguire, Esquire. (P36a). Contrary to the Court's finding, none of those witnesses ever observed an original Antenuptial Agreement between Petitioner and Decedent or had any knowledge of its terms. Rather, their testimony about an antenuptial agreement is based exclusively on hearsay allegations that the Court accepted as true even though they lack foundation, in contravention of N.J.R.E. 802.

Snyder testified that Decedent told her about a prenup before they got married, probably when they got engaged. (11T43:16-25; 11T43:16 to 44:7). Decedent told Snyder that Fred Perone wanted Decedent to have a prenuptial agreement before she got married. 11T 11:18 to 12:10. This unreliable hearsay testimony does not support a finding that Petitioner was presented with a prenuptial agreement or that he signed it.

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Likewise, Ms. Whelan recalled that a little after they were married, Decedent mentioned "I have a prenup" but didn't say anything else. (10T 111;7-10; 10T 99:9-12). Ms. Whelan had no specific recollection of that discussion and didn't know the specifics. (10T111:15-19. 10T 99:2-6;10T111:3-6). Ms. Whelan never saw the "prenup." (10T 110:12-25).

None of the testimony relied on by the Court supports a finding that an original executed prenuptial agreement ever existed. In fact, the Photocopy, on its face, states in Section 10.4- titled "Original agreements" that "This Agreement shall be executed in four (4) counterparts, two for each party." (P112a) By its terms, four originals of the Photocopy were to be executed, and yet not one original of the document was presented at trial. No competent evidence was presented by Respondent at trial that demonstrated that four separate original documents were "lost.'

The Court also found that "Petitioner had a motive to sign the [Photocopy] considering the federal court cases to which the Petitioner was a party regarding his parents' estates, where he thought he was recovering large sums of money, including a nightclub called the Melody Lounge." P37a. The litigation Petitioner filed 40-50 years ago had no relevance to this action and the Court's findings about that litigation are based solely on conjecture and speculation. (8T92:14-18; 8T96:6-11); The Melody Lounge closed in 1986—six years before the marriage. (9T64-11). The litigation did not involve significant money—it arose from estate litigation involving $300,000 in

the estate accounting to be divided among six beneficiaries, one of which was Petitioner. (9T7:19-24; 8T120:1-15). Petitioner filed an accounting action challenging a consent order in which he was to receive $75,000. (9T7:12-16). In addition, at the time of his marriage, the Second Federal Suit had been dismissed by memorandum dated April 30, 1992—seven months before his marriage. The Third Federal Suit was not filed until about a year later. There was no pending litigation at the time of the marriage.

The Court also found that the parties governed their finances in accordance with "the letter and intent" of the Photocopy. (P37a). That finding disregards Article Four of the Photocopy titled "Financial Arrangements During Marriage" that contemplated the creation of a joint account into which the parties' salaries would be deposited and used as a marital account. (P112a, Article Four). No evidence was presented at trial that the Decedent had a joint account or used her income towards the marriage.

Another unsupported finding is that "the original antenuptial agreement was in the Rubbermaid box that Decedent described to Kathleen Whelan." (P23a). The Court found that Petitioner had full control of the home and Rubbermaid box and "one could argue that petitioner was in procession of the original given the testimony of the lost Rubbermaid box." (P36a). The Courts is replete with conjecture, speculation and far-reaching assumptions.

Ms. Whelan testified that a few days before Decedent died, she received a call from Decedent, but Ms. Whelan could hardly understand a word she was saying. (10T 107:5-11). Ms. Whelan testified that the speaker on the phone “kept saying, there's a--Rubbermaid Box in her walk-in closet to the right. Make sure you get it. Not me but you know, that is all she could say.” (10T107:11-16). Whelan continued “And then I repeated back to her, there's a Rubbermaid box on the right in her walk in closet walk-inur papers and she said "yes" and that's all she could say. Then she hung up.” (10T 107:16-21). The speaker only referenced a Rubbermaid Box and made no mention of a prenuptial agreement. No testimony was presented that supports a finding that there was an original prenuptial agreement in a Rubbermaid box. The Court’s finding that the Rubbermaid Box contained an original prenuptial agreement is based solely on conjecture and far-reaching assumptions.

Likewise, there is no competent evidence that the Decedent ever possessed a Rubbermaid box. Snyder went into the Home to clean it before and after Decedent’s death and was familiar with the walk-in closet. (11T 17:2-22). Snyder testified that she never saw a Rubbermaid Box in the closet. (11T17:16-21). Snyder testified that she went to the Home on three different occasions after Decedent’s death and each time, went into the walk-in closet and did not see any Rubbermaid box. (10T120:3-6; 10T119:20 to 120:2; 11T17:10-22).

Snyder's testimony also confirms that Petitioner did not have "full control" of the Home, as found by the Court. Snyder and Respondent both entered the walk-in closet before and after Decedent's death. (12T43:to 44:2; 12T43:to 44:2). The Court's finding that Petitioner destroyed the original prenuptial in a Rubbermaid box is based on speculation and conjecture and far reaching assumptions.

The facts demonstrate that Decedent did not regard the Photocopy to have any importance. Indeed, Decedent would have no reason to conceal the making of the 2014 Will from Plaintiff if it was in accordance with the terms of an agreement between the parties. Respondent acknowledged that prior to the Decedent's death, Decedent never talked to Respondent about a prenuptial agreement. (12T36:6-10). Decedent did not maintain the prenuptial agreement in her safety deposit box, with her other important papers. (11T119:1-5; P574a-P596a).

No justification for the failure to produce at trial an Original of the Photocopy. The Court's finding that "all original versions of the Agreement have been lost or destroyed" is without any factual support. (P36a). The Best Evidence Rule precluded admission of the photocopy. No adequate, substantial or credible evidence was presented that reflected that the parties entered into a prenuptial agreement before their marriage and the introduction of the Photocopy was an abuse of discretion that resulted in manifest injustice that warrants reversal of the dismissal of Count Four of Petitioner's complaint.

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B. The Photocopy Violates the Uniform Pre-Marital Agreement Act and Should Not Have Been Enforced (P39a)

Another independent basis to reverse the Court's Order that enforced the Photocopy is that it does not conform to the law. Specifically, in 1989, New Jersey adopted the Uniform Pre-Marital Agreement Act (the Act), *N.J.S.A.* 37:2-31 to -41, which expressly applies to agreements "executed on or after" 1989. The Act is applicable to the Photocopy which is dated November 22, 1991.

The Act renders the Photocopy unenforceable because it lacks an itemized list of the parties' assets as required under the Act. see N.J.S.A. 37:2-33. Specifically, NJSA 37:2-33 titled "Formalities" mandates that a statement of assets be annexed to a prenuptial agreement for it to be enforceable. That statute was enacted after the Court in DeLorean v. DeLorean, 211 N.J.Super. 432, 439 (Ch. Div. 1986) suggested that the Court, by rule, require that an itemized list be attached to prenuptial agreements to discourage a plethora of plenary hearings:

> A conflict arose as to precisely what financial information was disclosed by Mr. DeLorean. ... But we should address the question of how to avoid disputes of this nature in the future. It is clear that we can ascertain with complete certainty whether there was a full and complete disclosure only by requiring a written list of assets and income be attached to the antinuptial agreement. Anything less will encourage a plethora of plenary hearings which would frequently be complicated by contradictory and conflicting testimony, often tainted by memory lapses.

In Orgler v. Orgler, 237 N.J. Super. 342 (App. Div. 1989) the court again noted that the "'easiest device' to evidence" of knowledge of a party's financial condition "is by annexing to the agreement a list of assets and their approximate values." Id. at 349

(quoting Marschall v. Marschall, 195 N.J. Super. 16, 33 (Ch. Div. 1984)). The court found the prenuptial agreement unenforceable in part because "the parties appended no schedule of their respective assets to the agreement." Id.

Here, the Court found that there was no statement of assets annexed to the Photocopy as required by N.J.S.A. 37:2-33. P39a. The Court, nevertheless, enforced the Photocopy, which was erroneous and should be reversed. P39a.

C. The Waiver Provisions of the Photocopy Are Unenforceable and The Court's Contrary Findings Should be Reversed (P39a to P42a).

Given that the Photocopy fails to comply with the Uniform Pre-Marital Agreement Act, the waiver provisions of the Photocopy should not have been enforced under N.J.S.A. 3B:8-10. In re Estate of Shinn, 394 N.J. Super. 55 (App. Div.), certif. denied, 192 N.J. 595 (2007).

In addition, the absence of a clear and unequivocal waiver of the Petitioner's rights under the Act renders the waiver provisions in the Photocopy unenforceable. In re Estate of Shinn, a wife sued her husband's estate to declare a pre-nuptial agreement unenforceable because her husband had understated his assets. 394 N.J. Super at 62. The trial judge found that there is no material distinction between what N.J.S.A. 3B:8-10 refers to as "fair disclosure" and what N.J.S.A 3B:2-38 describes as "full and fair disclosure." 394 N.J. Super. at 61. The trial judge concluded that under both N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38, the pre-nuptial agreement should not have been

enforced and also found that the agreement did not contain an adequate written waiver of the right to full financial disclosure:

> [i]n order to meet that statutory test of express waiver of a right to disclosure beyond what one has received, one has to acknowledge, one has to know that ... she ... is **not getting the disclosure called for by the statute, and the writing has to say, even though we're not getting the disclosure we're entitled to, we waive that, it's okay, we waive our right to it. There's nothing like that in this agreement, so there is no express waiver in writing of the kind called for by the statute**.

Id at 62-63 (emphasis added). The findings in Shinn are consistent with established law, that any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms. Leodori v. Cigna Corp., 175 N.J. 293, 302, 814 A.2d 1098 (2003); see, e.g., Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 460-61, 541 A.2d 1046 (1988) (holding that waiver in collective bargaining agreement unenforceable "[u]under New Jersey law[,] for a waiver of rights to be effective it must be plainly expressed.")

Here as with the prenuptial agreement in In re Estate of Shinn, the Photocopy does not contain any language that acknowledges that its parties were not getting the disclosures called for by the Act and that the parties waived their right to those disclosures. P 117a, 8-1). The waiver provisions also say nothing about the rights of the parties upon death. Id. Therefore, as in In Re Estate of Shinn, there is no express statutory waiver of the rights to an elective share of a parties' estate.

Here, as in In re Estate of Shinn, the Photocopy fails to provide the disclosures that the legislature determined were required for enforceability, a statement of assets

annexed thereto. Petitioner also did not discuss finances with Decedent before their marriage and did not have independent counsel. Therefore, equitable principles do not save an alleged agreement that violates Uniform Pre-Marital Agreement Act, and the Court's finding to the contrary are erroneous as a matter of law and should be reversed.

POINT THREE
(ALTERNATIVE COUNT)
THE GRANT OF A LIFE ESTATE WITHOUT RIGHTS OF ALIENATION IS UNEQUITABLE AND AN ABUSE OF DISCRETION (P43a to 44a)

In the alternative, the Court's grant of a life estate in favor of Petitioner should be set aside in favor of a more just allocation of assets. The Court found that Petitioner has sufficiently demonstrated marital contributions primarily in the form of physical labor and attachment of Petitioner's name to certain documents for the benefits of Decedent. (P43a). The Court impressed the trust after finding he had an interest in the Estate assets due to Petitioner's veteran status, his income, his assistance in Decedent growing her Avon business for nearly two decades and the physical labor he performed to improve and maintain the Home. (P43a).Yet, when impressing a constructive trust, the Court granted the Petitioner a life estate in the Home with restrictions on alienation in that he is not free to sell mortgage or otherwise alienate that interest. (P43a).

There is no rational basis for restricting Plaintiff's interest in his home to a life estate that he cannot mortgage, sell or otherwise alienate. The Court did not rely on any appraisal of the Home or the other assets of the Estate or place any value on the

contributions that Petitioner invested in his long marriage to the Decedent. The restrictions are significant, in that they affect a fundamental property right and significant aspects of the manner in which property can be used that have been found to be unreasonable as a matter of public policy. Highway Holding Co. v. Yara Engineering Corp., 22 *N.J.* 119, 133 (1956). The grant of the life estate without rights of alienation is unreasonable, unjust and arbitrary, warranting that it be set aside.

Assuming, *arguendo,* that the Court's rulings on the Will and the Photocopy are upheld, the manner in which the Court allocated the Estate assets under the constructive trust was unreasonable and unfair given that Decedent had unclean hands and breached fiduciary obligations she owed to Petitioner. Assuming, *arguendo* that the Photocopy is upheld, it directed a joint account be created into which the parties' salaries would be deposited and used as a marital account. (P112a,). Decedent breached that provision while she handled the finances exclusively, leaving no joint assets for Petitioner. Decedent also violated her spousal duties by dissipating the marital assets prior to her death in favor of Respondent. Dissipation of marital property by one spouse breaches a spouse's fiduciary responsibility to the other. Monte v. Monte 212 N.J. Super. 557 (App. Div. 1986) cert. denied, 133 N.J. 432 (1993).

Decedent's concealment of her intent to disinherit Petitioner also breached the duties and responsibilities that were created by her marriage to Petitioner. See,

Chalmers v. Chalmers 65 N.J. 186, 194 (1974); Moore v. Moore, 376 N.J. Super.246 (App. Div. 2005) (spouses have responsibilities created by their marriage pursuant to the concept of duty to achieve a just result). The Decedent had a duty to disclose her intended disinheritance of Petitioner since it impacted his interest in the marital assets that Decedent administered. Instead of making that required disclosure after the 2014 Will was made, Decedent led Petitioner to believe that he was an object of her affections and a beneficiary of her Will. (7T118:15-22; P376s-P466a)). Decedent's concealment of Petitioner's disinheritance left Petitioner in a position where he did not invest in his own future or protect his own interests. Decedent had unclean hands, warranting that a constructive trust be imposed in favor of Petitioner that fairly allocates the Estate assets in favor of Petitioner so that a just result is achieved.

CONCLUSION

The Court abused its discretion by making findings that lack foundation, are based solely on hearsay and conjecture and are so widely off the mark that a manifest denial of justice resulted. It is respectfully requested that:

A. The Court reverse the Order as to Counts One and Three of Petitioner's Amended to Complaint and that those counts be reinstated;

B. That the Court find that the Photocopy should not have been entered into evidence pursuant to the Best Evidence Rule, that it is unenforceable under

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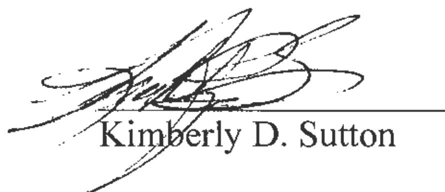
the Uniform Pre-Marital Agreement Act and that Petitioner did not waive his statutory rights to an elective share of the Estate Assets.

C. In the alternative, the life estate with restrictions on alienation should be set aside and Petitioner should be granted a fair allocation of Estate assets under his claim for a constructive trust.

Respectfully submitted,



Kimberly D. Sutton

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1838-22T4

IN THE MATTER OF THE ESTATE

OF LYNDA NATHANSON SUTTON,

DECEASED

On Appeal from Final Order of
Superior Court of New Jersey,
Chancery Division, Probate Part
Docket No. P-127920-21

Sat Below:

Hon. M. Susan Sheppard, P.J.Ch.

BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT/CROSS APPELLANT, SANDRA L. WILLIAMS

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<u>TRANSCRIPT REFERENCES</u>[1]

"1T" refers to motion transcript dated September 10, 2021
"2T" refers to motion transcript dated December 14, 2021
"3T" refers to motion transcript dated February 18, 2022
"4T" refers to motion transcript dated May 19, 2022
"5T" refers to motion transcript dated July 5, 2022
"6T" refers to motion transcript dated August 15, 2022
"7T" refers to trial transcript dated August 29, 2022
"8T" refers to trial transcript dated August 30, 2022
"9T" refers to trial transcript dated August 31, 2022
"10T" refers to trial transcript dated September 1, 2022
"11T" refers to trial transcript dated September 2, 2022
"12T" refers to trial transcript dated September 19, 2022

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1 The Respondent notes that the six motion transcripts labeled as "1T" through "6T" in the Petitioner's brief are irrelevant to the appeal. In fact, the Petitioner fails to utilize any of these transcripts in support of his positions on appeal. The only relevant transcripts on appeal are the six transcripts of trial from August 29 through September 19, 2022 (7T-12T).

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2 Pursuant to Rule 1:36-3, this unpublished decision is included in the Respondent's Appendix attached to this Brief.

PRELIMINARY STATEMENT

Lynda Nathanson Sutton ("Decedent") died in May 2021, after a lackluster marriage to Roy F. Sutton ("Petitioner"). Prior to their marriage, the parties executed a Antenuptial Agreement providing that all property and assets they obtained prior to the marriage shall constitute pre-marital assets and shall remain the parties' separate, non-distributable property during the marriage, which shall be willed freely upon the death of either party.

In her 2014 Will, the Decedent left all of her assets to her daughter, Sandra L. Williams ("Respondent"). The 2014 Will was drawn up by a long-time attorney friend, made by the Decedent purposely and without coercion on the part of anyone, as found by the Chancery Division. The reasons for not leaving assets to the Petitioner included the following:

- the Petitioner's refusal to contribute towards any of the household expenses during the marriage, and lived rent-free during the marriage in the Decedent's home acquired prior to the marriage
- the Petitioner's abandonment of the Decedent and their relationship for long periods of time at different points in the marriage
- a disturbing incident one night involving the Respondent when she was sixteen years old, while the Decedent was away on a business trip, causing the Petitioner to leave the house for a year
- the Petitioner would often leave Decedent alone at a party and "sneak out," thinking it "funny"

- the Decedent on multiple occasions told the Decedent's friend, Gail Snyder that the Petitioner was involved with another woman

- the Petitioner did not assist Decedent around the house, including one occasion where during a snowstorm where the Decedent shoveled the snow while Petitioner remained inside

- the Decedent told Snyder that the Petitioner never paid any of the bills and wasted money, and that this conduct "pissed her off."

- the Petitioner had a habit of lying to the Decedent

At trial, the Petitioner denied the existence of the Antenuptial Agreement, claiming it was fabricated. He also sought to have the Will declared null and void, on the basis that the Respondent daughter exerted undue influence upon the Decedent. In ruling that the Petitioner's was not a credible witness, the Chancery Division rejected both of these claims. The Petitioner also sought a declaration that he has an equitable ownership interest in the Decedent's house such that a constructive trust be imposed upon same, a claim also denied. These rulings should be affirmed on appeal.

However, in ruling that the law of constructive trust warranted an award to the Petitioner of a life estate in the Decedent's home, the Chancery Division unfortunately abused its discretionary equitable authority. Reversal of this ruling is thus warranted.

COUNTER STATEMENT OF PROCEDURAL HISTORY

Lynda Nathanson Sutton ("Decedent") died from Covid-19 pneumonia on May 6, 2021. (11T141-16 to 143-9). Within a week, the Petitioner, her husband Roy F. Sutton ("Petitioner") filed a Caveat preventing the admissibility of any alleged Will to Probate. (Pa 538). He then filed a Verified Complaint and Order to Show Cause seeking (1) the appointment as administrator of the Estate of Decedent; (2) a declaration that Decedent died intestate; and (3) the imposition of a constructive trust in favor of Petitioner over one-half of the assets titled in the name of Decedent. (Pa 94-97).

The Petitioner's Complaint contends the Decedent's Will, dated October 16, 2014, is null and void as the subject of undue influence and/or duress. He further alleges that the Antenuptial Agreement signed by the Decedent and allegedly the Petitioner is invalid and thus not a waiver of his elective share. In the alternative, he contends he is entitled to a constructive trust. (Pa 97).

The Respondent, Sandra L. Williams, the daughter of Decedent ("Respondent"), filed an Answer to the Verified Complaint and crossclaims for probate of a 2014 Will, appointment of Respondent as Executrix, and enforcement of the Antenuptial Agreement. (Pa 99-104).

Trial was held before the Honorable M. Susan Sheppard, J.S.C. of the Chancery Division, Probate Part of Atlantic County. (7T-12T). On the final day, the Court placed limited findings on the record after a Motion for Judgment was made by the Respondent. The court found that the Decedent died with a legally valid Will and that the Will was not the subject of undue influence or duress. It advised the parties that it would supplement the findings in this written Decision. (12T191-15 to 23; 12T200-13 to 17; 12T202-17 to 206-4).

In its final decision, the Chancery Division entered an Order outlining the following relief:

1. Petitioner's COUNT ONE of the Amended Complaint requesting appointment as Administrator of the Estate is DENIED.

2. Petitioner's COUNT TWO of the Amended Complaint requesting a declaration that Petitioner has an equitable ownership interest in the Home and that a constructive trust be imposed upon same is GRANTED IN PART. Petitioner's request that a constructive trust be imposed upon one-half the assets titled in the name of Decedent is DENIED.

    a. Petitioner is GRANTED a life tenancy in the Home located at 436 Lafayette Blvd., Brigantine, New Jersey 08203.

3. Petitioner's COUNT THREE of the Amended Complaint requesting that the Will dated October 16, 2014, is null and void as being the subject of undue influence or duress is DENIED.

4. Petitioner's COUNT FOUR of the Amended Complaint requesting that Petitioner be awarded one-third of Decedent's augmented Estate is DENlED.

5. Petitioner's COUNT FIVE of the Amended Complaint requesting that the "Ante-Nutial" [sic] Agreement, dated November 21, 1992, be declared null and void is DENlED.

6. Respondent's CROSS-CLAIM requesting admission of the Will to Probate and her appointment as Executrix of the Estate of Lynda Nathanson Sutton is GRANTED.

(Pa 7-8). The Court filed an accompanying Trial Decision and Final Judgment. (Pa 9-49).

The Petitioner filed a Notice of Appeal with the Superior Court, Appellate Division. (Pa 1-3).

COUNTER STATEMENT OF FACTS

Parties

The Decedent, Lynda Nathanson Sutton ("Decedent") purchased a home in 1992 in Brigantine, New Jersey, where she resided until her death from Covid pneumonia in 2021. This home was purchased prior to her marriage to the Petitioner, and titled in the Decedent's name only. (7T40-13; 7T49-8 to 11; 11T91-4 to 9).

The Petitioner, Roy F. Sutton ("Petitioner") married the Decedent in 1992, and for the most part, resided in the Decedent's home until her death. (7T41-23 to 24).

The Respondent, Sandra Williams ("Respondent") is the daughter of the Decedent by a prior relationship. At the time of trial, the Respondent was 41 years old and had two sons, ages 12 and 9. The Respondent has a Bachelor's degree in Science from LaSalle University, owns a small clothing business, and works part time at the Knife and Fork restaurant in Atlantic City. (11T62-9 to 63-20).

A. Pre-Marriage and Antenuptial Agreement

In October 1992, the Decedent purchased a home at 436 Lafayette Boulevard in Brigantine, New Jersey ("Home") one month before her marriage to

the Petitioner. The mortgage was obtained through A. Ralph Perone, Esq,, and it was paid off solely by the Decedent. The Petitioner's name was never added to the Deed. (11T91-4 to 9).

Prior to marrying the Petitioner, the Decedent had a child, Sandra L. Williams, the Respondent in this matter ("Respondent").

On November 21, 1992, the day before their marriage, the Petitioner and Decedent executed an Antenuptial Antenuptial Agreement. (Pa 110-119) Section 2.1 of the Antenuptial Agreement states:

> Any property acquired during the marriage in the name of one party or under circumstances in which it is clear that such [sic] property was intended to be acquired separately by one party or where the source of the funds or assets by which such separate property was acquired is premarital assets, and shall remain the separate property of the party acquiring such assets, including but not limited to any property into which same is converted any income or other usufruct thereon, increments, accretions, or increases in value of such assets, whether [sic] due to market conditions or the services, skills, or efforts of either party, at any time thereto.

(Pa 111). Section 6.1 of the Antenuptial Agreement states: "Upon the death of either party, nondistributable property shall remain separate to be willed freely. Interests in distributable property shall also be willed freely." (Pa 112). The Antenuptial Agreement was signed by both the Petitioner and Decedent, an A. Ralph Perone signed the Agreement as a witness. (Pa 115).

Before becoming the Atlantic County Deputy Surrogate, Patricia McDougall worked for the law firm of Fitzsimmons and Baylinson where A. Ralph Perone and his brother were clients. McDougall recognized the signature of A. Ralph Perone on the Antenuptial Agreement when the document was submitted to the Surrogate's Office in connection with this matter. She testified that she remembered A. Ralph Perone's signature from her time working at Fitzsimmons and Baylinson because of an instance where Perone had to provide his signature on hundreds of stock transfers. McDougall testified that she believed that it was Perone's signature on the Antenuptial Agreement based upon her familiarity with his signature. (10T11-12 to 13-14; 10T20-18 to 26-20).

The Decedent told her good friend Gail Snyder about the Antenuptial Agreement. Snyder was a friend of the Decedent for forty-seven years, the latter having been her seventh grade teacher. They maintained a very close relationship over the years, and confided in each other. Snyder attended the Decedent and Petitioner's wedding in November 1992. (11T4-14 to 5-5; 11T11-19 to 21). The Decedent also told her friend Kathleen Whelan about the existence of the Agreement. (10T99-2 to 6).

After the Decedent died, Snyder retrieved a copy of the Antenuptial Agreement from some boxes in the Decedent's house, and handed it over to the

Respondent (11T52-2 to 3; 11T55-25 to 56-20).

The Petitioner testified that he never signed the Antenuptial Agreement. This testimony was rejected by the Chancery Division:

> Petitioner testified that be never signed the Antenuptial Agreement. This court does not find Petitioner credible.

(Pa 14).

Prior to the marriage, the Petitioner was involved in many lawsuits regarding his parents' estates. (See Ex. R-4, a federal court opinion in Sutton v. Sutton, 71 F. Supp. 2d 383 (D.N.J. 1999) which details the factual history of the nine lawsuits filed by Petitioner. If Petitioner was meritorious in his claims against the families' estates, the payout would have occurred after his marriage to Decedent. In fact, the Federal Courts Opinion wherein Petitioner lost wasn't decided until 1999, seven years into the marriage. Kathleen Whelan testified credibly that Petitioner most likely initiated the Antenuptial Agreement with Decedent due to the pending litigations to assure that the award was separate from marital assets. In this respect, the Respondent testified:

> I mean, Roy has been litigious his whole life, like this is what we were all worried about, getting to this point here, this trial taking like over a year of back and forth, like this is what my mom was trying to protect me from. We always knew Roy was capable of that.
>
> He always gave unsolicited legal advice, when somebody slipped in the mall to when somebody had an issue at work to anything, he

> always gave advice about you should sue this one or you should do this, or, you know, sending people to court with papers. That was like his hobby. This is like a sport to him. So I'm not surprised to be here and I'm not surprised that I had to sit through a bunch of, you know, stories and accusations and lies.

(10T161-3 to 17).

Expert Opinion on Antenuptial Agreement

John Paul Osborn, a forensic document examiner, testified as an expert witness on behalf of the Respondent. Forensic document examination involves the examination of all kinds of physical evidence that appears on documents. Handwriting analysis comprises only a part of the work of a forensic document examiner. (9T146-10 to 25).

Osborn has worked as a forensic document expert since 1982. He is certified by the American Board of Forensic Document Examiners and was granted membership in the American Society of Questioned Document Examiners, where he served as President for two years. Osborn has been tested and recertified every five years, the last recertification occurring in 2020. (9T147-10 to 152-11).

Osborn has testified as an expert over 300 times, appearing as an expert in state and federal courts as well as internationally, for both criminal and civil matters. He has also been retained by the United States Department of Justice on multiple occasions. (9T154-21 to 156-7). The full qualifications of John Paul

Osborn were attached as Appendix 5 to his report of findings in Exhibit R 13.

Osborn prepared an expert report detailing his examination of certain documents. He examined the Agreement bearing the signatures of the Decedent and Petitioner and evaluated both reproductions and originals of documents bearing known signatures of the Petitioner, which ranged in date from 1989 through 2021. (9T162-15 to 163-18).

Osborn prepared two signature comparison charts showing the enlarged signatures in question and known signatures of the Petitioner. He was asked to determine if the signatures of the Petitioner on the antenuptial agreement were genuine. Osborn opined that it was "highly probable" that both signatures of the Petitioner on the antenuptial agreement are genuine signatures. "Highly probable" is an expression of virtual certainty under the standards of Osborn's profession. He noted that it could not be a definite conclusion of identity due to working with a copy as opposed to an original document. (9T163-20 to 167-14).

The standard of "highly probable" was the second highest rating given by forensic experts, which rests above a "probable" standard, which nevertheless still represents a very strong conclusion. Osborn has testified that in other cases where he found a probable standard, and those opinions and conclusions were accepted by the court, meaning he was not precluded from testifying. (9T168-15 to 171-3).

Osborn's finding of "highly probable" in the instant case represents a finding of virtual certainty, which goes beyond the legal definition of a reasonable degree of certainty. (9T171-10 to 12).

Osborn also determined that the Petitioner's two signatures were not a fabrication from another source. He found no evidence of simulation of the signatures, commonly known as forgery in the legal field. Osborn also found no evidence of a cut and paste or manipulation with reference to the Petitioner's signatures. (9T172-9 to 174-5).

Osborn's expert testimony was uncontroverted, as the Petitioner failed to provide any expert testimony rebutting his opinions.

In assessing the credibility of the Osborn, the Chancery Division held as follows:

> This court finds John Paul Osborne uncontroverted and extremely credible.

(Pa 26).

B. The Marriage Between Decedent and Petitioner

Decedent and Petitioner were married on November 22, 1992, and remained married until the Decedent's death on May 6, 2021. They had no children

together. The Petitioner has no children. As noted above, the Decedent had one child, the Respondent. (Pa 373; 7T43-1 to 3).

1. Marital Separations

There were multiple extended periods of time when Petitioner was not living in the Decedent's Home. In February1997, when the Respondent was sixteen years old, a disturbing incident took place one night when the Decedent was away on a business trip. Left alone with the Petitioner, the Respondent woke up undressed in the morning, to her great distress. When she awoke, the Petitioner was nowhere in the house. That morning, the Respondent informed the Decedent what had happened. As a result, the Petitioner left the house and moved away, and did not return to live with the Decedent until the Respondent had entered college and was living in Philadelphia. (11T70-23 to 73-11).

The Decedent told Gail Snyder about this incident, who noted that the Petitioner left the house for about a year. She testified that the Petitioner "left the house, left the marriage." (11T17-23 to 18-20).

There were also other periods when Petitioner and Decedent did not live together between 2005 and 2007. During these times, the Petitioner lived in other areas of South Jersey. At separate time periods, Petitioner had lived on his own in Maple Shade and Pleasantville, and also lived with his sister in Galloway.

Respondent testified that she does not remember Petitioner returning to the Home with Decedent until 2009. While the Petitioner was living in Pleasantville, the Decedent was not in any contact with him. The Decedent would do drive-byes with the Respondent in the car on many occasions to look at the places Roy was living. The Respondent heard suspicions from the Decedent about extramarital affairs that Roy was having. Around 2008 or 2009, the Decedent was aware that Roy was buying gifts for the daughter of a woman from Delaware who was having a baby. The Decedent was upset about Roy's extramarital relationships. (11T74-18 to 78-19).

The Petitioner testified that he lived other places because it made his commute shorter for continuing his education in Delaware, even though it only saved him thirty minutes one-way out of an alleged four-hour commute. (7T211-16 to 213-7). While the Petitioner was living with his sister in Galloway, the Petitioner sent Decedent a letter requesting to dissolve their marriage, which states:

> * * * my personal feelings are that the marriage should dissolve and that you should have the freedom to deal with your life as you see fit. In that light, I have no claim against any of your assets as I believe that you would like to preserve them all for your family and Sandi.

(Pa 536).

The Petitioner admitted into evidence many cards sent to Petitioner from Decedent declaring her love and affection. (Pa 378-467). However, the record reveals the marriage as troubled, as reflected by the above noted periods of separation. In addition, Gail Snyder testified that the marriage was "odd" for a number of reasons, including the following:

- the Petitioner would often leave Decedent alone at a party and "sneak out," thinking it "funny" (11T8-1 to 6)
- the Petitioner would abandon Decedent and their relationship for long periods of time
- the Decedent on multiple occasions told Gail Snyder that the Petitioner was involved with another woman (11T9-9 to 12)
- the Petitioner did not assist Decedent around the house, including one occasion where during a snowstorm where the Decedent shoveled the snow while Petitioner remained inside (11T9-19 to 21)
- the Decedent told Snyder that the Petitioner never paid any of the bills and wasted money, and that this conduct "pissed her off." (11T8-18 to 22)
- the Petitioner had a habit of lying to the Decedent (11T11-5 to 7)
- the Petitioner, in front of Snyder referred to the Decedent as a "whale" on more than one occasion (11T11-13 to 18)

The following colloquy occurred on the cross examination of the Decedent's witness, Gail Snyder:

Q. Isn't it true when Roy and Lynda were together that they were happy?

A. I don't know. I think there was more unhappiness on her side than there was happiness. I mean there were times when there was, they were happy, but.

THE COURT: But what? Please answer.

A. So many times she would call me and be unhappy and tell me things about her husband, she wasn't happy. She wasn't happy when he would come home from being in Cherry Hill on the weekends, she wasn't happy that he was coming home.

(11T59-3 to 14).

These observations were corroborated by Kathleen Whelan, a friend of the Decedent since 1963, her freshman year in high school. Whelan and the Decedent maintained a close relationship, confiding in each other during their long relationship. (10T88-17 to 89-25). Whelen characterized the marriage of the Decedent and the Petitioner as "kind of strange" (10T95-3) and noted that (1) the Petitioner never appeared at the Decedent's high school reunions, even though Decedent was on the event committee (10T93-18 to 21); (2) the Petitioner and Decedent had previously broken up their relationship and had been living apart, with Roy moving away (10T95-9 to 96-13); (3) the Decedent told her about another woman with whom Petitioner was romantically involved (10T97-16 to 22).

Kathleen Donahue was a close friend of the Decedent who knew her for almost fifty years. They belonged to the same church, which the Petitioner did not attend. During this time, they regularly confided in each other. (10T132-14 to 16; 10T134-1 to 12. The Decedent told Kathleen Donahue that she was not happy that Roy was not contributing to the household expenses. The Decedent was fearful, because her father abandoned her when she was very young. Donahue testified that the Defendant told her that the marriage was "different" and it appeared as if "she was taking care of him." She noted that the Decedent told her that she did not want Roy "to get anything of mine." (10T136-25 to 138-8; 10T138-9 to 15). She testified that the Decedent

> * * * said to me [Donahue], I really don't want Roy to get anything of mine. That's what she said. That I -- that was from Lynda's mouth to me and Lynda's not here.

(10T147-18 to 19). Donahue noted that the Petitioner was not with the Decedent when she received her cancer diagnosis from Doctor Nazha, and that the Decedent went to her cancer treatments alone. (10T149-20 to 150-3).

The Respondent testified at length as to the Petitioner's habits and inappropriate conduct which annoyed and disturbed both the Decedent and Respondent. (10T79-2 to 83-11). She noted that the Decedent had seen a therapist

and also a church group for help for her marital problems. (10T157-4 to 16). In addition, the Respondent stated:

> I know there became a time that she stopped voicing her issues or frustrations because she felt that, that it would result in a fight or him ignoring her or packing up and leaving, whether it was for a short time or a long time

(10T156-19 to 23).

However, because of her strong religious faith, the Decedent chose to never divorce the Petitioner. (11T58-19 to 24). In addition, the Decedent was afraid of taking such a legal step, since the Petitioner would have "made her life, you know hell," as the Petitioner "wouldn't have just gone quietly." (10T162-21 to 24). In addition, as noted by the Respondent:

> I'm sure she appreciated the safety of having, you know, of having somebody else in the house, like feeling like she was protected in some way, like it wasn't just her, because she didn't have that most of her life (crying).

(11T84-6 to 10). The Decedent had "abandonment" issues, which were based upon the fact that her father left the family and went to California when she was seven years old. This event "really scarred her" and caused her to seek therapeutic help. (11T87-22 to 88-11; 11T89-24 to 90-11).

2. Finances

During the entire marriage, the Petitioner and Decedent had separate bank accounts and separate finances, having no accounts or assets of any type owned jointly. The Decedent handled the couple's finances, and by herself paid the mortgage and taxes on the Home, all utility bills, as well as the expenses associated with her cell phone, car, and household items. In addition, the Decedent paid for the Petitioner's health insurance through her payments to her employer Avon[3]. (7T84-15 to 85-2; 8T11-9 to 12). The mortgage on the Home was eventually satisfied and paid off by the Decedent. (11T91-22 to 24).

The Petitioner possessed no records showing that any money from his bank records was used for household expenses. (8T10-11 to 11-2). With respect to the Petitioner's testimony on this issue, the Chancery Division noted:

> The Petitioner alleged that he contributed to the costs, upkeep of the Home, and general expenses throughout the marriage. Petitioner failed to present any receipts to demonstrate his contributions.

(Pa 18).

3 The Decedent worked for Avon from the time that the Respondent was 5 or 6 years old, initially working as a salesperson and coordinator before being promoted to a district manager. She retired after the onset of her illness. (10T150-4 to 152-9).

The Petitioner's refusal to contribute to the household expenses frustrated the Decedent, and when the Respondent questioned her about this situation, the Decedent told her that "it's not worth the fight." (11T86-14 to 87-2).

This situation, however, created a mindset in the Decedent that because the Petitioner failed to contribute financially to the marriage, he should not have any expectations of an inheritance of any kind. (11T87-3 to 21).

3. Superstorm Sandy

The Home was severely damaged as a result of Superstorm Sandy. The Petitioner and Decedent explored various options and eventually applied for a construction rehabilitation program grant. (11T92-16 to 96-2). Even though the Petitioner was never on the Deed for the Home, the Decedent put his name on the application due to his veteran status. (Pa 490-507). Because the grant was insufficient to rebuild the house, a mortgage from PNC bank was obtained to make up the difference. (Pa 512-513). While both the Decedent and Petitioner were both listed as the Mortgagors, only the Decedent was listed as the Borrower, and only she -- and not the Petitioner -- was responsible for payment. (Pa 512).

While the Petitioner's income was necessary for PNC to grant the mortgage, the Decedent paid off the mortgage in 2020, relieving the Home from any debt. As noted by the Chancery Division: "Petitioner <u>failed to provide any proof</u> that he

paid any of the mortgage payments while Decedent was alive." (Pa 19; emphasis original).

C. The Relationship of Decedent and Respondent

The Petitioner contended that the Decedent was manipulated and controlled by the Respondent, which allegedly resulted in the Petitioner's exclusion from the Will. (7T13-7 to 14-5; 7T64-9 to 16).

However, Timothy Maguire, Esq. testified that Decedent and Respondent had a loving mother-daughter relationship. (9T226-3 to 13). The Respondent testified that she had a very close relationship with Decedent. (10T148-6 to 149-7).

The Respondent openly acknowledges that she went through a rebellious period of about two years, starting in 2006, where she had substance abuse issues and that the father of her children had been involved with drugs and he subsequently passed away. The substance abuse arose of a prescriptions for pain killers given to the Respondent for neck and back pain after she was injured in an automobile accident. The doctor who prescribed this medication - Manuel B. Nigalan, M.D. -- was eventually convicted and was incarcerated. (11T97-1 to 99-15).

The Respondent, however, turned her life around. She entered the Maryville – Post House rehabilitation clinic for inpatient treatment, where she successfully recovered from her painkiller addition. As of the time of trial, she had been "clean" for 13 years. (11T106-7 to 109-16).

D. Drafting and Execution of the Will

Judge Timothy Maguire was an attorney in private practice in 2014, having opened up his own firm in 1999, which included his wife and attorney, Michelle Maguire. Macguire served as a solicitor at various points for the cities of Brigantine, Ventnor, and also for Mullica Township. He also served as counsel for various planning and zoning boards. In 2015, Maguire was appointed as a Municipal Court judge in Brigantine, and in 2022, was selected as the chief judge of the central Municipal Court of Atlantic County. (9T211-2 to 213-10).

As part of Timothy Maguire's private practice, he prepared Wills for his clients. Maguire first met the Decedent when she was his 7th grade teacher. The Decedent became a client of Maguire over a decade ago. In 2014, the Decedent asked Macguire to prepare a Will for her. (9T214-16 to 216-4).

Maguire identified Exhibit R-9 as the Decedent's original Will, which he prepared and which was signed by the Decedent on October 16, 2014. (Pa 105-109). (9T216-20 to 217-2; 9T227-7 to 21). The witnesses to the Will were

Maguire and his wife, Michelle, both of whom were attorneys at this time. (9T230-13 to 17; 10T43-16 to 20).

As per the Decedent's instructions, Maguire drafted the Will to include Article Sixth which states:

> For reason best known to me, I direct that my husband, Roy Sutton specifically be excluded from inheritance of any portion of my estate.

(Pa 107; 9T229-24 to 230-5).

As noted by McGuire, three reasons prompted the Decedent to leave her entire estate to the Respondent. First, she wanted to take care of her daughter. Second, the Decedent did not want the Petitioner to inherit because he had not provided either the financial or emotional support that the Decedent sought in the marriage. Third, the Decedent was concerned because the Petitioner was a very litigious person, and felt that the Petitioner would sue to try to prevent the probate of the Will. (9T220-8 to 25; 9T225-11 to 226-2). As to these three reasons, Maguire testified: "I would say all three of those things she said to me at least three, four, or five times." (9T225-24 to 226-2). Maguire further testified:

> So, she made it very clear to me that she wanted to go -- everything to go to Sandi, if Sandi were to predecease her to the boys, and that she deliberately did not want Roy to get anything. I'm clear on that.

(9T220-19 to 22). To this end, Decedent showed Maguire the letter Petitioner sent to Decedent requesting the dissolution of the marriage, as quoted on page 14 above. (Pa 536; 9T222-24 to 223-17).

The Decedent also brought a copy of the signed Antenuptial Agreement to her appointment with Maguire. The Decedent informed him that Ralph Perone, Esq. had prepared this Agreement. (9T223-18 to 224-19). Maguire had a "specific recollection" of being given this document by the Decedent. (9T272-24 to 273-7).

Maguire testified that the Respondent was not present at the meetings where the Will was discussed and drafted, and was not present when the Will was signed by the Decedent. (9T226-14 to 227-6). This fact was confirmed by the Respondent. (11T109-19 to 111-5).

McGuire had no reason to believe that (1) the Will was signed unwillingly, (2) Decedent was of unsound mind, (3) Decedent was under any form constraint, or (4) Decedent was being unduly influenced by anyone in any way with reference to the Will. (9T232-3 to 25). These facts were confirmed by Michelle Maguire, Esq. at trial. (10T44-22 to 45-9). In this respect, the following colloquy occurred during the testimony of Timothy Maguire:

> Q. Okay. If any of those items, and by that I mean willingness, sound mind, constraint, undue influence, were suspected by you, would you have prepared this will?

A. I would have prepared it, but I would not have let the individual sign it. In other words, I have had instances where people have come into the office, and after my discussions with them I felt that they were not of a mental capability to knowingly sign the will and understand what they were doing. So, I -- I don't do it, and I tell them they'll have to go to another attorney.

Q. And that was not the case here; is that correct?

A. Not even close. Not even close.

(9T233-9 to 23).

The Decedent gave her friend Gail Snyder a copy of her Will shortly after it was executed. (11T12-11 to 21). Kathleen Whelan testified to the testamentary intent of Decedent, namely that Decedent wanted to leave her entire Estate to Respondent. (10T98-8 to 17). Kathleen Donahue testified that the Decedent directly informed her -- "from Lynda's mouth to me" -- that all of the Decedent's assets would be passed on to the Respondent. (10T147-12 to 20).

The 2014 Will was never altered or changed since its inception.

E. Decedent's Hospital Stay

The Decedent was hospitalized for the final time on April 20, 2021, with Covid pneumonia, and died on May 6. (11T141-16 to 143-9).

The Respondent had telephone conversations and Facetime calls with the Decedent while she was hospitalized. The Respondent was able to understand

everything the Decedent was saying, except during the last conversation a few days before she died. (11T144-15 to 146-2).

On April 30, 2021, the Decedent called the Respondent to tell her to contact Timothy Maguire, Esq., and to let her know the Respondent's mortgage[4] with the Decedent was forgiven. Respondent testified that the Decedent also texted her later that day to tell her how proud she was of her and her sobriety. The Decedent never mentioned the Petitioner in any of her phone calls, and the Respondent was unaware of any conversations by the Decedent with the Petitioner during the hospitalizations. (11T146-19 to 149-23).

Both Timothy and Michelle Maguire spoke with Decedent while she was in the hospital because Decedent wanted to ensure that her wishes would be carried out, specifically that Respondent would be taken care of via the executed Will, and also that the mortgage with the Respondent be forgiven. (9T235-21 to 237-17).

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4 In 2014, the Respondent purchased a lot in Brigantine, New Jersey with money given to the Respondent from her uncle, Fred Perone. In 2019, the Respondent began construction of a house on that lot via a mortgage given by the Decedent. Construction was completed by December 2019. Up until the near the end of the Decedent's life, the Respondent was sending monthly mortgage payments to the Decedent. A written mortgage agreement was prepared by Timothy Maguire, Esq., who testified that the Decedent informed him just before she died that she wanted to forgive the Respondent's mortgage. (11T135-11 to 137-1; 11T139-9 to 141-14; 9T234-22 to 237-17).

Petitioner testified that Decedent was unable to use her phone after she was hospitalized. Petitioner stated that he believes it was not Decedent talking on the phone to Timothy Maguire, Michelle Maguire, Respondent, or Kathleen Whelan just prior to her death. (Pb 29). However, the Chancery Division rejected this testimony, stating: "This court finds that Decedent had her phone in the hospital and that she did call the above-named individuals during her stay." (Pa 22).

F. After Decedent's Passing

Safe Deposit Box

The Decedent placed items, including her Will, in a safe deposit box, so that if anything happened to her the Respondent would have access to these items. The Petitioner was not provided with access to this box. (11T53-1 to 3). Instead, access to the safe deposit box was given to her friend, Gail Snyder. Snyder never accessed the safe deposit box until she surrendered it and closed it out. She provided the Respondent with the original Will that had been stored in the deposit box. (11T12-24 to 16-11). This fact was confirmed by the Respondent. (11T119-8 to 10).

Rubber Maid Box

Shortly before the Decedent died, she telephoned her good friend, Kathleen Whelan, at which time she informed Whelan about a Rubbermaid box in her walk-

in closet on the right-hand side. She requested that Whelan obtain the Rubbermaid box. Whelan repeated these instructions back to the Decedent, who said "Yes." That was all the Decedent was able to say on the phone, and then she hung up. She died a day a two later. (10T107-2 to 20). The Respondent confirmed Whelan's testimony as to the Rubbermaid Box. (11T119-11 to 120-2). The original of the Antenuptial Agreement was believed to be inside the Rubber Maid Box. (11T119-11 to 120-2).

After the Decedent's death, her friend Gail Snyder went to the Decedent's house three times. The Petitioner was living in the house during this time. As per the Decedent's instructions, Snyder went to the former's walk-in closet to obtain the Rubbermaid box. It was missing. (11T16-13 to 17-22).

However, a copy of the Antenuptial Agreement was found by Gail Snyder in a random box in the Decedent's house. (11T51-1 to 3).

The Petitioner was the only person living in the Decedent's house from the time she went into the hospital up until the present time, and was the only one who had access and control of the Decedent's possessions in the house, including the Rubbermaid box. (Pa 23).

Petitioner claimed he did not remove anything from the Home. (8T122-2 to 10). However, Petitioner later testified that he removed a bureau, boxes that

allegedly contained mildew, Avon products, and other items Petitioner believed to be trash. The removal of these items violated the Chancery Division's Order instructing the Petitioner to remove nothing from the house. (8T122-11 to 127-18). As to the missing Rubbermaid box, the Respondent testified as follows:

> THE COURT: Okay. What did you think it was that you were looking for?
>
> THE WITNESS: A rubber box with a lid, with like a clear bottom and maybe not a clear top, but she told, my mother told Kathy exactly where to look for it, when you walked into the closet, like on the right hand side on the floor, and her closet is pretty big. She said like I think to the immediate right when you walked in.
>
> THE COURT: And did you see anything?
>
> THE WITNESS: There were a lot of things in there but we didn't see anything that held documents, but even before my mother died, Roy had talked about ransacking the house from the garage to the attic, looking for the dog's ashes because he said my mom told him she wanted to be buried with their previous dog's ashes. So when he was talking about going through the house, and this was before she passed, I knew, I felt that he was not looking for the dog's ashes. I felt like he was, you know, looking for things, so, things that had been gone before she passed.

(12T44-12 to 45-7). The Petitioner alleged that he did not remove or destroy any legal documents from the house after the Decedent entered the hospital. (8T128-15 to 129-1).

The Chancery Division noted the following timeline of events that occurred after the Decedent's death:

> Timothy Maguire, Esq. sent a copy of the Will to Petitioner a few days after Decedent's passing. The Caveat to Decedent's Will was filed the day after Gail Snyder and Respondent went to Decedent's Home in search of the Rubbermaid Box, and within a week of Decedent's passing.

(Pa 24).

Shortly thereafter, the Petitioner filed a complaint with Adult Protective Services ("APS"), alleging that the Decedent's mother was not being taken care of properly. This charge was fabricated by the Petitioner, conduct which alarmed and frightened the Respondent. (11T120-17 to 22 to 122-15; 11T131-24 to 132-3). The APS complaint was "quickly" resolved and dismissed via a phone call the following day No investigation was conducted. (11T134-11 to 135-10).

At this time, the Petitioner, who was not a subscriber or connected in any way to the Respondent's cell phone contract[5], managed to cancel the Respondent's Sprint phone contract (11T122-25 to 126-15).

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5 As noted by the Respondent: "I had four lines on the account, none of which were Roy's [Petitioner]. But they told me that somebody had called and cancelled service that morning, and they said it was Roy Sutton at 8:17 a.m." (11T124-20 to 23). The Petitioner had managed to do this by answering the "security questions" associated with the account, which included things such as "what street did you grow up on" and similar information that the Petitioner would know. (11T125-5 to 9).

A few weeks after the dismissed APS complaint, the Petitioner -- the evidence is overwhelming that it was indeed him -- filed a written complaint dated August 13, 2021 with Child Protective Services ("CPS"), causing CPS representatives to show up at the Decedent's house. This was set in motion via a letter sent to CPS alleging a need for "drug tests and urine from the [Respondents] kids." (8T32-3 to 134-17; 11T122-122-19 to 21; 11T126-17 to 127-4]. As noted by the Respondent:

> And at the time, me, my two children and my ex-boyfriend had lived in that house and none of us were taking drug tests, so the whole thing was like suspicious. But you know, I had an inkling of where it all originated from.

(11T127-5 to 9). After obtaining a copy of the written complaint, the Respondent discovered that a letter was fabricated as being written by a "Thomas New." This person, a childhood friend of the Respondent who died in an automobile accident in 2003, was well known to the Petitioner[6]. Given the circumstances, the evidence strongly points to the Petitioner as the fabricator of that letter to CPS. (11T128-

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6 The Petitioner denied knowing Thomas New. (7T138-10 to 139-1). This testimony was shown to be false during the testimony of Kathleen Donahue -- Thomas New's grandmother -- who noted that several months prior, the Petitioner had mailed Donahue several photos of Thomas New that he had in his possession. These included a photo of Thomas New at the Decedent's 40th birthday party. These photos were produced by Donahue at trial and identified by her. (10T138-25 to 145-14).

17 to 131-18). The charges, obviously false, were "quickly" dismissed by CPS. (11T131-19 to 21). As to this event, the Respondent states:

> I was disgusted. It made me scared, and I also felt a little relieved because I know that that letter could have ended up resulting in my kids, you know, being taken out of the house, possibly separated, with strangers, you know, temporarily while this investigation was done, and my kids had already been through so much. So I was completely disgusted, and you know, scared, like what's next.

(11T130-24 to 131-6).

G. Petitioner's Finances

The Petitioner received monthly benefits of at least $6,200. These include a VA disability pension since 2003 (current amount $3,600 per month), monthly social security in the amount of $1,800, and a federal pension of $800 per month. (7T208-18 to 209-21). These payments were deposited into bank accounts solely in the name of the Petitioner. (8T10-6 to 10).

During the last ten years that the Petitioner and Decedent were both working, each earned approximately $65,000 per year. (8T7-17 to 10-5).

H. Petitioner's Litigious History

Between 1985 and 1999, the Petitioner, as a plaintiff, filed nine lawsuits relating to his father's estate. (8T101-13 to 102-9; 9T37-12 to 18). In these suits,

the Petitioner sued Ronald Sutton, his brother, and Loretta Sutton, his mother, as Co-executors of his father's estate. He also filed lawsuits against (1) the attorneys that handled the estate (2) city of Atlantic City, and (3) the Alcoholic Beverage Commission. His lawsuits included a malpractice suits against attorneys George Seltzer and Phillip Perskie, the latter being one of the estate attorneys that handled his father's estate. Five of the nine lawsuits were filed in the New Jersey state courts, which concerned his father's estate, including against the executors, trustees and attorneys involved. More than one of those suits were taken up to the New Jersey Supreme Court. Four of the lawsuits were filed in federal court, and concerned the same issues and same or similar parties. (8T92-19 to 115-18).

All nine lawsuits and all appeals filed by the Petitioner resulted in a dismissal of all of his claims. (8T117-10 to 16). The history of the Petitioner's litigations and the dismissal of each one was reviewed in the published decision in *Sutton v. Sutton*, 71 F. Supp. 2d 383, 385 (D.N.J. 1999), *aff'd,* 216 F.3d 1077 (3d Cir. 2000), which comprised Exhibit R-4 at trial. (8T116-5 to 8). At the beginning of the opinion, Judge Simandle writes:

> The instant case arises from a series of transactions and various lawsuits dating back to 1985 and it requires this court to explore the limitations upon its ability to entertain newly pleaded federal claims relating to a <u>seemingly endless series of matters</u> previously litigated in the state courts. As discussed herein, all of the claims and issues

> within this have been, or could have been, decided in the three previous federal lawsuits and other state court actions that this estate debate has engendered.

Id. at 385 (emphasis added). All claims brought by the Petitioner in this matter were dismissed by Judge Simandle. 71 F. Supp. 2d at 393.

I. Chancery Division's Findings of Credibility

The Chancery Division evaluated the credibility of the witnesses at trial, which included the five witnesses presented by the Petitioner and the eight presented by the Respondent. (Pa 16-20). As to the Petitioner's testimony, the Court concluded:

> Petitioner's testimony was contradicted by multiple fact witnesses, exhibits, and even his own testimony between his deposition and at trial. This court does not find Petitioner to be a credible witness.

(Pa 25).

As to the Petitioner's other witness, the Chancery Division found Melissa Young Tucker, a former neighbor, to be credible but essentially irrelevant in terms of the time period testified to. (Pa 25). As to Nicholas Gurrancino, a longtime friend of Petitioner, the Court found him "credible but not persuasive." (Pa 25). The Court similarly found Paula Guarracino as "credible but not persuasive." (Pa 25-26). The Petitioner's last witness, Elizabeth Gelo, a caretaker for the

Decedent's mother, was found to be "credible but not relevant to this court's inquiry." (Pa 26).

All five of the Respondent's witnesses were found to be credible and relevant. The testimony of the forensic document examination expert, John Paul Osborne, was found to be "uncontroverted and extremely credible." (Pa 26). Both attorneys, Timothy and Michelle Maguire, were found to be credible. (Pa 26-27). Atlantic County Deputy Surrogate, Patricia McDougall, was held credible, as was the testimony of Kathleen Whelan and Kathleen Donahue. (Pa 27). Gail Snyder's testimony was found to be "reasonable, well-founded and credible." (Pa 28). As to the Respondent, the Chancery Division held as follows:

> Most of Respondent's testimony is uncontradicted and supported by other witnesses. She was composed. Her demeanor was such that her recollection of all the facts as recited was believable. Respondent was extremely credible while testifying as to her shortcomings in life including the relationship with the father of her children and her challenges with substance abuse and parenting. The fact that she admitted that, at times, she was not a "model'' child was also credible. In the end, her bond and close relationship with her mother and the love they shared as a mother and daughter was evident. This court finds Respondent credible.

(Pa 28).

STATEMENT OF STANDARD OF REVIEW

The appeals court may not substitute its own view of the evidence, especially with respect to findings of credibility. See, *State v. Nunez-Valdez*, 200 N.J. 129, 141-142 (2009) (appellate court not at liberty to substitute its credibility findings); *State v. Locurto*, 157 N.J. 463, 474 (1999), making it clear that "[a]ppellate courts should defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Accord, *State v. Dunbar*, 434 N.J. Super. 522, 526 (App. Div. 2014) ("We particularly defer to those findings that flow from the trial court's opportunity to see and hear the witnesses, an opportunity not enjoyed by a reviewing court").

A probate court's post-trial factual findings as to testamentary capacity and undue influence "are entitled to great weight [on appeal] since the trial court had the opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony." *In re Will of Liebl*, 260 N.J. Super. 519, 523 (App. Div. 1992). Unless the trial judge's findings are "so manifestly unsupported or inconsistent with the competent, reasonably credible evidence" the factual conclusions should not be disturbed. Id. at 524. Accord, *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 340 N.J. Super. 104, 118 (App. Div. 2001).

LEGAL ARGUMENT

POINT I

THE RECORD AND APPLICABLE LAW SUPPORT THE CHANCERY DIVISION'S VALIDATION OF THE DECEDENT'S WILL.

As the party contesting the Decedent's Will, the Petitioner bears the burden of proving undue influence. *In re Estate of Stockdale*, 196 N.J. 275, 303 (2008). Undue influence is a form of fraud that must be proven by clear and convincing evidence. *In re Niles Trust*, 176 N.J. 282, 300 (2003).

The elements that must be present to raise a presumption of undue influence are: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence, and (2) suspicious circumstances as to the Will. *In re Estate of Stockdale*, 196 N.J. at 302-03 (2008); *Haynes v. First National State Bank*, 87 N.J. 163, (1981); In re Miles, 176 N.J. 282 (2003).

While parent-child relationships are confidential by nature, the mere existence of a family connection does not of itself create a confidential relationship. *Estate of Ostlund*, 391 N.J. Super. 390, at 401 (App. Div. 2007); *Pascale v. Pascale*, 113 N.J. 20, at 34 (1988).

A confidential relationship alone does not raise a presumption that the beneficiary exercised undue influence. "Circumstances suggestive of inequality,

unfairness, imposition, or overreaching give rise to a presumption of undue influence ... " *In re Will of Blake*, 21 NJ. 50, 55-56 (1956).

Other suspicious circumstances might include: a drastic change in testamentary plan; the person allegedly committing the undue influence is the sole beneficiary; the beneficiary participates in the preparation of the Will or trust (e.g., selects the attorney, gives instructions to the attorney preparing the Will or trust, has knowledge of the contents of the Will or trust, etc.); the beneficiary is present at the execution of the Will or trust or secures the witnesses; the beneficiary conceals the execution of the Will or trust and takes possession of the document; the beneficiary isolates the testator/settlor from the natural objects of the testator/settlor's bounty; lack of independent legal counsel; secrecy and haste surrounding the making of the Will; or an unexplained change in the testator's attitude toward those for whom he had previously expressed affection. *See In re Will of Catelli*, 361 N.J. Super. 478 (App. Div. 2003).

Here, the record in no way justifies a finding of undue influence or even a shifting of the burden of proof. The facts show an independent woman who was relying on an antenuptial agreement by keeping her assets separate, stuck in a bad marriage, who was independent, and repeatedly told people that she wanted to

leave all of her assets to her daughter, which she was entitled to do pursuant to the valid antenuptial agreement.

In its decision, the Chancery Division held: "Here, the court finds there were NO suspicious circumstances." (Pa 34). It then devotes five paragraphs delineating the reasons for this conclusion. (Pa 34-35). Those paragraphs, which require no repetition here, effectively put to rest the Petitioner's arguments on this issue, which in the view of the Respondent, is not a "close" or difficult legal issue.

On appeal, in Point I, the Petitioner makes five arguments, all of which lack merit. They are briefly addressed in turn.

A. The De Novo Standard of Review Fails To Provide a Basis for Reversal of the Chancery Division's Decision.

The fact that the Appellate Division utilizes a de novo standard of review on Rule 4:40-1 motions for judgment matters little here. The fact remains that the record provides overwhelming evidence against any contention that the Respondent exercised undue influence upon the Petitioner when making the 2014 Will.

In addition, emphasis is drawn to the twin standards of review applicable to this case, as noted on page 36 above.

First, the Appellate Division may not substitute its own view of the evidence, especially with respect to findings of credibility. The elephant in the room in the Petitioner's brief is its failure to acknowledge in any respect the detailed credibility findings made by the Chancery Division in its written decision. As detailed earlier in this Brief, all five of the Respondent's witnesses were found to be credible and relevant. By way of sharp contrast, the Petitioner's testimony was found to be not credible. On top of that, the Petitioner's other three witnesses were either found "credible but not persuasive" or "credible but irrelevant." Such findings -- essentially irreversible on appeal -- run headlong into most if not all of the Petitioner's arguments.

Second, the Petitioner on appeal faces the burden of showing that the Chancery Division's findings were "so manifestly unsupported or inconsistent with the competent, reasonably credible evidence." *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, *supra.,* 340 N.J. Super. at 118. They have made no such showing on this appeal.

B. The Chancery Division Applied the Correct Burden of Proof With Respect to the Petitioner's Undue Influence Claim.

In contending that the Chancery Division applied the incorrect standard, the Petitioner makes the remarkable argument that the standard for proving undue influence is merely the preponderance of the evidence, and not clear and convincing evidence, citing *Estate of Ostlund,* 391 N.J. Super. 390, 403 (App. Div. 2007). (Pb 18).

The Appellate Division in *Estate of Ostlund* said no such thing. That case did not involve a claim of undue influence in making a will, but rather, the "disposition of a joint bank account on the death of one of the parties to the account and the right to certain checks payable to decedent that were deposited to the joint account after decedent's death." 391 N.J. Super. at 393. It rested upon the application of the Right of Survivorship statute (N.J.S.A. 17:16I-5) that applies to Multiple-Party Deposit Accounts. From this irrelevant decision, the Petitioner selects the following passage in support of his bizarre standard of proof argument:

> In addition to the statutory test set forth in the Multiple–Party Deposit Account Act discussed above for determining ownership on death of a joint bank account, our courts have set forth in *Pascale v. Pascale,* 113 *N.J.* 20, 549 *A.*2d 782 (1988), and in *In re Estate of Penna,* 322 *N.J.Super.* 417, 731 *A.*2d 95 (App.Div.1999), an alternative basis to challenge the ownership of a joint survivorship account on the death

> of one party. Those cases provide that, if the challenger can prove by a preponderance of the evidence that the survivor had a confidential relationship with the donor who established the account, there is a presumption of undue influence which the survivor donee must rebut by clear and convincing evidence.

391 N.J. Super. at 401 (emphasis added).

However, whether a survivor had a confidential relationship with the donor of a Multiple-Party Deposit Account has nothing to do with the instant case, and of course, does not represent the burden of proof in proving undue influence in making a will.

As noted by the New Jersey Supreme Court, the burden of proof at trial to show undue influence is indeed the standard of "clear and convincing" evidence. *In re Niles Trust*, 176 N.J. 282, 300 (2003). This is because the act of undue influence is a type of fraud. Id. at 299. The Petitioner's argument to the contrary can only be construed to have been advanced in bad faith.

C. The Chancery Division Did Not Apply Any Incorrect Standards In Evaluating the Evidence.

The Petition again makes an incorrect standard argument, to no avail. In this respect, he argues:

> When granting Respondent' s motion for a directed verdict, the Court failed to apply the standards governing motions under R.4:40-1, and disregarded all the evidence presented by Petitioner and failed to afford Petitioner any favorable inferences. (P9- P3 5). The Court also limited its review of the facts to the very narrow period time that the will was executed * * *

(Pb 18-19).

Such contentions ignore the fact that the Petitioner was not a credible witness, as found by the Chancery Division:

> Petitioner's testimony was contradicted by multiple fact witnesses, exhibits, and even his own testimony between his deposition and at trial. This court does not find Petitioner to be a credible witness.

(Pa 25). As a result, how can the Petitioner reasonably expect to be accorded favorable inferences? There was no foundation upon which to extend any favorable inferences to the Petitioner's largely unbelievable testimony. He writes:

> Rather, the Court presented an Opinion that disregards the competent, substantial and <u>credible evidence</u> in the record and rather, relies on hearsay and lay opinions without foundation that it cherry picked to support its predetermined rulings.

(Pb 20; emphasis added). Such a statement flies in the face of the Chancery Division's explicit credibility findings, and cannot provide a basis for reversal on appeal. In addition, what hearsay does the Petitioner object to? And how exactly did the trial court "cherry pick" the evidence? The Petitioner does not say.

Along the same lines, the Petitioner argues that "the Court failed to subject all the evidence presented at trial to careful scrutiny to determine if suspicious circumstances were present." (Pb 18-19). What, precisely, is the "evidence at trial" the Petitioner is talking about? Again, he does not say.

D. The Chancery Division Correctly Found An Absence of Suspicious Circumstances.

In alleging suspicious circumstances, the Petitioner repeatedly argues about the Respondent's "self-serving testimony." (Pb 22-23). Aside from the fact much testimony as a matter of course has this characteristic, the Petitioner ignores the fact that multiple fact witnesses presented credible testimony detailing the unhappiness and despair of the Decedent's marriage. These witnesses included Gail Snyder, Kathleen Whelan, and Kathleen Donahue. Thus, the record at trial contains four witnesses testifying about the Decedent's unhappy marriage.

In attempting to hurdle this powerful cumulative evidence, the Petitioner cites cards written to him by the Decedent expressly love and affection. (Pb 22). The Respondent's response is two-fold.

First, marriages and human relationships are complex ecosystems, which often contain contradictory feelings and actions. The fact that that the Decedent may have expressed affection in writing does nothing to discount the deep unhappiness within. If the Petitioner thinks the marriage was so great, why were there multiple separations? And why would he have written this letter to the Decedent?

> * * * my personal feelings are that the marriage should dissolve and that you should have the freedom to deal with your life as you see fit. In that light, I have no claim against any of your assets as I believe that you would like to preserve them all for your family and Sandi.

(Pa 536).

Second, the Decedent did her best to keep the failed marriage going, in part no doubt because of her strong religious faith, which prevented her from filing for divorce.

Third, the Decedent was afraid of taking such a legal step, since the Petitioner would have "made her life, you know hell," as the Petitioner "wouldn't have just gone quietly."

Fourth, multiple witnesses cited the Decedent's "abandonment" issues, which were based upon the fact that her father left the family and went to California when she was seven years old. This event "really scarred her" and caused her to seek therapeutic help.

Thus, any notion that "suspicious circumstances" caused the Decedent to disinherit the Petitioner lack all merit.

The Petitioner also cites the testimony of Maureen Tucker, a witness who claimed the Respondent manipulated the Decedent during the time that the Respondent was going through a difficult time in her life. (Pb 24). However, the Chancery Division properly found that her testimony was irrelevant in terms of the time period testified to, noting that "her experience living next to Respondent when she was struggling in the relationship with the father of her children who had substance abuse issues." (Pa 25).

The Petitioner further relies upon his testimony that the Decedent allegedly wanted to make a trust for the Respondent. (Pa 25). However, aside from the Petitioner's non-credible testimony, there is no basis whatsoever in the record for such a statement. The Petitioner also contends that the Decedent

> * * * suddenly and secretly made a will on October 16, 2014 that benefitted only Respondent, thirteen days after the newspaper publication of JZ's arrest was being circulated in the small

> community. Respondent obviously took advantage of Decedent's distress over the newspaper publication of JZ's arrest on October 3, 2014 as a means to unduly influence Decedent to make a Will on October 16, 2014.

(Pa 25-26).

The first sentence is inaccurate. The Decedent's Will was no secret. It was carefully drafted after the Decedent met with a trusted long-time friend, Timothy Maguire, Esq., at which time Maguire was convinced of the Decedent's honest and open intentions. The Will was witnessed by two persons, and it's existence was made known to various of the Decedent's friends. In addition, the Chancery Division aptly states:

> Respondent did not participate nor was she present for the creation or signing of the Will. The Will was made years before Decedent's passing and was not changed after its execution. Decedent affirmed her testamentary intent from the hospital before her death. Further, the Will is consistent with the terms of the Antenuptial Agreement, Ex. RM2, and the letter Petitioner sent Decedent in the Summer of 2005. Ex. P-28. This Court finds that there were no suspicious circumstances surrounding the drafting and execution of Decedent's 2014 Will.

(Pa 35).

In addition, by arguing that Gail Snyder told the Petitioner that the Will was not found in the safe deposit box (Pb 27), the Petitioner further distorts the record and ignores the following testimony explaining Snyder's confusion on this issue:

Q. Okay. And you were asked a lot of questions about your deposition and saying back and forth as to whether there was or wasn't a Will. The question I have for you is, did you ultimately become aware that the original Will was in the bag that you gave to Sandi?

A. Yes.

Q. And how did you become aware that the original Will was there?

A. Sandi told me the original Will was there.

Q. Okay.

A. It had to have been in there. I was getting the Will and the Prenup confused. We took boxes out of Lynda's house, we found the Prenup in those boxes. <u>The Will was in the safe deposit box</u>. I had my Wills, Prenup and Will mixed up and the boxes mixed up.

(11T51-11 to 52-5).

In contending that the Decedent was unable to talk coherently on the phone the week before she died, the Petitioner contends that the Chancery Division "disregarded Respondent's description of the Decedent during a facetime call that she and Petitioner had with Decedent a four to five days before she died." (Pb 30).

However, as the transcript shows, this facetime call was the <u>final</u> conversation between the Respondent and the Decedent. At this point, the Decedent was placed on a ventilator, which was a "couple of days" before she

died. (11T145-20 to 146-18). Thus, the fact that communication was difficult at this late hour is unsurprising.

By way of sharp contrast, the conversations the Decedent had with Michelle Maguire and others -- including the Respondent -- took place a week or more before her death. Here, the Petitioner ignores the Respondent's other testimony, namely, that (1) on April 30, 2021 -- a week before her death on May 6, 2021 -- the Decedent called the Respondent to tell her to contact Timothy Maguire, Esq., and to let her know the Respondent's mortgage with the Decedent was forgiven, and (2) the Decedent also texted the Respondent later that day to tell her how proud she was of her and her sobriety. (11T146-19 to 149-23).

Accordingly, the Chancery Division properly rejected the Petitioner's testimony regarding the Decedent's hospital phone calls, stating: "This court finds that Decedent had her phone in the hospital and that she did call the above-named individuals during her stay." (Pa 22).

The Petitioner's argument that suspicious circumstances accompanied the making of the Will is untenable and without support. The Chancery Division's conclusion on this issue should thus be affirmed.

E. The Petitioner's Spoliation Argument Utterly Lacks Merit.

This issue is a red herring that (1) was not brought up at trial, (2) was first raised in the Petitioner's Post Trial Brief, and (3) has no relevance to the facts as they were introduced at trial.

The reported cases deal with the issue of spoliation under circumstances that deal with a product that was destroyed in some manner by one of the parties that resulted in damages to the other party. The cases dealing with spoliation involve a product that had an alleged defect, which is not the subject matter of our case.

The issues here involve whether there was a valid Will, whether there was undue influence, whether there was a valid Antenuptial Agreement, whether Petitioner is entitled to an elective share, and finally whether Petitioner is entitled to an equitable interest in the estate. There was testimony during the trial on each of these issues, including from Timothy Maguire, the attorney who prepared the Will. His testimony was clear and convincing that the Decedent's expressed desires on multiple occasions was to disinherit the Petitioner from her Will and that she was not under any undue influence from Respondent at any time. Timothy Maguire testified credibly, under oath, concerning all of his conversations with Lynda and her wishes for her Will. He did the same at his deposition, taken by

Petitioner's counsel. Whether or not Maguire took any notes, kept any notes, or still has any notes is not relevant in a spoliation claim.

Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition. *Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc*., 336 N.J. Super. 218 (App. Div. 2001) (citations omitted).

There is a four part test in New Jersey concerning a duty to preserve evidence. A duty to preserve evidence arises when there is (1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation.

Here, parts 3 and 4 of the test cannot be met. Assuming that the notes exist and are not available, where is the evidence that was presented at trial that supports a finding of foreseeability of harm or relevance to the litigation? The alleged notes involve the Decedent's wishes for her Will. Timothy Maguire testified that based upon his conversations with the Decedent he prepared a draft document, forwarded it to her for review, she ultimately approved the Will, it was reviewed with her

again prior to signing, and was signed, witnessed, and notarized. The notes would be irrelevant to the validity of the Will or the false allegation of undue influence.

A Plaintiff who destroys evidence interferes with a defendant's ability to defend a lawsuit and right to discovery. Where plaintiffs spoliate such evidence, sanctions should be imposed. The existence of a duty to preserve evidence is a question of law to be determined by the court. *Aetna Life and Casualty Co. v. Imet Mason Contractors*, 309 N.J. Super. 358, 365 (App. Div. 1998).

In this matter, a party did not destroy evidence pertinent to the action. The pertinent evidence on this issue only includes the Will. The original Will was produced at trial and identified by the witness, the scrivener, as the Decedent's original Will prepared in accordance with her wishes.

Spoliation, as its name implies, is an act that spoils, impairs or taints the value or usefulness of a thing. *Rosenblit v. Zimmerman*, 166 N.J. 391, 400 (2001). In law, it is the term that is used to describe the hiding or destroying of litigation evidence, generally by an adverse party. Id. at 400-401. When spoliation occurs, the law has developed a number of civil remedies where "the litigant whose cause of action has been impaired by the absence of crucial evidence." (emphasis added). Id. at 401. The alleged notes of the attorney preparing a client's Will are not crucial evidence under the circumstances.

The Chancery Division heard the testimony of Timothy Maguire concerning the Will and the wishes of Lynda Sutton, as well as any potential notes that may have existed. As the Court was able to take all of the witness's testimony into consideration, it is best able to determine the relevance of the notes in question, the importance of the notes, and what, if any, bearing it had on the credibility of the testimony of the witness. The Chancery Division thus appropriately rejected the Petitioner's spoliation argument. (Pa 29-30).

POINT II

BECAUSE THE PARTIES ENTERED INTO A VALID AND ENFORCEABLE ANTENUPTIAL AGREEMENT, THE PETITIONER IS NOT ENTITLED TO AN ELECTIVE SHARE UNDER N.J.S.A. 3B:8-1.

Together with the Will, the Antenuptial Agreement ("Agreement") signed and executed by the parties in October 1992 is valid and enforceable. Because (1) compelling evidence shows that the Petitioner destroyed the original, and because (2) the rules of evidence permit the use of a copy as admissible and competent evidence, the fact that original is missing fails to support the Petitioner's position.

As a result of the signing of the Agreement, the Petitioner waived his right to an elective share under N.J.S.A. 3B:8-1.

A. The Agreement Is Valid and Enforceable.

The Petitioner's overriding argument at trial and on appeal is that because the Agreement is a photocopy and not an original, it cannot be utilized by the Respondent. This position lacks all merit.

Copies of documents are readily admissible under N.J.R.E. 1003, entitled "Admissibility of duplicates," which states:

> A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Four reasons support the admissibility of the copy of the Agreement.

First, multiple witnesses testified to its existence including Respondent, Gail Snyder, Kathleen Whelan, and Timothy Maguire, Esquire.

Second, the uncontroverted expert opinion of John Paul Osborn concluded that it was "highly probable" that both signatures of the Petitioner on the antenuptial agreement are genuine. "Highly probable" is an expression of virtual certainty under the standards of Osborn's profession. Osborn also determined that the Petitioner's two signatures were not a fabrication from another source. He found no evidence of simulation of the signatures, commonly known as forgery in the legal field. Osborn also found no evidence of a cut and paste or manipulation with reference to the Petitioner's signatures. In assessing the credibility of the Osborn, the Chancery Division held as follows:

> This court finds John Paul Osborne uncontroverted and extremely credible.

(Pa 26).

Third, the Petitioner had motive to sign the Agreement, as a result of his filing numerous state and federal court cases regarding his parents' estate where he thought he was recovering large sums of money, including a night club called the Melody Lounge.

Fourth, compelling and credible evidence points to the Petitioner as the destroyer and/or concealer of the original Agreement. The Rubber Maid Box facts detailed on pages 27 to 29 above provide strong evidence in this regard. Any difficulty in determining the authenticity -- the evidence to the contrary is overwhelming -- represents a self-created hardship on the part of the Petitioner. Since the evidence points to him as the destroyer of the original, he cannot make any complaints about the copy.

Thus, the copy of the Agreement represents admissible and competent evidence under N.J.R.E. 1003. Distinguishable, for example, is *Watley v. Watley*, A-2545-19T2, 2015 WL 9467244, at *2 (App. Div. Dec. 29, 2015), where the court rejected the defendant's claim that plaintiff signed a prenuptial Antenuptial Agreement, on the basis that a copy of which was never produced. (Ra 1-3).

Noteworthy is the Petitioner's failure to acknowledge N.J.R.E. 1004, entitled "Admissibility of other evidence of contents," which states in relevant part:

> The original is not required and other evidence of the contents of a writing or photograph is admissible if:
>
> (a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or
>
> (c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing;

Here, all three sections apply, for the reasons outlined above.

On appeal, the Petitioner advances various arguments, all of which lack merit.

He relies upon the "Best Evidence Rule" under N.J.R.E. 1002. (Pb 35-36). This fails because the impossibility of producing the original is "excused" in the instant case, for the numerous reasons outlined above[7].

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7 Traditionally, the "best evidence rule" has provided that in proving the terms of a writing (See N.J.R.E. 801(e)), where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent or of course unless the contents of the writing are admitted by the adversary of the proponent of the writing. 2 McCormick on Evidence §230 at 61 (10Th ed. 1992). Fielder v. Friedman, 124 N.J.L. 514 (E. & A. 1940); Emery v. King, 64 N.J.L. 529 (Sup. Ct. 1900); In re McCraven, 87 N.J. Eq. 28 (Ch. 1916).

The Petitioner next contends that that because the copy has misspelled words and contains sections from a form book, it "does not reflect that it was ever regarded as anything more than an unenforceable draft." (Pb 36). No authority whatsoever is cited in support of this remarkable position.

The Petitioner objects to the testimony of Deputy McDougall as to the Ralph Perone's signature on the Agreement, on the unsupported basis that her memory "was so faded by the time of trial." (Pb 37). This runs headlong in the totality of her testimony and the fact that the Chancery Division held her testimony as credible.

Further argument is made as to attempts at impeaching the expert testimony of John Osborne. (Pb 38-39). Such arguments carry little weight, and do nothing to dispel Osborne's "highly probable" conclusion, which amounts to a virtual certainty under the standards of Osborn's profession.

The Petitioner contends that signing the Antenuptial Agreement would have been impossible, as it was the day before his wedding, arguing:

> Petitioner had no contact with Decedent that Saturday as he was busy setting up the private venue for the wedding while Decedent was preparing food for 65 guests at their wedding the next day. (7T43:14-24; 7T48:16 to 49: 7).

(Pb 39). **First,** it's unclear how this activity would have precluded the signing of a document.

Second, the notion that the Petitioner was completely occupied with the setting up of the wedding lacks credibility. The wedding was held at the Decedent's friend's house (Barbara) in Ventor. With about thirty or forty people in attendance, it "wasn't a real large wedding." (9T109-5 to 19). The setup and decorations were "pretty basic." (11T7-19).

Third, the Petitioner's testimony lacked credibility, to say the least.

Remarkably, the Petitioner also argues that "no acceptable excuse was provided by Respondent for the absence of the original of the Photocopy." (Pb 40). This flies in the face of the Respondent's clearly expressed position at trial, which was that the Petitioner destroyed the original.

The Petitioner complains about the Chancery Division's "conjecture and far-reaching assumptions" and about the "unreliable hearsay testimony" of the numerous witnesses testifying to the existence of the Agreement. (Pa 40-41). Such argument fail as a matter of course.

The Petitioner contends that his state and federal court litigations lack relevance, on the false basis that they were "filed 40-50 years ago." (Pb 41). In

fact, these cases were active between 1985 and 1999. As the marriage and Agreement occurred in 1992, such litigations were directly relevant.

Finally, in challenging the existence of the Rubber Maid Box, the Petitioner asserts that he did not have "full control" of the house after the Decedent passed, because Gail Snyder and the Respondent also had entered it. (Pb 42-44). Does the Petitioner mean to say that either Snyder or the Respondent absconded with the original? What is his point exactly?

Thus, for all of the above reasons, the Chancery Division correctly held that a valid and enforceable Agreement was signed and executed by the Decedent and Petitioner.

B. The Copy of the Agreement Does Not Violate the Uniform Pre-Marital Agreement Act.

Enforcement of a premarital agreement is governed by the version of N.J.S.A § 37:2-38 (1988) in place at the Agreement, which states:

> The burden of proof to set aside a premarital agreement shall be upon the party alleging the agreement to be unenforceable. A premarital agreement shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:
>
> a. The party executed the agreement involuntarily; or
> b. The agreement was unconscionable at the time enforcement was sought; or
> c. That party, before execution of the agreement:

> (1) Was not provided full and fair disclosure of the earnings, property and financial obligations of the other party;
> (2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;
> (3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; or
> (4) Did not consult with independent legal counsel and did not voluntarily and expressly waive, in writing, the opportunity to consult with independent legal counsel.
>
> d. The issue of unconscionability of a premarital agreement shall be determined by the court as a matter of law.

The Chancery Division appropriately held that the Petitioner failed to meet his burden of showing that the Agreement was unconscionable under the statute. (Pa 31).

On appeal, the Petitioner does not argue unconscionability, and instead contends that there was no list of assets attached to the Agreement, contrary to N.J.S.A. 37:2-33. (Pb 45-46). However, the Chancery Division ruled on this issue as follows:

> Although the copy of the Antenuptial Agreement does not include an annexed statement of assets, pursuant to N.J.S.A. 37:2-33, this Court will not speculate as to what could have been attached to the full agreement. There may have been an annexed statement, or there may not have been, but what is present is, by the terms of the Agreement, the parties were fully apprised of the extent and approximate value of all the property and estate of the other.

(Pa 39).

C. The Petitioner Is Not Entitled To An Elective Share Under N.J.S.A. 3B:8-10.

N.J.S.A. 3B:8-10, which governs waiving the right to an elective share, states the following:

> The right of election of a surviving spouse or domestic partner and the rights of the surviving spouse or domestic partner may be waived, wholly or partially, before or after marriage before, on or after May 28, 1980, by a written contract, agreement or waiver, signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or domestic partner or a complete property settlement entered into after or in anticipation of separation, divorce or termination of a domestic partnership is a waiver of all rights to an elective share by each spouse or domestic partner in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Here, the Antenuptial Agreement did not require a waiver of disclosure as required by the statute, because, under Section 8.1 of the Agreement,

> The parties acknowledge that each has produced during the course of the negotiations leading to the execution of the within agreement, financial statements, records, and other documentation pertaining to his or her financial status, income, expenses, assets and liabilities. Each party represents to the other the completeness, truthfulness, and accuracy of said data, with the understanding that the other party is relying thereon. In accepting the terms contained herein and execution of the within agreement.

(Pa 116-117).

Given this fact, the Chancery Division correctly held: "No waiver is required when the parties fully apprised each other of the financial assets of the other, and Shinn does not save Petitioner's claim." (Pa 41).

On appeal, the Petitioner reiterates his reliance upon *In re Estate of Shinn*, 394 N.J. Super. 55 (App. Div. 2007), contending that both the Antenuptial Agreement and the waivers contained in it are unenforceable. (Pb 46-47). However, *Shinn* is easily distinguished, in that the husband in that matter extremely underestimated certain values of property he owned prior to the marriage. In addition, the prenuptial agreement in that matter was marred by coercion, in that the husband told his wife that she either had to sign the agreement or they would not marry.

By way of sharp contrast, the parties in the instant case fully and accurately disclosed their assets, which were not very much, as much of their wealth was created during the marriage. In rejecting the Petitioner's reliance upon *Shinn,* the Chancery Division reasoned as follows:

> Here, both Decedent and Petitioner did not possess significant sums of wealth before their marriage. Decedent's largest asset was (is) her Home located at 436 Lafayette Blvd. Brigantine, NJ, which Petitioner moved into after they where married. Petitioner was clearly apprised of Decedent's largest asset because he lived in it throughout the marriage. Decedent certainly increased her wealth throughout the marriage. She worked tirelessly to manage the 400 individuals in her Avon sales territory. However, Petitioner also accrued most of his

> wealth during the marriage, specifically during his tenure working for the Department of Defense and Logistics Agency as a medical buyer, Petitioner has presented zero evidence that would support the proposition that Decedent did not provide a full and fair disclosure of her assets prior to the marriage. Decedent and Petitioner had very little assets to show each other, most of their wealth was acquired during the marriage, and were kept separate in accordance with the terms of the Antenuptial Agreement. Petitioner was never placed on the Deed and never presented any evidence of joint assets.

(Pa 40-41).

Here, the Decedent reasonably relied on the validity of the Antenuptial Agreement in the preparation of her Will, where in Article Sixth, it states: "For reasons best known to me, I direct that my husband Roy Sutton specifically be excluded from inheritance of any portion of my estate." This desire was reiterated by the Decedent in conversations with Timothy Maguire, the attorney and now judge, who prepared the decedent's Will. His testimony was corroborated by various witnesses at trial.

For all of the above reasons, the Chancery Division properly concluded that the Petitioner was not entitled to an elective share under N.J.S.A. 3B:8-10.

POINT III

THE PETITIONER WAS NOT ENTITLED TO THE POWER TO ALIENATE THE DECEDENT'S HOUSE.

In her cross appeal, the Respondent vigorously contests the Chancery Division's ruling that the law of constructive trust warranted an award to the Petitioner of a life estate in the Decedent's home (see Point IV).

On appeal, the Petitioner expresses dissatisfaction with the life estate award, claiming that there "is no rational basis for restricting [his] interest in his home to a life estate that he cannot mortgage, sell or otherwise alienate. (Pb 48).

The Petitioner relies upon the general principle -- wholly inapplicable here -- of a "fundamental property right" under "public policy." (Pb 49). In support, it cites *Highway Holding Co. v. Yara Eng'g Corp.*, 22 N.J. 119 (1956), a case having no relevance here. That matter involved an appeal from a summary judgment of awarding the return of a deposit of $1,000 made on a contract for the purchase of certain lands. In entering judgment the trial court held, Inter alia, that the title was unmarketable. 22 N.J. at 213. The resolution of such issues have no relevance to the instant case.

The Petitioner makes the remarkable argument that the Petitioner had "unclean hands" and caused the "dissipation of marital property." (Pb 49). Such arguments, devoid of any evidence in the record, require no response.

Finally, the Petitioner makes an allegation of the Decedent's "concealment of her intent to disinherit Petitioner also breached the duties and responsibilities that were created by her marriage to Petitioner." (Pb 49-50). Again, this argument fails, as the record does not support it, and the law cited by the Petitioner is irrelevant and off-point, requiring no discussion.

CROSS APPEAL

POINT IV

(Pa 8; Pa 42-44)

THE CHANCERY DIVISION ERRED IN PROVIDING THE PETITIONER WITH A LIFE ESTATE IN THE DECEDENT'S HOME.

In ruling that the law of constructive trust warranted an award to the Petitioner of a life estate in the Decedent's home (Pa 42-44), the Chancery Division unfortunately abused its discretionary equitable authority. Reversal of this ruling is thus warranted.

A. The Law of Constructive Trust Did Not Warrant Such Relief In the Instant Case.

Courts are authorized to impose a constructive trust "whenever specific restitution in equity is appropriate on the facts." *Flanigan v. Munson*, 175 N.J. 597, 607 (2003), quoting Dan B. Dobbs, Remedies§ 4.3, at 246 (1973). Such a trust is designed to "prevent unjust enrichment and force a restitution to the plaintiff of something that in equity and good conscience [does] not belong to the defendant." Ibid. Stated differently, a "constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such

circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee." *Flanigan v. Munson*, *supra*.

The party seeking imposition of a constructive trust bears the burden of establishing its right to that remedy by clear and convincing evidence. *Dessel v. Dessel,* 122 N. J. Super 119, 121 (App. Div. 1972).

A two part test is employed in order to find a constructive trust, namely, (1) a party must have committed a wrongful act, and (2) the wrongful act must result in a transfer of property that unjustly enriches the recipient. Ibid. The *Flanagan* court stated that "we caution courts generally that a constructive trust is a powerful tool to be used only when the equities of a given case clearly warrant it." Id. at 611.

The equities here do not warrant it.

Here, the record shows that the Petitioner has failed to clearly and convincingly show that he was entitled to any equitable relief whatsoever. Credible testimony proved that Petitioner has lied on multiple occasions, was a self-centered, unfaithful husband, and took advantage of his minor stepdaughter, the Respondent. As found by the Chancery Division, the Petitioner falsely claimed that he contributed to the costs, upkeep of the home, and general expenses

throughout the marriage. He failed to present any receipts to demonstrate his contributions. His failure to financially contribute was corroborated by multiple credible witnesses. During the 28 year marriage, the Petitioner lived rent free and contributed nothing financially toward the household expenses.

Additional inequitable conduct by the Petitioner can be summarized as follows, all based upon testimony deemed credible by the Chancery Division:

- Disturbing incident one night involving the Respondent when she was sixteen years old, while the Decedent was away on a business trip, causing the Petitioner to leave the house for a year
- Petitioner's groundless filing of complaint with Adult Protective Services
- Petitioner's groundless filing of complaint with Child Protective Services, utilizing the name of deceased "Thomas New," a person Petitioner falsely denied knowing
- Petitioner's unlawful termination of the Respondent's phone accounts
- the Petitioner's apparent destruction/concealment of the Antenuptial Agreement
- the Petitioner would often leave Decedent alone at a party and "sneak out," thinking it "funny"
- the Petitioner would abandon Decedent and their relationship for long periods of time
- the Decedent on multiple occasions told Gail Snyder that the Petitioner was involved with another woman

- the Petitioner did not assist Decedent around the house, including one occasion where during a snowstorm where the Decedent shoveled the snow while Petitioner remained inside

- the Decedent told Snyder that the Petitioner never paid any of the bills and wasted money, and that this conduct "pissed her off."

- the Petitioner had a habit of lying to the Decedent

- the Petitioner, in front of Snyder referred to the Decedent as a "whale" on more than one occasion

Such conduct, standing alone, provides a basis for denying the equitable relief sought by the Petitioner.

There is simply no basis for the finding of a constructive trust based solely on some minor physical labor, attachment of his name to certain documents, or the alleged contributions made to the Decedent's career. Assuming arguendo that the Petitioner's statements were true -- which might very well be a stretch in this case -- they in no way satisfied the high burden needed to impose a constructive trust.

In addition, the imposition of a constructive trust runs headlong into the legally prepared Antenuptial Agreement, which provided that each party shall keep and retain sole ownership of all property owned by one party to the exclusion of the other, and that any property acquired during the marriage in the name of one party shall <u>remain the separate property</u> of the party acquiring the assets. The

Antenuptial Agreement is a waiver of all rights that Petitioner had to any property owned by Decedent.

The Chancery Division's reliance upon *Carr v. Carr*, 120 NJ. 336 (1990) does not support its holding. That matter, fundamental distinguishable, does not provide a suitable foundation for its decision. In *Carr*, the wife was in the process of divorcing her husband when he died, and as a result, was not entitled to her equitable distribution or her elective share. This matter involves a prenuptial agreement, not a divorce. In *Carr,* the Court found that the wife was entitled to an equitable interest in the husband's estate because of "the Black Hole" that was created as a result of the interplay between the divorce statutes and the elective share statutes. This black hole would have left her with nothing. 120 N.J. at 344.

Thus, in *Carr,* the constructive trust was utilized to rectify a distinct and compelling unfairness and inequity. That setting truly satisfied the clear and convincing standard for obtaining such relief. Here, by way of contrast, denying the Petitioner his "Hail Mary" cause of action would have no such accompanying unfairness. The equities here simply did not warrant the relief sought.

B. The Doctrine of Unclean Hands Barred the Petitioner From Obtaining Equitable Relief.

Court of equity follows the equitable maximum that "he who seeks equity must do equity." This principle obliges a party seeking equitable relief to what is required by conscience and good faith. *Natovitz v. Bay Head Realty*, 142 N.J. Eq. 456, 463 (E.&A. 1948); *Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P.*, 204 N.J. 569, 585 (2011).

Related to this principle is the "unclean hands" doctrine, which provides that a court will refuse relief to any party which has-acted in a manner "contrary to the principles of equity." *Johnson v. Johnson,* 212 N.J. Super. 368, 384 (Ch. Div. 1986). It is based on the belief that courts should not grant relief to one who is "a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis,* 85 N.J. 507, 511 (1981). The essence of the unclean hands doctrine is that a "suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *A. Hollander & Son, Inc. v. Imperial Fur Blending Corp.,* 2 N.J. 235, 246 (1949). As noted by a leading authority:

> Whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principles, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

2 Pomeroy, *Equity Jurisprudence* § 397, p. 657 (3rd ed. 1905); See also, *Chrisomalis v. Chrisomalis*, 260 N.J. Super. 50 (App. Div. 1992) (wife was equitably estopped by her fraud and unclean hands from seeking declaration that antenuptial agreement was invalid and unenforceable).

Here, the Petitioner's repeated reprehensible conduct barred him from obtaining equitable relief. Because he came into equity with unclean hands, the Chancery Division committed reversible error in granting him a life estate in the Decedent's property.

CONCLUSION

For all of the foregoing reasons, the Respondent-Respondent/Cross Appellant, Sandra L. Williams, respectfully requests the Appellate Division to affirm the following Orders entered by the Chancery Division:

1. Petitioner's COUNT ONE of the Amended Complaint requesting appointment as Administrator of the Estate is DENIED.

2. Petitioner's COUNT THREE of the Amended Complaint requesting that the Will dated October 16, 2014, is null and void as being the subject of undue influence or duress is DENIED.

4. Petitioner's COUNT FOUR of the Amended Complaint requesting that Petitioner be awarded one-third of Decedent's augmented Estate is DENlED.

5. Petitioner's COUNT FIVE of the Amended Complaint requesting that the "Ante-Nutial" [sic] Agreement, dated November 21, 1992, be declared null and void is DENlED.

The Petitioner respectfully requests that the Appellate Division reverse the Chancery Division's Order granting the Petitioner a life estate in the Decedent's home via the imposition of a constructive trust.

Respectfully Submitted,

// Michael D. Weinraub //
MICHAEL D. WEINRAUB, ESQ.

Date: September 22, 2023

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

IN THE MATTER OF THE ESTATE OF LYNDA NATHANSON SUTTON, DECEASED	:	**DOCKET NO. A-001838-22-T4**
	:	**ON APPEAL FROM:**
	:	**TRIAL COURT/STATE AGENCY** **Superior Court of New Jersey** **General Equity, Probate Part** **Atlantic County**
	:	**TRIAL DOCKET-P-127920-21**
	:	**SAT BELOW** **Hon. M. Susan Sheppard, P.J.Ch.** **Hon. John C. Porto, Acting P.J.Ch (Motion Judge)**
	:	**CIVIL ACTION**

PETITIONER'S AMENDED REPLY BRIEF AND APPENDIX IN FURTHER SUPPORT OF APPEAL AND IN OPPOSITION TO RESPONDENT'S CROSS-MOTION

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PRELIMINARY STATEMENT

In this appeal, Petitioner requests that the Appellate Division reverse a directed verdict entered after a six-day trial that summarily dismissed claims that his late wife, Lynda Sutton (hereinafter "Decedent") was unduly influenced by his stepdaughter, Respondent Sandra Williams (hereinafter "Respondent"), to make a will dated October 16, 2014 (hereinafter "Will") that named her as its sole beneficiary. The Court erred by finding it was not "suspicious" that Decedent's husband of 29 years was disinherited in a Will that was concealed from him for years while it was possessed by Respondent who frequently bullied the Decedent and who brought her to tears. The Court erred by failing to apply the appropriate burdens of proof and by relying on unsupported lay opinions and far-reaching assumptions while it disregarded as "irrelevant" the events taking place when the Will was made.

Petitioner also requests that the Final Judgment be reversed that enforced a photocopy of a document titled "Ante-Nuptial Agreegment" (hereinafter "Photocopy") finding it waived Petitioner's right to an elected share of the Estate. The Photocopy failed to contain an itemized list of the parties' assets as required under by N.J.S.A. 37:2-33. Admitting the Photocopy into evidence violated the Best Evidence Rule, N.J.R.E. 1002 as only speculation and conjecture support the finding that there was an original of the Photocopy that was destroyed by Petitioner. P36a.

The Court presented an Opinion that disregarded the credible evidence in the record and rather, speculation and conjecture support its rulings, obviously because it was inflamed and antagonized by the disparaging remarks advanced by Respondent. Throughout this litigation, Respondent engaged in a smear campaign that consisted of ad hominem attacks about Petitioner in the form of unverifiable rumors, gossip, distortions and even outright lies to which no dates were provided and that did not bear upon the issues or arguments in question. The specious allegations of misconduct should have been rejected as they lacked a factual foundation and, in many instances, there was no nexus between Petitioner and the alleged incidents and were so prejudicial as to amount to a miscarriage of justice.

Now again, in her Opposition and Cross-Appeal, Respondent continues with her strategy. Only now, Respondent advances a new argument that was not raised below, that Petitioner's "unclean hands" bars the imposition of a constructive trust in his favor. Db[1] at 72-73. Petitioner again supports her arguments with unverifiable rumors, gossip, distortions and even outright lies. In fact, many of the allegations advanced by Respondent in her Opposition brief are not supported by citation to the record. The alleged misconduct advanced by Respondent is not based on credible evidence, fail to support Respondent's arguments and should, respectfully, be rejected.

[1] Db means Brief and Appendix of Respondent/Cross Appellant

LEGAL ARGUMENT
POINT ONE
RESPONDENT'S PORTRAYAL OF ALLEGED MISCONDUCT DURING THE PETITIONER'S TWENTY-NINE YEAR MARRIAGE IS NOT BASED ON CREDIBLE EVIDENCE AND DOES NOT CONSTITUTE UNCLEAN HANDS

The alleged misconduct that Respondent presented at trial about the Petitioner and again, in its Cross-Appeal have no relevance to the claims before the Court nor did they relate to Petitioner's character for truthfulness or untruthfulness and therefore they should have been disregarded. The unclean hands doctrine provides,

> "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis*, 85 N.J. 507, 511, 427 A.2d 1105 (1981). The equitable maxim "[a party] who comes into equity must be with clean hands" has limitations:
> It does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action; **but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought.**

Heuer v. Heuer, 152 N.J. 226, 238, 704 A.2d 913 (1998) (quoting Neubeck v. Neubeck, 94 N.J. Eq. 167, 170, 119 A. 26 (E. & A. 1922)).]'It is the effect of the inequitable conduct on the total transaction which is determinative whether the maxim shall or shall not be applied.'" *Heuer*, 152 N.J. at 238 (quoting Untermann v. Untermann, 19 N.J. 507, 518, 117 A.2d 599 (1955).

The allegations that Respondent advances allegedly occurred sometime during a twenty-nine-year period and in most instances, the alleged incidents are

undated and lack any specificity. The unclean hands doctrine is not appropriate here because there is no correlation between the alleged wrongful conduct and the underlying controversy, which is whether the Respondent unduly influenced the Decedent to make a will that named her as the sole beneficiary.

Respondent's strategy violates N.J.R.E. 608 (a). Impeachment with specific instances of conduct is prohibited under Evidence Rule 608(a), which provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness, and provided further that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Except as otherwise provided by Rule 609 and by paragraph (b) of this rule, **a trait of character cannot be proved by specific instances of conduct.** (Emphasis added).

The irrelevant, disparaging, and unsupported aspersions advanced by Respondent should not have been considered by the Court. They diverted the Court's attention from the controlling issues and inflamed and antagonized the Court to the prejudice of the Petitioner, resulting in an unjust and unfair trial.

A. The So Called "Reasons" For Disinheriting Petitioner Are Based on Speculation and Conjecture and Fail to Constitute "Unclean Hands."

Respondent presents six alleged incidents that she claims to be the reason for excluding Respondent from Decedent's will. Db at 1-2. The so-called "reasons" that the Respondent provided are also alleged to constitute inequitable conduct that should bar him from obtaining any equitable relief. Db at 69-60.

The so called "reasons" advanced by Respondent are not reasons that were expressed by the Decedent for disinheriting Petitioner when making the 2014 Will. Db.1, 13-19. Timothy Maguire, Esq. testified that during his discussions with the Decedent about the Will, she did not give any specific examples of any alleged dissatisfaction with her marriage. 9T267:5-14. Likewise, the 2014 Will does not disclose any specific reason for the disinheritance. P105a to 109a. Decedent did not leave behind any letters, videos or other writings where she expresses any unfavorable feelings towards Petitioner. To the contrary, all the writings that the Decedent left behind expressed her love for the Petitioner. P374a to 467a. The competent evidence reflected that at the time the 2014 Will was made, Decedent was happy in her marriage, spending a weekend with Petitioner at the Molly Pitcher Inn on December 15, 2014, less than two months after making the Will. P485a to P486a.

Had the Court properly considered all the material facts presented at trial and scrutinized the evidence to determine if it was competent, it would be evident that the so called "reasons" presented by Respondent for the Petitioner's disinheritance lack foundation, had no basis in fact and rather, were nothing more than unverifiable gossip, far reaching assumptions, and distortions that should have been disregarded.

1. Nothing But Innuendo Ties Petitioner to the February 1997 Incident

In her opposition, Respondent asserts that the reason that the Decedent did not leave assets to the Petitioner in her Will was because of an event that took place in February, 1997. Db at 1, 13, 68. The Court characterized that alleged incident as a

"disturbing incident" twice in its Opinion (P16a), reflecting it was antagonized and inflamed by Respondent's accusations. Indeed, what can discredit a litigant more than an accusation of being a child molester? Yet, the testimony that Respondent gave at trial does not link Petitioner to the so called "disturbing incident," and rather, all that Respondent relies on is innuendo.

The Respondent testified that in February 1997, while Decedent was away on a business trip, Petitioner was babysitting Respondent who was then sixteen years old. (11T70:23 to 71:2). Respondent testified it was during a school night, and Respondent spent the evening with her boyfriend, Ben, a high school graduate who was working nights in a casino valet department. (12T107:9-18). Respondent testified that later that night, Petitioner came into the room and sternly told Ben he had to leave, and Respondent went to bed. (12T108:1-20).

Respondent said the next morning she woke up undressed and was confused because she had never done that before and did not know what had happened. 12T109:2-8. What Respondent fails to disclose in her opposition is her acknowledgment at trial that it was possible that she was dreaming and something was going on in her dream where she undressed herself. (12T109:7 to 108:23). Respondent testified that next morning, her boyfriend drove her to school and when she returned home, she told Decedent about the incident[2]. (11T72:2-8).

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[2] Decedent was not home when the alleged incident took place, and yet, Respondent's counsel asked Ms. Snyder what Decedent told her about the

In her attempt to tie Petitioner to the incident, Respondent testified at her deposition that after that incident, she felt uncomfortable around Petitioner. (12T111:9-13). At trial, Respondent changed position. Respondent testified that after she told the Decedent about the incident, Petitioner moved out of the house and did not return for years, until she graduated high school. (11T72:16-19).

Contrary to Respondent's self-serving testimony, Petitioner did not move out of the Home after February 1997 or while Respondent was in high school. During high school, Petitioner found that Decedent was losing control of Respondent and expressed his concerns to Decedent shortly before the Respondent's 17th birthday on October 19, 1997, approximately eight months after the "February 1997 Incident." (P573a; 12T150:7-22). In his letter, Petitioner advised the Decedent that from his observations, Respondent was too immature to be given a car:

> **Sandi is only 16 going on 17**......As it now stands, her boyfriend is having a greater influence over her and her life rather than those who have her best interests at heart. Laying aside his disrespect, rudeness (stopping by at 2 AM or calling her at 1AM and making her emotionally upset; etc).
>
> * * *
>
> ....I would decline to get her a car until she can demonstrate a consistent 3.5 average and or show consistent respect for and a concern for your wishes respecting school.. When you gave her the algebra books, she had a smart comment to make at the top of the stairs about not using them and I would use her own attitude to encourage her to do better and dump her attitude.

February incident. 11T17:23 to 18:9. Ms. Snyder's testimony about what Decedent allegedly told her is double hearsay that does not fall within any of the hearsay exceptions and should not have been considered.

(P573a). Petitioner told Decedent she needed to set boundaries with Respondent and to just say "no" to her demands, and Decedent would respond to Petitioner, " She'll argue with me. I can't. I don't want to push her away" (7T191:12 to 192:6; 193:15-22). Respondent admitted she was a "brat about the car" and Decedent ended up buying it for her. (P703a). Respondent's contention that Petitioner moved out of the home in February 1997 is inconsistent with competent evidence in the record.

Respondent's characterization of Petitioner before this litigation also confirms that the Respondent knew that Petitioner had nothing to do with the February 1997 incident. After the alleged incident, Respondent gave Petitioner cards in which she described Petitioner as a "blessing and I am so grateful to have always had you in my life" (P 661a; 12T20:20 to 21:4) and "You are a true blessing to our family." (P669a) and "Thank you for being such a strong support system for me and for each other. (P672a-673a).

Respondent's other testimony also makes it apparent that Petitioner had nothing to do with the February 1997 incident. Respondent repeatedly testified that the Decedent was very protective of her and how others treated her. (12T60:16-21). In fact, one morning, when Decedent found the words "whore" written across the front of Respondent's home, Decedent immediately called the police. (12T61:10 to 62:11). Yet, for the alleged "disturbing incident" after Respondent allegedly told Decedent what happened, she did nothing. (12T109:5-8). Respondent did not produce any police reports, medical records, legal action, or any other responsive

action that a "protective" mother would have taken to investigate the circumstances. Decedent never told Petitioner about Respondent's accusations and indeed, the first time Petitioner heard of this alleged incident was during this litigation. (12T145:8-25).

Respondent also gave Decedent a "thank you" card in 2011, that Respondent claims was written over a two-day period to be sure it included everything the Decedent did that Respondent was grateful for. (12T63:9-16; 12T112:6-19; P703a). In that card, Respondent thanks Decedent for actions she took with respect to her natural father, "never making me stay at Daddy's house alone." (P703a). Yet, nothing is mentioned in that card about any action Decedent allegedly took to address the alleged "disturbing incident." (P703a).

Nothing but innuendo, speculation, and conjecture ties Petitioner to the February 1997 incident, obviously because it had nothing to do with the Petitioner. Nor did it have anything to do with the 2014 Will. That Incident was raised by Respondent in this Appeal for the same reason it was raised during trial, solely to inflame the Court, confuse the issues and disparage the Petitioner.

2. There Were No Extended Marital Separations

Respondent alleges there were multiple extended periods of time when the Petitioner was not living in the Decedent's home. Db at 13. Respondent contends that they did not live together between 2005 to 2007. Db at 13. There is no citation

to the record for these contentions. That is because there are no facts to support Respondent's self-serving portrayal.

Mr. Guarracino testified that throughout the Petitioner's marriage to Decedent, the Petitioner lived in Brigantine, and he went to their house every few weeks for dinner. (9T91:16 to 92:6; 110:9-23). The Court found that Mr. Guarracino's testimony was credible. P25a.

Respondent's contention that Petitioner did not live in the home from 2006 to 2009 disregards her own testimony. Respondent testified that she talked to Decedent every day about Petitioner and would frequently hear Petitioner in the background. (12T49:8-18).

Respondent also overlooks that she and her then boyfriend, Joe, gave Petitioner an anniversary card on his 14th Anniversary, on November 22, 2006. (12T19:23 to 20:14; P666a-P667a). In that Anniversary Card, the Respondent writes:

- Congratulations on your 14th year. I hope you're happy and your love lasts forever. (P667a).

Likewise, Decedent gave Petitioner a Christmas card dated 2006. (P437a). Petitioner's contention that Respondent left the home from 2005 to 2007 is contrary to the competent evidence in the record.

Respondent's portrayal of the Decedent's living arrangements with Petitioner from 2005 to 2009 also lacks any foundation. Respondent acknowledged that during

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that time period, she was out of the house living with her boyfriend "Joe" and they both had corresponding drug problems. (9T:125:22 to 126:2; 12T15-17). Respondent testified that during this time, her thinking was distorted and in her quest for drug money, was working as a waitress seven days a week. (11T101:2 to 102:8; 12T65:3-7). Respondent testified she was "caught" in 2008 and ordered to attend Mayville Rehabilitation facility until 2009. (11T 107:2-16). The period that Respondent does not remember Petitioner living in the Home is when Respondent was living with her boyfriend, addicted to drugs, had distorted thinking, and was admitted to a rehabilitation facility.

Petitioner was never "separated" from Decedent, but rather, he endeavored to improve his education and commuted to and from school beginning in the spring of 2005 and later, upon graduation in December 2007, to work for the Department of Defense in Philadelphia beginning in 2008, with the consent and encouragement of Decedent. Kathleen Whelan understood that Petitioner was commuting to and from his Home, stating, "I know he was away a lot" explaining that "he was either at school or later, he got an apartment on Rt 73 close to the Bridge and would come home on weekends or whenever he could. But he was working or in school on the Philadelphia side of the bridge." (10T95:8-22).

Consistent with that testimony, Respondent testified that Petitioner worked during the week and would come home on weekends, and it became less and less that he would be away the last ten years that they were together. 11T82:20-25.

Respondent remembered that the Petitioner worked 10-hour days, working Monday through Thursday and would be home every Friday, Saturday and Sunday. (11T83:1-4).

Respondent's contention that Petitioner "abandoned the marriage" is devoid of any evidential support and rather, Petitioner and the Decedent remained happily married for more than 29 years during which the Home was their primary residence.

3. The Marriage Was Not Troubled.

Respondent also attempts to portray a marriage that was "troubled' by taking the testimony of her own witnesses out of context and by interjecting innuendo, conjecture and speculation. Specifically, Respondent misconstrues Ms. Whelan's testimony to create the illusion that the relationship between Petitioner and Decedent was "troubled":

(1) Respondent asserts that Ms. Whelan stated that "Petitioner never appeared at Decedent's high school reunions, even though Decedent was on the event committee. Db at 16; (P17a).

The testimony that Ms. Whelan provided was that she, herself, did not attend all the reunions, she just did not remember seeing Petitioner at the ones she attended. (10T93:9-24).

(2) Respondent asserts that Ms. Whelan stated that Petitioner and Decedent had previously broken up their relationship and had been living apart with Petitioner moving away. Db at 16.

The testimony that Ms. Whelan provided was that "I thought at one point they had split up, but they got back together." Her impression was that they were separated[3] maybe two months or something and then they reconciled. (10T129:25 to 130:10).

(3) Respondent asserts that Ms. Whelan stated that Decedent told her about another woman with whom Petitioner was romantically involved. Db at 16.

The testimony that Ms. Whelan provided was that Decedent once suspected that he may have been seeing someone, saying something about phone calls to the house, but Decedent never gave her any other details. (10T97:18-22).

Respondent also presents a distorted portrayal of Gail Snyder's testimony to characterize Petitioner's marriage as "odd:"

(1) Respondent asserts that Ms. Snyder testified that Decedent, on multiple occasions, told Gail Snyder that the Petitioner was involved with another woman. Db at 15.

Gail Snyder testified that she did not recall the year, but Decedent was suspicious that Petitioner may have been seeing someone because he was buying gifts for someone else, a woman or her children or her grandchildren, but she cannot remember the specifics. (11T46:7-17).

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[3] The short separation was in 2005 and resulted from Decedent taking out her frustration and anger on Petitioner after Respondent quit her job and entered into a romantic relationship with "Joe" who had a bad reputation in the community from being involved in narcotics and having gone to jail. (7T 143:5to 148:11). Petitioner wrote Decedent a letter to shock her, and shortly after, they met up, talked and reconciled. (7T 145:22).

No other facts were presented to support Respondent's aspersion that Petitioner had extramarital affairs.[4] The hearsay remarks allegedly made by Decedent were irrelevant to this litigation as they did not relate to the Will, and were obviously interposed solely to create the false illusion that Petitioner was unfaithful to Decedent.

(2) Respondent asserts that Ms. Snyder testified that Petitioner would often leave Decedent alone at a party and sneak out thinking it was "funny." Db at 15

Ms. Snyder admitted she had no idea what Petitioner was thinking on those occasions. Ms. Snyder testified that a few times, Petitioner left parties that Decedent attended, but she never talked to Petitioner about it and did not know why he left. (11T47:17 to 48:9).

Petitioner explained that he worked for the Defense Logistics Agency (DLA) as a medical buyer supporting the troops in Afghanistan with disposable medical supplies. (7T121:5 to 123: 5; 12T146:4-11; P 736a). Petitioner's home computer was connected to Kabul and when he was home during weekends, there were times when there was pressing unrest in Afghanistan. (7T121: 17 to 122:17). On these occasions,

[4] Decedent never questioned Petitioner about her alleged suspicions about other women. (12T146:1-3). Decedent worked with multiple women at the DLA but only had professional relationships with them. Decedent knew that because she accompanied Petitioner to his work luncheons and work events and developed good relationships with his co-workers. 7T149:2 to 150:7.

Petitioner let Decedent know that he would leave a party they were attending before it was over so he could go home and check his emails. (7T121:9-122:2). When medical events occurred, Petitioner would receive an email with medical requirements and go to Philadelphia to collect the supplies and take them to Dover Air Base to get the needed disposable medical supplies to Afghanistan within 16 hours. (7T121:17 to 122:8). Decedent never complained to Petitioner when he left the family parties early, as she understood his work requirements. (7T122:23 to 123:2).

(3) Respondent asserted that Decedent told Snyder that Petitioner wasted money. Db at 15.

The factual basis for Ms. Snyder's statement was that when Decedent asked Petitioner to go to the store to buy some shrimp, he brought home colossal shrimp. (11T8:24 to 9:2). On another occasion, when he went to Staples he purchased "real thick kind of paper." (11T9:1-5).

(4) Ms. Snyder alleged that Petitioner did not assist Decedent around the house, including one occasion where, during a snowstorm, Decedent shoveled snow while Petitioner remained inside. Db at 15.

Petitioner had open heart surgery in 2002 and 2019 and had a cardiac history and was found to be disabled. (7T60:6-8; P509a). Petitioner was physically unable to do vigorous cardiac exercises, like shoveling snow.

Ms. Snyder's claims that Petitioner never help around the house is belied by the handwritten notes in the Cards that Decedent gave to Petitioner, including two

that expressly thanked him for "all you do and for being a great Dad and Grandpop" (P383a) and "Thanks for all you do." P387a

4. Decedent Never Contemplated Divorce.

Respondent also tries to create the illusion that Decedent contemplated divorce from Petitioner. Db at 18. Yet, Ms. Whelan testified that Decedent never spoke to her about leaving Petitioner or getting a divorce. (10T129:10-13).

Likewise, Ms. Snyder did not provide testimony that she ever had any discussions with Decedent about a divorce. And yet, at the conclusion of Ms. Snyder's testimony, the Court questioned "Do you know why she never divorced him?" Ms. Snyder responded "She had a strong faith. Divorce is not—that's the only thing I can think of—strong faith, her faith. She wouldn't divorce him because of her faith." (11T58:19-24).

The requirements of N.J.R.E.602 and N.J.R.E. 701 were not satisfied for the lay opinion testimony of Ms. Snyder. N.J.R.E. 602 requires that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." When lay opinion is based primarily on hearsay statements, it is inadmissible. Neno v Clinton, 167 N.J. 573, 585-86, 772 A.2d 899 (2001).

N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the

> perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

The Rule's requirements are "to ensure that lay opinion is based on an adequate foundation." Neno v. Clinton, 167 N.J. at 585. Subsection (a) requires that a lay opinion be limited to matters directly perceived by a witness "through use of one's sense of touch, taste, sight, smell or hearing." Id. The purpose of N.J.R.E. 701 is to ensure that lay opinion is based on an adequate foundation. Id. A lay witness's opinion cannot rely on the inadequate support of inadmissible hearsay without the benefit of an exception.

Here, there was no testimony elicited at trial that reflected that Ms. Snyder's opinion was rationally based on an adequate foundation. How could Ms. Snyder assert that Decedent did not divorce because of her a strong catholic faith when no facts were submitted that demonstrated Decedent had a strong catholic faith? Indeed, when Decedent decided to marry, she did not request to be married in a Catholic church by a priest and rather, planned a wedding at her friend's Ventnor home that was officiated by a mayor. (11T6:18 to 7:7). Nor was there any evidence that the Decedent ever contemplated divorce. Respondent acknowledged at trial, Decedent told her she was happy to be married to Petitioner. (11T83:15 to 84:10; 12T15:1-7; 12T16:4-14).

5. Decedent Kept Her Finances Private

Respondent's portrayal of Decedent's finances fails to constitute competent facts. Db at 19. From the onset of their marriage, Decedent took control of the finances and handled them exclusively so that even Petitioner was unaware as to what the Decedent was paying. (7T49:15-17; 8T10:6-21; 8T27:6-10;8T30:5-20). Respondent did not establish any foundation for her testimony concerning Decedent's finances. In fact, Respondent testified that she was not present during any of the financial transactions that were the subject of her testimony and acknowledged she did not know how the Home was paid for contending that "she did not know all the details." 11T95:7 to 96:5. Yet, relying solely on Respondent's testimony, the Court held that the mortgages to the Home were eventually satisfied and paid off solely by Decedent. (Db at 19; (P14a).

Respondent also made erroneous statements about the Decedent's finances, testifying that Decedent paid for Petitioner's health insurance through her payments to her employer, Avon. Db at 19. Decedent's Avon Confirmation statement reflected that Petitioner Decedent's benefits did not extend to health, vision or medical coverage for Petitioner. (12T149:10-25; P743a). Petitioner is a disabled veteran who had his health coverage through the Veterans Administration. (12T149:19 to 150:6).

The only "facts" that Respondent provided at Trial about Decedent's finances is that she observed Decedent use Petitioner's credit card to purchase items that she wanted. (11T90:17-22). The other testimony that Respondent provided about the

Decedent's and/or Petitioners finances should be disregarded as lacking a factual foundation.

6. Ms. Whelan Testified About an Earlier Made Will, Not the 2014 Will

Respondent contends in her opposition that "aside from Petitioner's non-credible testimony," there is no basis whatsoever in the record for stating that Decedent wanted to make a trust for Respondent. Db at 46. Respondent further contends that Ms. Whelan testified to the testamentary intent of the Decedent shortly after the 2014 Will was executed. Db at 25.

Respondent's portrayals are erroneous. Ms. Whelan did not present any testimony about the 2014 Will. Rather, Ms. Whelan testified about a will that Decedent made prior to 2012. (10T121:3-4). Ms. Whelan testified that she believes her copy of that will was destroyed by flood waters from Hurricane Sandy in October 2012. (10T121:17-24). In that earlier made will, Decedent asked Ms. Whelan to serve as a trustee of a trust created under that will. (10T120:7 to 122:10). This is consistent with Petitioner's testimony that the Decedent repeatedly told him that any money she left for Respondent would be in trust, given Respondent's history with money and her romantic relationships with drug addicts and criminals. (7T178:16-22; 7T180:12 to 181:9; 7T189:17-22).

7. Decedent was Easily Influenced By Respondent

Another misleading portrayal of the Decedent is that she was "strong willed." Indeed, Respondent testified that Decedent had what Respondent characterized as "abandonment issues," explaining that Decedent would not bring up how she would feel if she pushed enough times and instead, she would just give up and surrender and not talk about it. 12T 55:22-56:16. Respondent testified that her abandonment issues were so severe that she sought counseling for it, although she did not disclose who the counseling was through or when it took place. 11T89:24 to 90:9.

Examples of the Decedents weak will were provided by Respondent. She testified that during her drug addiction, her friend base changed and she "felt more comfortable with people who were similar to her." (12T102:9-14). Respondent brought her "friends" home, including some with criminal records, but Decedent would let them in and not say anything, although she was very concerned. (12T62:20 to 63:63:19). Respondent later thanked the Decedent for "trying to like my friends." (P703a).

Petitioner bought Respondent a car despite being cautioned that giving Respondent a car was not in her best interest. (P573a). Respondent thanked the Decedent for "buying me a car, even though I was a brat about it." (P703a).

Ms. Tucker also testified that when Respondent was building the home that Decedent was paying for, Respondent decided she wanted to have an elevator installed, which Decedent resisted, stating it was too expensive. (9T70:6-11). Yet,

Respondent obviously worked on Decedent and got the elevator that she wanted. (12T99:22 to 100:23). Decedent ended up paying $445,820 for Respondent's home (P566a) and took back a mortgage of $350,000. (P656a)

Respondent knew how to manipulate the Decedent to get what she wanted. (9T63:13-22: 9T73:2-11; 9T759 to76:17; P573a). Respondent acknowledged that she knew Decedent well and knew what made her happy and what made her unhappy. (12T57:18-22). The facts demonstrate that when making the Will, if Decedent could have expressed it, she would have said: "This is not my wish, but I must do it." In re Weeks, 29 N.J. Super. 533. 542 (1954).

8. The Sutton v. Sutton Litigation Is Not Relevant

Petitioner objected to the Respondent's introduction of the litigation that Petitioner filed in 1986 as not being produced during discovery and as having no relevance to this litigation, but the Court overruled that objection. (8T99:6-11; 8T107:5-22; 8T109:5to 110:17; 8T157:2-13). In its Opinion, the Court found that Sutton v. Sutton 71 F. Supp. 2d 383, 386 (D.N.J. 1999) was relevant on the basis of a hypothetical: " If Petitioner was meritorious in his claims against the families' estates, the payout would have occurred after his marriage to Decedent." P14a-P15a. The Court's hypothetical has no basis in fact given that the assets that were the subject matter of Sutton v Sutton had long been owned by Petitioner, in part, with the Estate and his five siblings, and thus, they constituted premarital assets that

would have been exempt from equitable distribution even without a prenuptial agreement. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484 (1974). The lawsuits Petitioner brought were to preserve the value of those assets, not to obtain a substantial payout. (8T97:19-24; 8T9916 to 100:1).

Sutton v. Sutton involved the Melody Lounge (hereinafter "Melody"), a night club and lounge owned by Sy Cur, Inc., and its liquor license in which Petitioner's father was the majority owner and Petitioner had a minority (6.7%) interest. 71 F. Supp. 2d at 386. The litigation also involved a parking lot adjacent to the Melody in which the Petitioner was a 1/6 owner along with five other siblings. Id.

Petitioner worked at the Melody as bartender and manager from 1963 until 1985, when his brother, as co-executor, abruptly closed that business two weeks after the Petitioner's father's death. 9T6:10-16. When the Melody was closed, all the goodwill that business had accumulated over more than 22 years as a going concern was lost. 9T6:15-21. Prior to that time, the Melody was profitable having no mortgage and no pending debts. 9T:6:20-24. In addition, the Melody employed 25 people including the Petitioner and Decedent. 9T6:25 to 6:2.

With the closing of the Melody, the Petitioner was out of his job of 22 years and became deeply depressed. 9T7:4-10. In his attempt to manage that condition, Petitioner diverted his attention to researching the law as it pertains to estate accountings. 9T7:10-16.

When the executors submitted an informal accounting in pending litigation that reflected that Petitioner would be paid $6400 as his disbursement under his father's will, Petitioner retained an attorney who filed an exception that challenged the informal accounting. Sutton v Sutton, 71 F. Supp. 2d. at 386. That exception was settled pursuant to a consent order dated May 6, 1988 (hereinafter "Consent Order" that settled Petitioner's claims for the sum of $75,000 "without offset" in exchange for a release of any further claim against the estate. Sutton v. Sutton, 71 F. Supp. 2d at 386. The Consent Order also stated that Petitioner was retaining his 1/6 interest in a parking lot and his 6.7% interest the Melody and its liquor license and noted that the Petitioner's five siblings would sell the parking lot across from the Melody for $650,000. Id. Plaintiff was paid the $75,000 in accordance with the Consent Order[5], three years before his marriage to Decedent. Id.

After that settlement, conflicts arose concerning the sale of the liquor license and the other assets identified in the Consent Order. The Petitioner began conducting legal research involving those issues and as a *pro se* plaintiff, Petitioner filed a motion in the Probate Court to vacate the Consent Order, which was denied, as was a motion for reconsideration. 71 F. Supp. 2d. at 386.

[5] Petitioner was found to have no standing to pursue claims against his father's Estate after this payout, causing the Notice of Motion to Enforce Litigants Rights in the Probate Matter, filed in 2006 to be dismissed.

Before his marriage to Decedent, Petitioner, as a *pro se* plaintiff filed two Federal lawsuits that expressed his distress over the accounting, the liquor license, and the distribution of his father's estate, both of which were not resolved on the merits, but rather, were dismissed for lack of subject matter jurisdiction. Sutton v. Sutton, 71 F. Supp. 2d at 391. The first Federal Lawsuit was dismissed on August 6, 1990, and the second on April 30, 1992, holding, *inter ali*a, that the Rooker Felman doctrine barred Federal Court review of the state court's approval of the Consent Order and that the Petitioner's First Amendment claim was inextricably intertwined with the validity of the Consent Order. Sutton v. Sutton at 71F.Supp. 2d at 386.

On November 22, 1992, approximately seven (7) months after the second Federal Lawsuit referenced in Sutton v. Sutton was dismissed, the Petitioner was married to Decedent. 71F.Supp. 2d at 386. There was no pending litigation when Petitioner was married. Sutton v. Sutton at 71F.Supp. 2d at 386.

Petitioner never told the Decedent he wanted a premarital agreement. (8T92:6-18). Petitioner did not have any discussions with Decedent about a prenuptial agreement. (8T92:6-8). Petitioner did not sign a prenuptial agreement prior to his marriage. (8T62:14-21).

At the time of the marriage, Petitioner was obviously disappointed that he entered into a Consent Order that impacted his rights with respect to his own assets. Petitioner found that he was unable to have that agreement vacated in either the State Court or Federal Court and the Consent Order impaired the Petitioner from having

his claims addressed. Yet, Respondent is advancing the theory that the day before the wedding, Decedent gave Petitioner the Photocopy, requesting that he sign a more onerous agreement than the Consent Order, to govern their assets during the course of his marriage.

Petitioner testified that had he been given the Photocopy the day before his marriage, he never would have entered into it. (9T11:8 to 12:2). Petitioner would have said, "Lynn, what are you trying to pull?" and he would have walked out. Id. When reviewing the Photocopy at trial, Petitioner found that its terms were akin to a dictatorial business arrangement that was not anything he was familiar with as a marriage. Id.

Nicholas Guarracino testified that he never had any discussions with Petitioner about a prenuptial agreement. (9T12:8-10). Mr. Guarracino knew that Petitioner would not have been married if there were one, explaining "because of the kind of guy he was" (9T12:12-15).

There is no evidence to support the Court's finding that Petitioner initiated a prenuptial agreement with the expectation of obtaining a substantial payout in the Sutton v. Sutton litigation if he was successful. (9T7:17-22). Due to events that unfolded over a period of several years after his marriage including corresponding reductions to the purchase price of the Melody, its liquor license and as a one/sixth owner of the parking lot, Petitioner, as a pro se litigant, brought additional Federal lawsuits to challenge those actions. (9T7:17-22); 71 F.Supp 2d 387. Unfortunately,

as a *pro se* plaintiff who never attended a formal civil procedure course, four of the five lawsuits that Petitioner filed were not resolved on the merits, but rather, on procedural grounds, including lack of standing, lack of subject matter jurisdiction, the entire controversy doctrine, and the Rooker-Feldman doctrine. Sutton v. Sutton, 71F.Supp. 2d at 386. At the conclusion of the litigation, Petitioner received approximately $23,000 for his interests in the Melody, its liquor license, and the adjoining parking lot. 71 F.Supp 2d 387.

Petitioner learned a lot about the law from acting as a *pro se* plaintiff in the Sutton v. Sutton litigation and eventually, returned to college and was awarded a bachelor's degree in paralegal studies from Widener University in December 2007. (9T8:9-15). The petitioner testified that looking back, he could have handled things a lot differently, recognizing that he would have avoided a lot of grief by a lot of people by retaining an attorney instead of trying to pursue his claims on his own. (9T 8:2-15).

Respondent has not presented any other litigation that Petitioner filed since the Sutton v. Sutton litigation ended over 24 years ago. Since then, Petitioner obtained a bachelor's degree in paralegal studies and subsequently, a Master's degree in contract management. Respondent's portrayal of Petitioner at trial as being "litigious" is disingenuous at best.

9. The Adult Protective Services Letter Was Submitted In Good Faith

Respondent asserts that Petitioner advanced a "fabricated" charge with Adult Protective Services ("APS") about the Decedent's mother. Db at30. Petitioner contacted the APS in good faith, after Respondent barred him from visiting his mother-in-law of 29 years, who was then 97 years old, in failing health and who was frail, confused, and requiring around the clock aides from caregivers, including Elizabeth Gelo. (165a; 12T128:21 to 129:10; 12T132:20-25). Respondent took that action after Petitioner expressed his concern to Respondent about the care his mother-in-law was receiving after he found Decedent's mother was left unattended at nights in June 2021 and had fallen. (P166a to P167a). When Respondent learned that Petitioner had notified the APS about Decedent's mother, Respondent spoke poorly about Petitioner to his mother-in-law and destroyed the composition books that the aides had maintained that memorialized the Decedent's mother's care and behavior. (12T132:5-9;12T132:25 to 133:11; P172a to P173a). Respondent testified that the APS matter was closed without an investigation. (12T135:8-10).

Respondent failed to provide any proofs contrary to the testimony of the Petitioner and Elizabeth Gelo, that demonstrated that Petitioner had a good faith basis to contact the APS. (P164a to P171a; 12T127:14 to 141:17).

10. Petitioner Did Not Contact Child Protective Services:

Another element of the smear campaign is Respondent's false assertion that Petitioner wrote a letter to Child Protective Services (CPS) about Respondent that

was signed "Thomas New" who had died. Db at 31. Petitioner objected to the CPS testimony as no nexus exists between the letter and Petitioner and it was not relevant to the claims, but the Court allowed it for credibility. (8T132:5-10; P165a).

No evidence was presented that reflected that Petitioner ever wrote a letter under anyone else's name but his own. Petitioner testified that he did not send a letter to CPS, (8T136:13; 8T160:8-18), never contacted CPS or the police about Respondent or her children and did not know the name Thomas New. (8T131:20 to 132:2; 11T127:23-25; 129:5; 8T138:10 to139:10). Petitioner was also unaware of most of the events raised in the CPS letter. (8T135:19 to 137:9). The contention that Petitioner wrote the CPS letter is based solely on innuendo, speculation and conjecture. (11T131:7-18).

Respondent claims that Petitioner knew who Thomas New was, because a few months before trial, Petitioner sent three pictures to Ms. Donahue, one of which included Thomas New when he was a little boy. The Petitioner explained that he found pictures in a card that Ms. Donahue had sent to Decedent years ago and he simply returned them to her. (10T141:21 to 144:18; 12T174:21-25; 12T173:20-23).

Ms. Donahue testified that a variety of people were in the pictures including her grandson, Thomas New, as a young child, who died in 2003, years after the pictures were taken. (10T139:2-3). Prior to his death, Thomas New had many friends in Brigantine, including Respondent. (10T152:7-17; 10T143:18-25). In fact,

Ms. Donahue stated that people still approach her and recognize her as Thomas's grandmother. (10T152:8-11). Likewise, Ms. Donahue testified that a lot of people were close to Decedent and a "good bit of them" knew her grandson, Thomas New. (10T151:23 to 152:11).

Respondent failed to demonstrate that Petitioner ever knew the name "Thomas New" when the CPS letter was allegedly written. Ms. Donahue testified she was really Decedent's friend and spent time mostly with her. (10T136:9-10; 10T134:21). Thomas New was five years younger than Respondent and would not have been acquainted with Petitioner. (10T143:18-25). Any one of the numerous people who were close to the Decedent and who knew Thomas New could have written the CPS letter. Respondent's contention that Petitioner wrote the letter is without basis and was part of her smear campaign against Petitioner. The CPS letter was never authenticated, is irrelevant to this proceeding and it should not have been considered.

Had the Court scrutinized the evidence that Petitioner presented at trial, it would have been apparent that all the "inequitable conduct" attributed to the Petitioner lacked a factual basis, did not involve the Petitioner, and had no relevance to the litigation. The Court was obviously inflamed and antagonized by the unsupported innuendos presented by Respondent, which lead to the unjust and unfair dismissal of all of Petitioner's claims.

POINT TWO

THE COURT ERRED WHEN IT PLACED THE BURDEN ON PETITIONER TO PROVE THE EXISTENCE OF UNDUE INFLUENCE BY CLEAR AND CONVINCING EVIDENCE

In its opposition, the Respondent contends that the Petitioner had the burden of proving undue influence using the "clear and convincing" standard. Respondent's opposition overlooks the shifting burdens associated with claims of undue influence and how that impacts the burdens of proof.

It is well settled that even a will, which on its face appears to have been validly executed, can be overturned upon a demonstration of undue influence. Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 175-76, 432 A.2d 890 (1981). In Haynes v. First National Bank of New Jersey, 87 N.J. at 175-76, the Supreme Court set forth the standard to be applied to rebut a presumption of undue influence (1) a confidential relationship and (2) "suspicious circumstance" that "need only be slight." Id at 177. When these two elements exist, a presumption of undue influence arises, and the burden of proof shifts to the proponent of the will to overcome the presumption by a preponderance of the evidence that there was no undue influence. *Id.* at 177-78. See also, In re Weeks, 29 N.J. Super. at 536-538 (when the presumption arises, both the burden of proof and the burden of going forward with proof, shift to proponent and to meet each of these assignments, the proponent must establish by the same quantum of proof -- that is, by a preponderance of the proof -- that there is no undue influence).

In Haynes, the Court recognized that a higher standard of proof is required for public policy reasons when an attorney, who serves as a fiduciary, is claimed to have unduly influenced the testatrix. Haynes supra, at 184-185. In those limited circumstances, a higher "clear and convincing" standard of proof is required to **rebut** the presumption of undue influence. Id. In Haynes, the Court found that the attorney had represented both testator and the proponent of the new will when he prepared the will and was unable to rebut the presumption of undue influence by clear and convincing evidence because there was no proof the attorney disclosed the conflict of interest to the testator. Id.

An application of the settled law confirms that the challengers to a will are not held to a clear and convincing burden of proof when providing proofs of the essential elements for undue influence. Holding Petitioner to a high, clear and convincing standard of proving that the Respondent unduly influenced the Decedent is in contravention of the established case law and the applicable burdens of proof.

Respondent contends that Estate of Ostlund, 391 N.J. Super. 390, 403 (App. Div. 2007) "has nothing to do with the instant case" and is "irrelevant" because it did not involve the making of a will but rather, the court was addressing a multiple party deposit account. Db at 42. Estate of Ostlund recognized that two different tests were available to determine if the proceeds in an account were to pass to the account beneficiary under a right of survivorship or to the decedent's estate. The first test involved a provision of the Multiple-Party Deposit Account Act that governed

survivorship accounts (*N.J.S.A.* 17:16I-5(a)), but if that test cannot be satisfied, the principles of undue influence provided an alternative basis to challenge the ownership of a joint survivorship account on the death of one party. Ostlund 391 N.J. Super. 390 at 401. To establish a presumption of undue influence and shift the burden of proof in an inter vivos transfer, a challenger of an inter vivos transfer needs to show a confidential relationship exist[ed] between [the] donor and donee by a preponderance of the evidence. Id citing Pascale v. Pascale, 113 N.J. 20, 30, 549 A.2d 782 (1988). Inter vivos transfers, unlike wills, do not require challengers to show suspicious circumstances to be set aside. Id. See also Bronson v.Bronson 218 N.J. Super 394, 527 A.2d 943 (App. Div. 1987) (addressed the difference between a claim of undue influence in cases involving *inter vivos* transfers and those involving wills).

Respondent's reliance on the clear and convincing standard in In re Niles Trust, 176 N.J. 282, 300 (2003) overlooks the particular facts in that case involved undue influence by a fiduciary, to which the higher "clear and convincing" standard of proof was required to **rebut** a presumption of undue influence that arose.

The high "clear and convincing" standard is applicable only in limited circumstances where a presumption of undue influence arises that must be rebutted by a fiduciary/attorney or the recipient of a gift. Neither of those circumstances are present here. Therefore, the Court's finding that Petitioner was required to prove

undue influence of the Decedent by the Respondent by clear and convincing evidence was erroneous as a matter of law.

POINT THREE

THE COURT APPLIED INCORRECT STANDARDS WHEN EVALUATING THE EVIDENCE SUPPORTING THE UNDUE INFLUENCE CLAIMS

Not only did the court apply the wrong burdens of proof when it granted the Respondent's motion for a directed verdict, the Court applied incorrect standards by failing to view all evidence in the light most favorable to the non-moving party. *See* R. 4:40-1 comment 1.

In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146(1995) the Court explained the process that is to be afforded on a motion that requires that the court accept as true all evidence supporting the position of the non-movant and to accord him the benefit of all inferences which could reasonably and legitimately be deduced therefrom :

> This process is a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials. This process, however, is not the same kind of weighing that a factfinder (judge or jury) engages in when assessing the preponderance or credibility of evidence. On a motion for summary judgment the court must grant all the favorable inferences to the non-movant. But the ultimate factfinder may pick and choose inferences from the evidence to the extent that "a miscarriage of justice under the law" is not created.

Id. at 536, 666 A.2d 146. The picking and choosing inferences from the evidence to determine the preponderance or credibility of evidence was not to be conducted

without affording the parties the opportunity to present closing arguments, which is an important aspect of the factfinding process:

> All who are acquainted with litigation recognize that summation is a most important aspect of the trial process. During closing argument, an attorney is placed in the role of an advocate in the truest sense of the word. The purpose of closing argument is to draw together all the facts at the end of the trial and to present the theories of the litigants to prepare the jury to make a proper decision.

State v. Vigilante, 194 N.J. Super. 560, 563, 477 A.2d 429(App.Div.1983)

Granting motion for a directed verdict without affording the Petitioner any argument and without having any closings, the Court overlooked and under evaluated crucial evidence. Reversal of a grant of a directed verdict motion is applicable in those circumstances when the factual findings and legal conclusions of the trial judge went 'so wide of the mark that a mistake must have been made.'" Llewelyn v. Shewchuk, 440 N.J. Super. 207, 214, 111 A.3d 1132 (App. Div. 2015) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279, 914 A.2d 1265 (2007)). Such a mistake may arise from the court 's "obvious overlooking or under evaluation of crucial evidence." Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, 338, 382 A.2d 933 (App. Div. 1978). Also, as with any non-jury case, deference will not be given to legal determinations which are manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282, 650 A.2d 1025 (App. Div. 1994) (quoting Rova Farms Resort

v. Investors Ins. Co., 65 N.J. 474, 484, 323 A.2d 495 (1974)), certif. denied, 140 N.J. 277, 658 A.2d 301 (1995).

An application of these standards to this matter warrants that the directed verdict be reversed, and Petitioner's claims of undue influence be reinstated. Here, in stark contrast to the established standards, the trial court afforded Respondent, rather than Petitioner, all favorable inferences and overlooked or undervalued crucial evidence to the extent that a miscarriage of justice was created.

Respondent contends that the Petitioner was not afforded any favorable inferences because the Court found that the Petitioner was not credible. Db at 43. Yet, there were witnesses other than Petitioner who provided testimony from which inferences favorable to the Petitioner should have been afforded.

In her Opposition to Petitioner's motion, the Respondent now asks, how exactly did the trial court "cherry pick" the evidence. The Petitioner does not say." Respondent overlooks 10 pages of Petitioner's Brief in Support of Appeal that outlined the evidence that the Court overlooked. See Petitioner's Brief in Support of Appeal at pgs. 20-30. The crucial evidence that the Court overlooked or disregarded includes the following:

The Court turned a blind eye to Gail Snyder's bias arising from her relationship with Respondent. Ms. Snyder admitted she was Respondent's close

friend explaining that she pretty much performs for Respondent the same type of services that Decedent was providing for Respondent when Decedent was alive. (11T38:11-13; 11T37:18-24; 11T37:7 to 38:9). Ms. Snyder provides care for Respondent's children regularly without compensation and Ms. Snyder also assisted Respondent throughout this litigation, including collecting and storing the documents that she and Respondent removed from Decedent's Home and serving as their custodian and sorting and photocopying selected documents at Respondent's request. (11T57:8 to 58:12). Ms. Snyder and Respondent strategized and communicated about this litigation. (11T51:18-24).

Ms. Snyder also falsely held herself out as a co-owner of the safety deposit box rented by Decedent, even though Ms. Snyder acknowledged that box was not hers. (11T13:2-10; 11T14:2-6). A review of the Safe Deposit Box rental that Decedent maintained in her safe confirmed that Decedent was the sole renter of that box. (P596a). That is obviously why Ms. Snyder did not have a key to the safety deposit box and within days of Decedent's death Ms. Snyder misrepresented her status as a co-owner of the safety deposit box to Petitioner to convince him to give her its key. (11T25:13-15). Ms. Snyder later told Petitioner that she did not find a will in the safety deposit box and testified to the same at her deposition. (7T163:12-19). In stark contrast, at trial, Ms. Snyder changed position and testified that she found the Decedent's will in the Decedent's safety deposit box, explaining that was what Respondent had told her. (11T51:22-25). The Court disregarded that testimony

as well as the pictures that Ms. Snyder provided at her deposition of the items she removed from the safety deposit box, that did not include a will. (P574a to P596; 11T23:23 to 24:15). The Will is five pages long with a thicker cover page, hardly a document that could be missed when going through the safety deposit box contents. (P105a to P109a; 11T28:12-21).

The Court's finding, that "Respondent found the Original Will in a bag of items that Gail Snyder had given Respondent from the Safe Deposit Box"(P23a) is also belied by the undisputed fact that on June 18, 2021, Respondent attached a copy of the Will to her answer to complaint in this litigation, averring that "the Original Will was subsequently located," three days before Ms. Snyder first entered the Decedent's safety deposit box on June 21, 2021. (11T50:4-6; 11T13:2-4; 11T13:24 to 15:4; P572a; P100a at 17; P104a to 109a). It is evident that the 2014 Will was not changed or destroyed by Decedent after it was made because it was in Respondent's possession and control, in her home safe for the years that followed its making. (12T29:13-15; 12T34:19-23).

The Court also found Petitioner's witnesses "credible." Yet, the Court disregarded those witnesses since they provided facts that were inconsistent with the Court's predetermined ruling, reasoning they were "not persuasive."

The Court disregarded credible testimony from Nicholas Guarracino, and his wife, Paula, who were the only witnesses at trial who had socialized with both Petitioner and Decedent and observed them as a couple. (9T92:1-17; 9T95:15 to

96:4; 9T98:21 to 99:2; 9T108:14 to 109:4; 9T110:14-20). Mr. and Mrs. Guarracino knew both Petitioner and Decedent for more than 40 years socialized with them both every few weeks and observed that they had a "real nice marriage." (9T90:24-24;9T110:9-13; 9T108:14-17; 9T92:1-17; 9T110:16-20). Mr. and Mrs. Guarracino also went to their wedding, attended parties that Decedent hosted for Petitioner, visited them at their home, and Mr. Guarracino contributed to a book of testimonials that Decedent collected for Decedent when he retired. (9T95:3 to 96:13; 9T110:16 to 112:9). Mr. and Mrs. Guarracino never observed any type of discord between Decedent and Petitioner. (9T95:25 to 96:4; 9T112:7-12).

Other material evidence that the Court expressly found to be credible but disregarded was from Melissa Young Tucker. P25a. (9T58:3-25). The Court found that the testimony provided by Ms. Tucker was essentially irrelevant in terms of the time period testified to. Pa 25. Yet, when evaluating undue influence claims, the circumstances surrounding the making of the will are to be examined. See, In re Weeks, 29 N.J. Super. at 541-542. The circumstances that existed in October 2014, when the Decedent was making the 2014 will, is precisely the time period that was the subject of Melissa Tucker's testimony. The Court's disregard of Ms. Tucker's testimony was erroneous as a matter of law as her testimony established the manner in which Respondent dominated and controlled the Decedent from the time she moved next door in 2013, until she moved out of the home in 2019. See Petitioner's Brief In Support of Appeal at pages 12-14.

Other material facts that the Court disregarded was that the 2014 Will was made only 13 days from the date that the Brigantine Times published that the Brigantine Police had arrested JZ, Respondent's longtime partner and the father of her two sons, and charged him with theft and credit card theft. (P546a; 7T186:16-18). Michele Maguire, Esquire described the Brigantine Time as a very popular circular in Brigantine that is the source of a lot of talk around the island. (10T69:23 to 70:10). By disregarding the newspaper publication about JZ, the Court under evaluated the severe emotional distress that Decedent was under due to JZ's continuing relationship with Respondent, and Decedent's continuing worry about Respondent' reputation and standing in the community. (7T181:5-24: 7T182:17-19; 7T 186:19 to 187:19). The Court recognized Decedent's distress, finding "Respondent fought with her mother because her mother wanted her to leave [JZ] to protect Respondent and her grandchildren." P20a. The Court overlooked, however, that while the Decedent was suffering anguish and distress, Decedent made the 2014 Will. (P108a). After the 2014 Will was made, Decedent advised Ms. Tucker that JZ was barred from Respondent's home and asked Ms. Tucker to alert her if JZ came around. (9T73:2-11).

The Court also disregarded bias on the part of Timothy Maguire, Esquire, when finding that he had no interest in the outcome of the case. P30a. When testifying at trial, Mr. Maguire represented Respondent, Respondent testified that she discussed with Mr. Maguire her concerns that the will would be challenged by

Petitioner before the Decedent's death, and after this litigation was brought, Mr. Maguire had discussions with Michael Weinraub, Esquire, who represents Respondent in this litigation, gave him documents so that Decedent's file could be recreated for this litigation. (9T269:4-7).That file included a photocopy of a prenuptial agreement (hereinafter "Photocopy") that had the words "Exhibit B" written across the bottom, that was given to him by Respondent's attorney, but Mr. Maguire testified under oath at his deposition that it was given to him by Decedent. (9T239:16 to 238:17; 9T237:23 to 238).

The Court also disregarded the significant amount of assets that made up the Estate. At the time of her death, Decedent held title to the Home, the residuary estate to a home at 1301 Quimet Rd. Brigantine, NJ, two IRA accounts with $273,000 (P702a), and a mortgage to a home Decedent had built for the Respondent in the sum of $350,000[6] (P656a; 9T234:22 to 235:23). The Court found that a mother would take care of an alleged financially needy child over a spouse who allegedly failed to meet the mother's needs. P34a. Yet, when the Will was made, the Decedent did not need to make a choice between her husband and her adult child. There were sufficient assets to distribute among the two, as Decedent had long expressed to Petitioner. (7T118:15-22; 7T 178:16-22; 7T180:12 to 181:9; 7T189:17-22).

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[6] Decedent paid $445,000 to construct Respondent's home. (P566a to P570a).

POINT FOUR

A SPOILATION INFERENCE SHOULD HAVE BEEN AFFORDED TO PETITIONER

Decedent's client file at Maguire and Maguire was stated to be lost. It was the Maguire Firms' practice to maintain notes in the client file and drafts of changes to a will but none were produced at trial. 10T80:10-23. Respondent contends an attorney's notes are not "crucial evidence" and there is no foreseeability of harm if the notes are unavailable. Db at 51, 52. Respondent contends that since Mr. Maguire testified, under oath, about all his conversations with the Decedent and her wishes for the will, the notes are not relevant.

The fact that Mr. Maguire testified about his communications with Decedent that occurred seven years earlier confirms that the notes he made contemporaneously with his meetings with Decedent were critical and material as impeachment evidence. It has long been recognized that the notes and drafts of the proposed notes and the other documents constitute extrinsic evidence may be admitted to impeach a witness, *see N.J.R.E.* 607; See State v. Burris, 145 N.J. 509, 535, 679 A.2d 121 (1996) (holding that for purposes of impeaching witness credibility, "relevant previous statements would be those that contradict or call into question [witness's] version of events as recounted at trial.").

The documents that an attorney drafts and the notes that are prepared are so material to a will contest that the legislature has determined that they should not be protected by the attorney client privilege. N.J.S.A. 2A:84A-20. The statute codified common law that recognized that a communication by a client to an attorney who drafted his will, and transactions leading to its execution, are not privileged after the client's death in a suit between the testator's heirs, devisees or other parties who claim under him. In re Crook's Estate, 87N.J. Super.210 (Co. Ct.1965); N.JS.A. 2A:84A-20. Those communications are material to the Petitioner's claims as they are relevant to the testator's intentions when the will was made.

In addition, a material issue in this case is whether the Decedent gave Mr. Maguire the Photocopy or whether he had received that from the Respondent. The Decedent's file would have resolved that issue. The only copy of the Photocopy that Mr. Maguire provided at his deposition was the same document that Respondent had attached to her answer to complaint, that had the words "Exhibit B" written on the first page written by Respondent's attorney. Also, Mr. Maguire's wife and law partner, Michelle Maguire, Esquire, who concentrated her practice in matrimonial law, never saw the Photocopy and was not given it to review or to give an opinion as to its validity when Decedent was making her will or at any other time. 10T56:8-18.

The loss of the Decedent's file precluded the Petitioner from determining just what Decedent had given to Mr. Maguire and when, and what advice and counsel

that Mr. Maguire provided to the Decedent, resulting in an incomplete record. The Court's failure to find that the loss of the Decedent's client file was material to this will contest was erroneous and a spoilation inference should have been applied.

POINT FIVE

THE PRENUPTIAL AGREEMENT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE OR ENFORCED AGAINST PETITIONER

Copies of documents are not to be admitted into evidence when there is a genuine question raised as to the original's authenticity or the circumstances make it unfair to admit the duplicate. N.J.R.E. 1003. Here genuine questions exist as to the Photocopies authenticity and the circumstances made it unfair to admit the Photocopy into evidence or to support a finding that it stripped the Petitioner of his rights to a Legislatively created elective share of his wife's estate.

Given how signatures on photocopies are easily forged or manipulated by electronic means, visual comparisons of signatures from photocopies to determine if they are genuine, is an insufficient method for authentication of a document. Yet, that was the process that Mr. Osborne used.

The New York Court in Banco Multiple Santa Cruz, S.A., v. Moreno, 888 F. Supp. 2d 356, 375- 376 (E.D.N.Y. 2012) (attached as Pra1) was confronted with a similar issue involving photocopied signatures. In Banco Multiple Santa Cruz, S.A., v. Moreno, when denying the grant of summary judgment, the Court evaluated, *inter alia,* whether a financial institution (MetLife) was negligent after it distributed the

proceeds from an annuity account when its means of verifying signatures was by comparing the signature cards to a faxed MetLife withdrawal form. 888 F. Supp. 2d at 375 (Pr[7]14a) John Paul Osborn in his capacity as a forensic document examiner, stated that signatures on faxed documents are easily forged or manipulated by electronic means. . .. ("[A]nyone with a computer could 'cut and paste' [Miguel]'s signature from one document onto a MetLife withdrawal form. . . . Thus, MetLife's procedures for disbursing variable annuity [sic] provided no protection to its customers at all.") Id. Mr. Osborn opined that in his professional opinion, the "acceptance of signed faxed documents of vital significance and in lieu of an original, by banks, insurance companies and corporate entities, constitutes an unconscionable business practice that exposes customers and companies alike to considerable risk of fraud and deception. I believe such practices should be forbidden by law." (Id. at 375 n.21; Pr14a n. 21). The court did not find that the difference between the allegedly forged signatures and the authentic signatures was markedly apparent, but it held that the bank may nonetheless have been obligated to do more than merely visually compare the signatures before honoring the withdrawal requests. (Id. at 378; Pr16a).

Here, as in Banco Multiple Santa Cruz, S.A., v. Moreno the process that Mr. Osborne used to determine if the Petitioner's signature was genuine was to compare

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[7] "Pr__a" means Petitioner's Reply Appendix In Further Support of Appeal and In Opposition to Respondent's Cross Motion.

signatures from various photocopies to determine if they were similar. 888 F. Supp. 2d at 375. Given that the Photocopy was a document of vital legal significance, particularly under the facts presented here, in which the Court found it contained language that supported waivers of an elective share of an estate (P37a) and Petitioner testifies that he never signed the document. (P8T63:3-10). As in Banco Multiple Santa Cruz, S.A., v. Moreno, more was needed to enforce the Photocopy than simply comparing photocopied signatures.

Respondent asserts that her expert, Mr. Osborne found no evidence of a cut and paste manipulation of Petitioner's signatures. Db at 55. That is erroneous. Mr. Osborne acknowledged at trial that there was evidence of physical manipulation of the Photocopy stating that a double line under Decedent's signature was evidence of the signature being taken from another source. (9T198:21-199:1; See P115a).

Genuine questions exist as to the existence of an original prenuptial agreement making it unfair to admit the duplicate into evidence. N.J.R.E. 1003. The Photocopy was found to have waived the Petitioner's right to an elective share of the Decedent's Estate, although it failed to contain the schedule of assets required by the Premarital Agreement Act, N.J.S.A. 37:2-33. The Court disregarded that statutory law reasoning "this court will not speculate as to what could have been attached to the full agreement." P39a.

Yet, the Court repeatedly engaged in speculation and conjecture to support its rulings about the Photocopy:

(a) It was speculative to assume an original of the Photocopy ever existed when none of the witnesses who appeared at trial had ever seen an original prenuptial agreement, even though its terms stated that four originals were executed. (P119a, 12T36:6-10; 11T11:18 to 12:10; 10T 101:25 to 102:7).

(b) It was speculative to assume that the prenuptial agreement that Decedent mentioned to Ms. Snyder or Ms. Whelan is the same document as the Photocopy as none of those witnesses had ever seen the prenuptial or were told any of its terms. Id.

(c) It was speculative to find that an original prenuptial agreement had been placed in a "Rubbermaid box" that the Petitioner found and destroyed. Nothing that the Decedent allegedly said to Ms. Whelan on the phone the day the Decedent had died or a few days before that date, had mentioned a prenuptial agreement. (10T107:11-16)

(d) It was speculative to assume that there was a "Rubbermaid box" in Decedent's closet. None of the witnesses had ever seen that "Rubbermaid Box" obviously because it never existed. (11T17:16-22). Indeed, it was undisputed that Decedent maintained a safe deposit box where she placed her important papers. P596a.

No competent proofs were presented that supported Respondent's contention that an Original of the Photocopy existed that was destroyed by the Petitioner.

The Respondent also asserts that "Kathleen Whelan testified credibly that Petitioner most likely initiated the Antenuptial Agreement with the Decedent due to the pending litigations to assure that the award was separate from marital assets. Db at 9. Respondent presents no citations to the record support that contention. That is obviously because Kathleen Whelan presents nothing more than an unsupported lay opinion that is not based on any fact, in contravention of N.J.R.E. 701.

Ms. Whelan also testified that she did not know who initiated the prenuptial agreement. 10T 102:5-9. Yet, Ms. Whelan was questioned as to who she thought initiated the prenuptial agreement and Petitioner objected. 10T102:2-17. The Court permitted Ms. Whelan to answer and stated it was her assumption that it might have been Petitioner[8]. 10T102:9-10. Ms. Whelan's testimony is devoid of a factual basis, consisted of conjecture, and should not have been considered by the Court. N.J.R.E. 701.

No competent proofs support the findings made by the Court as they relate to the Photocopy and rather, they are based on speculation and conjecture. Admitting the Photocopy into evidence is inconsistent with N.J.R.E. 1003 and constituted a miscarriage of justice.

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[8] Ms. Whelan made her assumptions after the Respondent talked to her about the litigation two to three times, advised her of Respondent's positions, emailed a copy of the Photocopy to her and sent her a number of texts. 10T113:9-114:10; 10T115:19-24; 10T113:6 to 113:14; 10T128:5-17.

POINT SIX

THE PHOTOCOPY VIOLATED THE UNIFORM PRE-MARITAL ACT

The Act renders the Photocopy unenforceable because it lacks an itemized list of the parties' assets as required under the Act. see N.J.S.A. 37:2-33. Respondent contends that no schedule of assets was needed, because the Photocopy contains terms that stated that the parties were apprised of the extent and approximate value of the property and estate of each other. Db at 61. The conclusory language of the Photocopy is not a substitution for the itemized list of assets that is required by N.J.S.A. 37:2-33.

Simply stating in the agreement that the parties were apprised of the extent and approximate value of the estate of another does not provide the detail that may be necessary several years later in determining whether the parties were provided with full and complete disclosure of assets. See, Estate of Shinn, 394 N.J. Super.55 (App. Div 2007). In Shinn, the schedule of assets in the parties prenuptial agreement made it evident years later, when the agreement was being challenged, that the husband had substantially undervalued his businesses, which was a breach of the requirement of adequate disclosure. Id.

The Court in DeLorean v. DeLorean, 211 N.J Super. 432, 439 (Ch. Div. 1986) explained that the purpose for an itemized list of the parties assets was to discourage a plethora of plenary hearings as to precisely what financial information was disclosed and whether it was accurately valued. See also, Orgler v. Orgler, 237 N.J.

Super. 342 (App. Div. 1989) (to waive a substantial right, there must be "full knowledge of the right and an intentional surrender which "can properly be considered 'known' only if there is full awareness of the other party's income and assets, since those facts are critical elements in determining the potential awards of alimony and equitable distribution which the signer of the agreement is being asked to 'waive.')"

Here, unlike In re Estate of Shinn, there is no way to determine precisely what assets were disclosed and whether their values were accurate since there is no list of assets in the Photocopy. The Respondent contends that disclosure of assets was not necessary here because their assets "were not very much, as much of their wealth was created during the marriage. Db at 63. Respondent overlooks that at the time of the marriage, both Decedent and Respondent had worked for more than 20 years. Respondent never disclosed the value of her Avon pension or the sums in the various accounts she managed. See, P702a

The list of assets is material to a determination of whether there was an enforceable waiver of rights. Therefore, the Court erred as a matter of law when it excused the legislative requirement of N.J.S.A. 37:2-33 and enforced Prenuptial agreement without a list of assets.

CONCLUSION

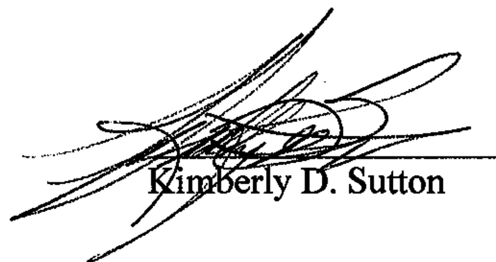
For the foregoing reasons and the reasons set forth in Petitioner's Brief in Support of Appeal, the Court abused its discretion by making findings that lack foundation, are based solely on hearsay and conjecture and are so widely off the mark that a manifest denial of justice resulted. It is respectfully requested that:

A. The Order as to Counts One and Three of Petitioner's Amended to Complaint be reversed and that those counts be reinstated.

B. That the Court find that the Photocopy should not have been entered into evidence pursuant to the Best Evidence Rule, that it is unenforceable under the Uniform Pre-Marital Agreement Act and that Petitioner did not waive his statutory rights to an elective share of the Estate Assets.

C. In the alternative, the life estate with restrictions on alienation should be set aside and Petitioner should be granted a fair allocation of Estate assets under his claim for a constructive trust.

Respectfully submitted,



Kimberly D. Sutton

FILED, Clerk of the Appellate Division, November 30, 2023, **A-001838-22**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1838-22T4

IN THE MATTER OF THE ESTATE

OF LYNDA NATHANSON SUTTON,

DECEASED

On Appeal from Final Order of
Superior Court of New Jersey,
Chancery Division, Probate Part
Docket No. P-127920-21

Sat Below:

Hon. M. Susan Sheppard, P.J.Ch.

REPLY BRIEF OF RESPONDENT-RESPONDENT/CROSS APPELLANT, SANDRA L. WILLIAMS

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TRANSCRIPT REFERENCES[1]

"1T" refers to trial transcript dated August 29, 2022
"2T" refers to trial transcript dated August 30, 2022
"3T" refers to trial transcript dated August 31, 2022
"4T" refers to trial transcript dated September 1, 2022
"5T" refers to trial transcript dated September 2, 2022
"6T" refers to trial transcript dated September 19, 2022

1 The Respondent notes that the six motion transcripts labeled as "1T" through "6T" in the Petitioner's brief are irrelevant to the appeal. In fact, the Petitioner fails to utilize any of these transcripts in support of his positions on appeal. The only relevant transcripts on appeal are the six transcripts of trial from August 29 through September 19, 2022.

POINT I

THE CHANCERY DIVISION ERRED IN PROVIDING THE PETITIONER WITH A LIFE ESTATE IN THE DECEDENT'S HOME.

In opposing the Respondent's cross appeal, the Petitioner advances various arguments, none of which contain merit.

A. N.J.R.E. 608 Has No Application to the Instant Case.

The Petitioner remarkably contends that N.J.R.E. 608(a) applies to defeat the Respondents cross appeal. This argument, advanced in extreme bad faith, lacks merit on several obvious grounds. **First,** the Respondent misquotes the Rule. The actual Rule 608(a) -- which contains nothing about specific instances of conduct -- states the following:

> (a) A witness' credibility may be attacked or supported by evidence in the form of opinion or reputation that relates to the witness' character for truthfulness or untruthfulness, provided that evidence of truthful character is admissible only after the witness' character for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The principle of specific instances of conduct is contained in subsection (c) of the Rule, which states:

> (c) Except as otherwise provided by Rule 609 and paragraph (b) of this Rule, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness.

This subsection, however, applies solely to criminal cases, as noted by a leading authority. *Biunno, Current N.J. Rules of Evidence,* Comment 3 on N.J.R.E. 608 (2023) ("Subsection (c) is limited to criminal cases").

Second, the Petitioner's meritless argument was not raised below, and is barred from consideration by the Appellate Division on appeal. It is well established that the Appellate Division has the authority to decline hearing issues that have not been raised in the trial court. See, *Firemen's Ins. v. National Union*, 387 N.J. Super. 434, 450 (App. Div. 2006); *Henebema v. SJTA*, 430 N.J. Super. 485 (App. Div. 2013), aff'd 219 N.J. 481 (2014). **Third,** the inequitable, reprehensible conduct relied upon by the Respondent goes well beyond the notion of truthfulness, as outlined on pages 69-70 of the Respondent's principal brief. **Fourth,** ignored by the Petitioner is the fact that the Chancery Division found that his testimony lacked truthfulness, concluding as follows:

> Petitioner's testimony was contradicted by multiple fact witnesses, exhibits, and even his own testimony between his deposition and at trial. This court does not find Petitioner to be a credible witness.

(Pa 25). Thus, the Petitioner's reliance upon Rule 608 and the principle of truthfulness lacks all merit.

B. The Doctrine of Unclean Hands Barred the Petitioner From Obtaining Equitable Relief.

The Petitioner argues that his conduct, as outlined by the Respondent in Point IV of her principal brief, does not constitute a reason for his disinheritance by the Decedent. (Pb 5). However, such argument is irrelevant.

Whether or not such conduct formed a basis for the Decedent to disinherit the Petitioner is a non-issue. The issue before the Chancery Division was whether the Decedent's Will was valid, and whether, as a result of alleged undue influence, there were suspicious circumstances surrounding the Decedent's Will. *In re Estate of Stockdale*, 196 N.J. at 302-03 (2008); *Haynes v. First National State Bank*, 87 N.J. 163, (1981); In re Miles, 176 N.J. 282 (2003).

The Petitioner next contends that the bad faith acts cited by the Respondent "lack foundation, had no basis in fact and rather, were nothing more than unverifiable gossip, far reaching assumptions, and distortions that should have been disregarded." (Pb 5). Along these lines, he challenges the record below, and the Chancery Division's assessment of his conduct. These allegations are addressed below in turn.

1. <u>The February 1997 Incident</u>

These facts relate to the Respondent when she was sixteen-years old. Left alone with the Petitioner, the Respondent woke up undressed in the morning, to her

great distress. When she awoke, the Petitioner was nowhere in the house. That morning, the Respondent informed the Decedent what had happened. The Decedent told Gail Snyder about this incident, who noted that the Petitioner left the house for about a year. She testified that the Petitioner "left the house, left the marriage." (5T17-23 to 18-20).

In response, the Petitioner alleges an "acknowledgement" by the Respondent that her state of undress may have been the result of a "dream" during the night. (Pb 6). However, the ludicrous nature of this position, as shown by counsel's ineffective cross-examination, becomes clear:

> Q. So you're saying the next morning you woke up you were undressed?
>
> A. Yes.
>
> Q. And you were confused because you didn't have any idea what happened, correct?
>
> A. Yeah, and I had never woken up undressed before previous to that and never have again.
>
> Q. And you hadn't been drinking with your boyfriend, had you?
>
> A. No.
>
> Q. Had you been doing drugs?
>
> A. No.
>
> Q. Don't you think you could have been dreaming?

A. About what?

Q. Having a dream that night and that something had happened?

MR. WEINRAUB: You mean about waking up unclothed?

A. I may have dreamt –

MS. SUTTON: No, dreaming something going on in her dream where she undressed herself.

A. I guess it's possible. I've spoken to a therapist, you know numerous times about this over, you know, quite a few years, and we came to the realization that if a friend came to me and told, you know, told me this and asked me what had happened, that I would say that you know, I didn't undress myself.

Q. Don't you think you would have been woken up if somebody was trying to undress you?

A. I don't know. My therapist also asked me if he thought maybe I had been drugged, or given like alcohol or something. You know, two different therapists have talked to me about the possibility of that.

(6T109-2 to 110-9). As this colloquy clearly demonstrates, there was no "acknowledgement" by the Respondent that the event may have been caused by a dream. In any event, the notion of a dream causing the undress of the Respondent borders on the ridiculous.

The Petitioner also argues that he did not move out of the house after the February 1997 incident. (Pb 7). However, this fact was confirmed by Gail Snyder, whose "testimony was found to be "reasonable, well-founded and credible" by the

Chancery Division. (Pa 28). As noted above, the Petitioner's testimony was found to lack credibility by the Court. The Petitioner further argues that "the first time Petitioner heard of this alleged incident was during this litigation." (Pb 9). Such an allegation is entitled to no weight. In addition, the 2011 "thank you" card and related materials (Pb 8-9) are irrelevant to the issue at hand and prove nothing. The Petitioner also asserts that the Respondent "did not produce any police reports, medical records, legal action, or any other responsive action that a 'protective' mother would have taken to investigate the circumstances." (Pb 8-9). Such argument, blind to the realities of such a situation, requires no response.

2. Extended Marital Separations

The record establishes that there were multiple extended periods of time when Petitioner was not living in the Decedent's Home. In seeking to rebut this evidence, the Petitioner misrepresents the Respondent's position. For example, he inaccurately states: "Respondent contends that they did not live together between 2005 to 2007. Db at 13" and complains about the lack of a citation to support this statement. However, that was not the Respondent's statement, which, in fact, states: "There were also other periods when Petitioner and Decedent did not live together between 2005 and 2007." (Rb 13; emphasis added). In any event, the Petitioner's absences during this time period was testified to by the Respondent:

> Q. Can you tell us about those other periods of times where Roy was not at the house?
>
> A. Yes. So he left in 1997. He came back sometime while I was in college, I'm guessing around 2001, after his surgery. Sometime between 2005 and 2007, he left. I don't remember him being back in the house until I have my son, JJ, which was November 2009.

(5T74-18 to 24). The Chancery Division found the Respondent's testimony as credible, holding as follows:

> Most of Respondent's testimony is uncontradicted and supported by other witnesses. She was composed. Her demeanor was such that her recollection of all the facts as recited was believable. Respondent was extremely credible while testifying as to her shortcomings in life including the relationship with the father of her children and her challenges with substance abuse and parenting. The fact that she admitted that, at times, she was not a "model'' child was also credible. In the end, her bond and close relationship with her mother and the love they shared as a mother and daughter was evident. This court finds Respondent credible.

(Pa 28). As noted above, the Court found the Petitioner not credible as a witness. The Petitioner cites testimony by his long-time friend, Nicholas Gurrancino, to the effect that he visited "every few weeks for dinner" and that the Court found Gurrancio's testimony was "credible." (Pb 10). Ignored by the Petitioner is that the Court found such testimony "not persuasive." (Pa 25). The Petitioner testified that he lived in other places "to improve his education" (Pb 11) and because it made his commute shorter for continuing his education in Delaware,

even though it only saved him thirty minutes one-way out of an alleged four-hour commute. (1T211-16 to 213-7).

The Petitioner acknowledged that he moved to Galloway Township as a result of "marital problems." (1T220-5 to 17). He also fails to note that he had a ten-year lease at an apartment in Maple Shade Township between 2009 and 2019. (1T224-3 to 18). Utterly ignored by the Petitioner is his letter to the Decedent requesting to dissolve the marriage. While the Petitioner was living away from the marital home with his sister in Galloway in 2005, he wrote the Decedent, requesting to dissolve their marriage. This letter states the following in relevant part:

> For over the past eight, or more, years. I have been listening to you talk to your family, friends, and Avon people in a nice and cordial manner; however and when it comes to me, you speak to me in a rude or curt manner and with, at times, biting and unnecessary, comments. In the past three weeks that we were together, I happened to pay particular attention to this and recognize that you are going to continue on with this mannerism towards me and I don't feel as though it is a positive basis for a relationship for either you or for me to continue. What little time that we do spend together, at times, ends up with contention and stress and that is not beneficial to either of us.
>
> ---
>
> My personal feelings are that the marriage should dissolve and that you should have the freedom to deal with your life as you see fit. In that light, I have no claim against any of your assets as I believe that you would like to preserve them all for your family and Sandi.

(Pa 536; emphasis added). Instead of acknowledging this letter -- which

highlights the long-term discord in the marriage and his extended absences from the marital home -- the Petitioner cites random anniversary and Christmas cards, items of little or no evidential weight or relevance. (Pb 10). He also writes:

> Petitioner and the Decedent remained happily married for more than 29 years during which the Home was their primary residence.

(Pb 12). Such fantasy does violence to the record below.

3. <u>Troubled Marriage</u>

Instead of addressing his 2005 letter to the Decedent, which constitutes powerful evidence of a failed marriage coming directly from the Petitioner, the Petitioner accuses the Respondent of "taking the testimony of her own witnesses out of context and by interjecting innuendo, conjecture and speculation." (Pb 12). He nitpicks the testimony of Gail Snyder and Kathleen Whelan, to no avail. (Pb 12-14). Snyder's testimony was found to be "reasonable, well-founded and credible." (Pa 28). As to Whelan, the Chancery Division stated:

> Ms. Whelan was a friend of Decedent's since 1963. Kathleen Whelan testified at length concerning the relationship between Decedent and Petitioner, the existence of the Antenuptial Agreement, and Decedent's final days. This court finds Kathleen Whelan credible.

(Pa 27). In attempting to explain his need to "slip away" from the Decedent at parties to "check his emails" (Pb 15), the Petitioner ignores the fact that such a task is easily accomplished by phone. His non-corroborated contention that he

informed the Decedent when he was leaving a party was contradicted by the credible testimony of Gail Snyder:

> There were times when Lynda and Roy would go to parties and Roy would just leave Lynda by herself, just sneak out. Last time she told me that he did that, she said she was there by herself, and he thought it was a joke. He thought it was funny that he would leave her at parties. They were just opposite people, just – it was just odd. He would leave the relationship, abandon her for long periods of time. It was upsetting to her that he would do that.

(5T8-1 to 10). The Petitioner repeatedly hangs his hat on alleged cards and notes sent to the Decedent. However, the record overwhelmingly demonstrates the marriage as a troubled one, accompanied by extended periods of separation and discord.

4. Decedent Contemplated Divorce

The Petitioner opines that any notion that the Decedent contemplated divorce is an "illusion." In alleging that the Decedent never broached the issue of divorce, he ignores his "personal feelings are that the marriage should dissolve," as expressed in his 2005 letter to her. It also goes without saying that (1) the trial court did not have the benefit of the Decedent's testimony on this issue, and (2) the Petitioner was not a credible witness.

The Petitioner attempts to rebut the testimony of Gail Snyder on this issue, citing various rules of evidence. (Pb 16-17). Such argument, not presented below,

is not properly before the Appellate Division on appeal. In any event, Snyder's testimony relating to the issue of divorce readily satisfies the requirement that Snyder's opinion be rationally based on her perception acquired through the use of her senses. See, N.J.R.E. 701; *Vitale v. Schering-Plough Corp*., 447 N.J. Super. 98, 123-124 (App. Div. 2016), aff'd as mod. 231 N.J. 234 (2017).

5. Decedent's Finances

The import and intent of the Petitioner's argument on the Decedent's finances is unclear. He provided no proof to rebut the fact that during the entire marriage, (1) the Petitioner and Decedent had separate bank accounts and separate finances, having no accounts or assets of any type owned jointly, and (2) the Decedent handled the couple's finances, and by herself paid the mortgage and taxes on the Home, all utility bills, as well as the expenses associated with her cell phone, car, and household items. In his trial testimony on finances and assets, the Petitioner was evasive, as demonstrated below:

Q. Lynda's assets are in Lynda's name, your assets are in your name, and it was never changed; am I correct?

A. No, I don't agree with you.

Q. Okay. Show me one asset that is in the name of Roy Sutton and Lynda Sutton.

A. We had credit cards.

Q. Assets are not credit cards, sir. Don't you remember we did this dance at the deposition? I asked assets. Tell us about one asset that was in your name and your wife's name jointly.

A. I can't recall.

(1T229-1 to 12).

6. <u>Absence of a Trust</u>

The Petitioner repeats earlier discredited arguments that the Decedent intended to create a trust as a means of providing for the Respondent in her Will. Here, the Petitioner falsifies the record, claiming that the Decedent asked Kathleen Whelan to serve as a trustee of a non-existent trust. This request never occurred, as made clear in the following colloquy during Whelan's testimony about the Decedent's previous Will:

Q. And you were named as a -- a –

A. Trustee.

Q. -- trustee at the time. And why did she have a trustee?

A. So -- to help Sandi with the will or to -- to be - - to stand up for whatever the will said. So Sand -- what -- what does the trustee do?

Q. Takes care of a trust.

A. Oh, well, I thought it was to -- to help – help Sandi enforce the -- the will. I don't know. <u>I don't know of any trust</u>.

(4T121-25 to 122-10; emphasis added).

7. Decedent Was Strong Willed and Independent-Minded

The Petitioner seeks to portray the Decedent easily influenced by the Respondent, relying upon his own discredited testimony and unavailing nitpicking of the Respondent's testimony. (Pb 20-21).

8. Petitioner's Nine Prior Lawsuits

Between 1985 and 1999, the Petitioner, as a plaintiff, filed nine lawsuits in state and federal court relating to his father's estate, suing his mother and brother, as well as the attorneys handling his father's estate, the city of Atlantic City, and the Alcoholic Beverage Commission. All of his claims were dismissed.

On reply, the Petitioner devotes six pages in attempting to downplay this litigious history. (Pb 21-26). He states that any success in recovery on his lawsuit would not have constituted marital property, and as a result, takes issue with the Chancery Division's comment that any such recovery would have occurred after his marriage to the Decedent. (Pb 21-22). The Respondent's response to this argument is two-fold.

First, the Respondent's intent in introducing the evidence of the nine lawsuits was to show the Petitioner's history of extreme litigiousness. (2T110-9 to 15). Such evidence supports the fact that the Decedent was concerned that the Petitioner was a very litigious person, and told her attorney, Timothy Maguire, that

the Petitioner would sue to try to prevent the probate of the Will. (3T220-8 to 25; 3T225-11 to 226-2). This prophecy turned out to be accurate.

Second, while any direct inheritance from his father's estate may not have constituted a marital asset -- depending on how that money was utilized and invested -- it is clear that any recovery by the Petitioner in his malpractice suit against his attorneys or in his suits against the City of Atlantic City and the Alcohol Beverage Commission would have constituted marital assets, on the basis that it occurred during the course of the marriage. Such a fact supports the Respondent's position that the Petitioner indeed drafted the Anti-Nuptial Agreement executed by he and the Decedent.

Petitioner's remaining argument, which focus on irrelevant and unpersuasive details of the various lawsuits, does not merit discussion.

9. Bad Faith Adult Protective Services Letter

In contending that the dismissed charge had merit, the Petitioner relies upon his own discredited testimony. He also relies upon the testimony of Elizabeth Gelo, the caretaker of the Decedent's mother. The Chancery Division properly held that Gelo's testimony was "not relevant." (Pa 26).

10. Petitioner's Letter to Child Protective Services

A few weeks after the dismissed APS complaint, the Petitioner -- the evidence is overwhelming that it was indeed him -- filed a written complaint utilizing the name of "Thomas New" with Child Protective Services ("CPS"), causing CPS representatives to show up at the Decedent's house. (See, Respondent's principal brief, pp. 31-32 and footnote 6). This complaint was summarily dismissed by CPS. (5T131-19 to 21).

In characterizing this evidence as a "smear" campaign, the Petitioner claims that he never knew of the name of "Thomas New" and did not know this person. However, the Petitioner's testimony to this effect was false and unavailing.

CONCLUSION

For all of the foregoing reasons, the Respondent-Respondent/Cross Appellant, Sandra L. Williams, respectfully requests the Appellate Division to reverse the Chancery Division's Order granting the Petitioner a life estate in the Decedent's home via the imposition of a constructive trust.

Respectfully Submitted,

// Michael D. Weinraub //
MICHAEL D. WEINRAUB, ESQ.

Date: November 30, 2023