PHILADELPHIA COURT
OF COMMON PLEAS
ORPHANS' COURT DIVISION
Estate of Catherine Kuehn, Power of Attorney
O.C. No 1375 PR of 2005
Control No. 075907
Sur First and Final Account of Catherine T. Nazarok, Agent for Catherine Kuehn, Deceased Principal

The account was called for audit January 7, 2008 **Before: Herron, J.**
Counsel appeared as follows:
Joseph Q. Mirachi, Esquire –for Agent
Edward T. Rostik, Esquire – for Joseph A. Kuehn, Jr., Administrator of the Estate of Catherine Kuehn, Deceased
A. James Milar – for Commonwealth of Pennsylvania

ADJUDICATION

Introduction

The Account filed by Catherine Nazarok raises the issue of whether she abused her authority under a power attorney by exerting undue influence over her elderly mother, Catherine Kuehn (hereinafter "Catherine"), who suffered from dementia. During the last 17 months of Catherine's life, her Will was destroyed, her assets were placed in joint accounts with the agent, and more than $100,000 was distributed to the agent and her close family members as gifts or other distributions. For the reasons set forth below, this court concludes that the agent should be surcharged so that the improperly dispersed funds can be returned to the Estate of Catherine Kuehn to be distributed to all her rightful heirs—including the agent Ms. Nazarok—according to the rules of intestate succession. See 20 Pa.C.S. § 2103.

Background

Catherine Kuehn died on March 7, 2005. She was survived by her daughter, Catherine Nazarok (hereinafter "Ms. Nazarok"), a son, Jacob, as well as by the wife,

Marlene, and three children of her deceased son Joseph.[1] Prior to her death, Catherine had executed an Appointment of Agent dated January 9, 2004 naming her daughter Catherine Nazarok to serve as her agent.[2] In August 2005, Joseph Kuehn, Jr., as administrator of the Catherine Kuehn's estate, sought a court order compelling Ms. Nazarok to file an account of her actions pursuant to that power of attorney. On November 21, 2005, Ms. Nazarok was ordered to file an account. Not until November 16, 2007 did Ms. Nazarok file that account, to which Joseph Kuehn filed objections. A series of hearings were held on those objections in June 2008.

At the hearing, medical testimony by two physicians, Dr. Aliya Ali and Dr. Mia Strazzeri established that Catherine Kuehn had been diagnosed with moderate dementia as early as 2000, although they differed on whether the dementia was vascular or the result of Alzheimer's disease.[3] Dr. Ali, who had examined Ms. Kuehn's medical records, noted that a 1999 record indicated that Catherine Kuehn had carotid artery stenosis which typically causes a decreased flow of blood to the brain and poses a risk for vascular dementia. Although surgery was recommended, Catherine refused to pursue it. A mini-mental exam conducted in September 2000 resulted in a score of 14 out of 30.[4] Based on this record, Dr. Ali expressed the opinion that Catherine would have been dependent on others for managing her finances, medications and daily life activities.[5] Dr.

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[1] 6/10/08 N.T. at 53-54 (Nazarok).
[2] Ex. P-4.
[3] 6/10/08 N.T. at 19-20 (Dr. Ali). Dr. Strazzeri believed that Catherine's dementia was vascular rather than Alzheimer's disease but she agreed that the dementia dated back to 2000. 6/17/08 N.T. at 50 (Dr. Strazzeri). Similarly, the respondent, Catherine Nazarok, testified that her mother had been diagnosed with Alzheimer's disease while her father was still alive and had been unable to identify the year, season or date when tested. 6/10/08 N.T. at 92 (Nazarok).
[4] 6/10/08 N.T. at 14-17 (Dr. Ali).
[5] 6/10/08 N.T. at 42 (Dr. Ali).

Strazzeri interpreted a score of 14 out of 30 as signifying the extent of dementia as "great" with "poor cognition."[6]

Catherine's husband died on December 3, 2005. Various witnesses confirmed that on that date, Catherine's husband had been deceased on a recliner chair for the entire day before she became aware that anything was wrong.[7] Catherine was then taken to live at the home of her daughter Ms. Nazarok. Ms. Nazarok recalled reading her parents' wills at that time, which provided that their assets were to be divided in equal shares among their 3 children.[8]

Catherine Kuehn, according to her daughter, had never handled her own finances, paid any bills or written checks. After Catherine moved in with Ms. Nazarok, she handled all of her mother's financial affairs.[9] On December 15, 2003, Ms. Nazarok opened a joint bank account in her and her mother's name,[10] for the sole purpose of ease in handling her mother's finances.[11] At the advice of bank employees, Ms. Nazarok opened three accounts: a savings account into which she placed her father's savings account; a checking account for her mother's pension and social security checks, and a money market account into which she eventually deposited proceeds from the sale of her mother's home.[12]

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[6] 6/17/08 N.T. at 55 (Dr. Strazzeri).

[7] See, e.g., 6/10/08 N.T. at 95 (Nazarok); 6/17/08 N.T. at 9 (Kuehn, Marlene).

[8] 6/10/08 N.T. at 53-55 (Nazarok). Marlene Kuehn also read Catherine's will the night her husband died, and confirmed that it provided for an equal distribution of assets among her three children. 6/17/08 N.T. at 8 (Kuehn, Marlene). According to Ms. Nazarok, the will stated that if one of Catherine's children died, his children would be the beneficiaries. 6/10/08 N.T. at 54 (Nazarok). Marlene Kuehn, in contrast, maintained that under Catherine's will if her husband died, "his portion went to me then from me, to my children…." 6/17/08 N.T. at 8 (Kuehn, Marlene).

[9] 6/10/08 N.T. at 64-65 (Nazarok).

[10] 6/10/08 N.T. at 56-57 (Nazarok); Ex. P-17.

[11] 6/10/08 N.T. at 81 (Nazarok).

[12] 6/17/08 N.T. at 68-70; see generally Ex. P-2.

Approximately one month after her mother moved in with her, Ms. Nazarok took Catherine to see Ms. Nazarok's attorney,[13] John Garagozzo, who characterized himself as a general practitioner specializing in prepaid legal plan representations for unions.[14] According to Ms. Nazarok, the reason for the visit was for the attorney to look over her father's will because she had been named executrix. She stated that Mr. Garagozzo reviewed the wills of both her mother and father. Afterwards, both wills were destroyed in a shredder in the lawyer's office.[15]

Mr. Garagozzo, however, had a different recollection of the purpose for this meeting and events during it. According to Mr. Garagozzo, Ms. Nazarok brought her mother to see him for a living will and power of appointment and stayed with her mother throughout the 45 minutes while her husband, Steven Nazarok, waited outside.[16] He observed no memory problems with Catherine and no one told him that she had been diagnosed with dementia.[17] According to Garagozzo's testimony, he did not review any wills during their meeting. Instead, he testified that Catherine told him she no longer wanted her will; he told her she could destroy it, and he walked Ms. Nazarok over to the shredder where she destroyed a manila envelope. Mr. Garagozzo, however, admitted that he did not know what was inside the manila envelope, but merely assumed it was the wills.[18]

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[13] 6/25/08 N.T. at 7 (Garagozzo). When asked whose lawyer Mr. Garagozzo was, Ms. Nazarok replied "mine," and believed that he continued to represent her during the discussions. See 6/10/08 N.T. at 58-59 (Nazarok).
[14] 6/25/08 N.T. at 6 (Garagozzo).
[15] 6/10/08 N.T. at 59-60 (Nazarok).
[16] 6/25/08 N.T. at 7-8 (Garagozzo).
[17] 6/25/08 N.T. at 8-9 (Garagozzo).
[18] 6/25/08 N.T. at 10, 16, 20 (Garagozzo)

This testimony without the benefit of notes of a meeting that took place four years in the past[19] was seriously contradicted by a prior letter Mr. Garagozzo had written in July 2005 to counsel for the petitioners. In that letter, Mr. Garagozzo stated that Catherine had destroyed her will shortly after her husband's death—and not in Garagozzo's office weeks later:

> On or about 9 January 2004, I had the pleasure of meeting Mrs. Kuehn [Catherine] who requested that I prepare a Power of Attorney (Appointment of Agent) and Living Will Health Care Directive. I offered to prepare a will but was advised by her that she once had a will which she destroyed shortly after the death of her husband on 3 December 2003. She advised me that she had no need for a will as she had moved in with her daughter, Catherine, and would be selling her house.[20]

In any event, there is no dispute that Mr. Garagozzo did prepare an "Appointment of Agent" for Catherine during their meeting. He conceded that the document he prepared did not contain the notice to principal or acknowledgment of agent required by 20 Pa.C.S.§ 5601(a).[21] He did not recall that he ever met alone with Catherine during this meeting.[22] Although Catherine did not sign the power in his office, he was sure that he had explained it to her.[23]

In addition to taking her mother to see her attorney, Ms. Nazarok took Catherine to be treated by her personal physician, Dr. Mia Strazzeri. Dr. Strazzeri was aware of Catherine's diagnosis of dementia as far back as 2000 which she believed was vascular.[24] Ms. Nazarok had never told her that Catherine's husband had been deceased for a full day

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[19] 6/25/08 N.T. at 17 (Garagozzo).
[20] See Ex. P-9 (7/19/05 letter from Garagozzo to Rostick).
[21] 6/25/08 N.T. at 20 (Garagozzo). Ms. Nazarok likewise confirmed that she did not remember a cover page to this document stating "Notice to Principal." See 6/10/08 N.T. at 62 (Nazarok). Ex. P-4 is thus the complete document.
[22] 6/25/08 N.T. at 13 (Garagozzo).
[23] 6/25/08 N.T. at 16-17 (Garagozzo)
[24] 6/17/08 N.T. at 50 (Dr. Strazzeri).

in a recliner before Catherine realized that he was dead,[25] but Dr. Strazzeri was aware that Catherine was taking aricept for memory loss, and , in fact, continued this prescription.[26] Dr. Strazzeri never performed her own independent mini-mental examination on Catherine but relied on the test referenced in her file from 2000.[27] Instead, the doctor assessed Catherine's mental status by asking questions, although admittedly she never asked questions that would have tested Catherine's orientation X3 or her knowledge of current events "because I didn't think it would make a difference in her treatment. I could see that Catherine was deteriorating."[28] Dr. Strazzeri also acknowledged that Ms. Nazarok was always present during her mother's visits and would "collaborate" in Catherine's responses to her questions. [29] Nonetheless, Dr. Strazzeri stated that Catherine always responded appropriately to her questions.[30]

The respondents, Catherine Nazarok and her husband Steven Nazarok, likewise maintained that Catherine behaved appropriately. Mr. Nazarok did not think that she had difficulty understanding him or those around her.[31] Ms. Nazarok stated that she never had any concerns about her mother's overall mental capacity.[32]

A contrary picture of Catherine's mental status was presented by the petitioner. Catherine's grandson, Joseph Kuehn, noted that whenever he saw Catherine, she would ask how school was going even though he had not been in school since 1993.[33] Her daughter-in-law of 31 years, Marlene Kuehn, noticed that when Catherine first came to

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[25] 6/17/08 N.T. at 52-53 (Dr. Strazzeri)
[26] 6/17/08 N.T. at 40, & 50-51 (Dr. Strazzeri).
[27] 6/17/08 N..T. at 53-54 (Dr. Strazzeri).
[28] 6/17/08 N.T. at 55, and generally 54-56 (Dr. Strazzeri).
[29] 6/17/08 N.T. at 43-44 & 42 (Dr. Strazzeri).
[30] 6/17/08 N.T. at 41 (Dr. Strazzeri).
[31] 6/17/08 N.T. at 91 (Nazarok, Steven).
[32] 6/17/08 N.T. at 78 (Nazarok)
[33] 6/10/09 N.T. at 155 (Kuehn, Joseph).

stay with Ms. Nazarok, her toe nails were in terrible shape and an emergency visit with the podiatrist had to be scheduled.[34] Ms. Nazarok concurred that Catherine's toe nail wrapped around her toe and had a fungal infection.[35] Marlene Kuehn also observed that Catherine could not be left alone. She recalled that once when Catherine was sitting on a patio for a grandchild's birthday party, Catherine asked why were they sitting in a cemetery and she mistook a pool pump for a tomb stone.[36]

During the nearly seventeen months that her mother lived with her, Ms. Nazarok made various expenditures as her agent. After her mother's home was sold in September 2004, Nazarok placed the proceeds in the joint money market account for an opening balance of $166,770.59.[37] She made various disbursements as agent on behalf of her mother, including $3,000 for the installation of windows in Nazarok's home so that Catherine could more easily look outside.[38] Nazarok lists $2,000 for installation of a central air conditioning system in her home, $9,000 for the purchase of a Ford explorer, and $10,000 to her daughter, Michelle Eroh, for "payment of roof on deceased's home."[39]

Nazarok's account also listed the following disbursements of $72,448 as gifts while her mother was alive:

$8,136.89	Catherine Nazarok: mortgage payment
$10,000	Marlene Kuehn
$10,000	Joseph Kuehn, Jr.
$12,689	Peasant Motors for Stephen Nazarok, Jr.
$ 1,539	Peasant Motors for Stephen Nazarok, Jr.
$ 850	Holiday money for various family members

[34] 6/17/08 N.T. at 10 (Kuehn, Marlene).
[35] 6/17/08 N.T. at 64 (Nazarok).
[36] 6/17/08 N.T. at 14-16 (Kuehn, Marlene).
[37] 6/10/08 N.T. at 69-70 (Nazarok); Ex. D-2. According to Ms. Nazarok, she deposited both proceeds from the sale of the property ($146,613.50) plus an additional $20,000 of her mother's money. 6/10/08 N.T. at 72-73 (Nazarok).
[38] See Account at 6.
[39] See Account at 6. Ms. Nazarok admitted that her mother was 86 when the Ford Explorer was purchased and that it was placed in Ms. Nazarok's name. 6/10/08 N.T. at 76-77 (Nazarok).

$37,370 Mortgage Payoff: Catherine Nazarok[40]

Of this $72,448 in gifts, therefore, $45,506.89 went to Ms. Nazarok to pay off her mortgage, while $12,689 went to purchase a car for her son, Stephen.[41] According to Ms. Nazarok, her mother told her to make these gifts.[42]

In addition to these disbursements while Catherine was alive, Ms. Nazarok made $27,627.54 in disbursements to herself or "agent" after the death of her mother by an alleged "right of survivorship," which included the following specifically itemized expenditures:

$9,781.	Purchase of Trailer Home on May 24, 2005
$7,500	Retainer for Legal Fees on August 16, 2006
$1,500	Cruise for Agent's 40th Anniversary in October 2006
$2,000	Spending money for cruise in October 2006[43]

There were also other unitemized expenditures transferred to agent by "right of survivorship not recalled by agent" for such expenses as monthly premiums, healthcare expenses, homeowner insurance, auto insurance, as well as lot rentals for trailer home.[44]

Finally, in her account, Ms. Nazarok stated that the estimated balance in the bank account on the date of Catherine's death (May 7, 2005) was $53,408.54.[45] A Wachovia bank document, however, lists the closing balance as $64,713.07.[46] Ms. Nazarok, when questioned about this discrepancy of nearly $11,000, was unable to explain it.[47]

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[40] See Account at 7.
[41] 6/10/08 N.T. at 78 (Nazarok).
[42] 6/10/08 N.T. at 78 (Nazarok).
[43] See Account at 10.
[44] See Account at 10.
[45] See Account at 8.
[46] See Ex. P-19. The bank document was entitled as a verification of account balance at the date of death of Catherine Kuehn.
[47] 6/10/08 N.T. at 80 (Nazarok).

Legal Analysis

Petitioner argues that Catherine Kuehn lacked the capacity or was unduly influenced to execute the power of attorney, to destroy her will, to transfer her assets into a joint account with a right of survivorship, or to make the gifts set forth in the account.[48] For the reasons set forth below, this court concludes that petitioner established a prima facie case of undue influence by clear and convincing evidence, which respondent failed to rebut. Alternatively, because the power of attorney at issue failed to include the notice to principal set forth in 20 Pa.C.S. § 5601(c), respondent had the burden of demonstrating that her exercise of the power of attorney was proper, which she failed to sustain.

I. ***The Execution of the Power of Attorney Was the Result of Undue Influence***

In cases where the execution of a power of attorney is challenged as the result of undue influence, the plaintiffs have the burden of proving their claims by clear, precise and convincing evidence. Henry v. Fike, 22 Fid. Rep. 2d 270, 275 (Common Pleas Ct.Jefferson Cty. 2002). Undue influence "is a subtle, intangible and illusive thing" which must often be established by circumstantial evidence. Estate of Clark, 461 Pa. 52, 67, 334 A.2d 628, 635 (1975); Estate of Ziel, 467 Pa. 531, 540, 359 A.2d 728, 734 (1976). Although it can occasionally be shown by direct evidence, more often undue influence is the result of a "gradual, progressive inculpation of a receptive mind" so that the "fruits of undue influence may not appear until long after the weakened intellect has been played upon." Estate of Lakatosh, 441 Pa. Super. 133, 143-44, 656 A.2d 1378,1384 (1995).

Consequently, to establish that a power of attorney was the result of undue influence, the petitioner must present clear and convincing evidence that at the time the

[48] 2/6/09 Petitioner's Brief at 2.

power attorney document was executed "there was a confidential relationship, that the persons enjoying such a relationship received the bulk of the estate and that the decedent's intellect was weakened." In re Schell, 29 Pa. D. & C. 4th 504, 509-10 (Com. Pleas Juniata Cty. 1995). See also Burns v. Kabboul, 407 Pa. Super. 289, 307, 595 A.2d 1153, 1162 (1991). Once this is established, the burden shifts to the proponent of the power of attorney to disprove undue influence. Id. See also Paolini Will, 13 Fid. Rep. 2d 185, 187 (Mont. Cty. O.C. 1993).

A confidential relationship exists for the purpose of evaluating undue influence whenever "the circumstances make it certain the parties do not deal on equal terms, but, on one side, there is an overmastering influence, or, on the other, weakness dependence or trust, justifiably reposed [for] in both [situations] an unfair advantage is possible." Estate of Ziel, 467 Pa. 531, 542, 359 A.2d 728, 734 (1976)(citations omitted).

The record presented at the hearings established that at the death of her husband, Catherine became totally dependent upon her daughter Ms. Nazarok. According to Ms. Nazarok's own testimony, Catherine never handled her own finances. Before her husband's death, he had managed their finances; after his death, Ms. Nazarok took charge of Catherine's financial affairs including signing checks.[49] Catherine's reliance on her daughter extended beyond her finances. Not only did she move in with her daughter, but thereafter Catherine's home was sold, thereby precluding any return to it. Catherine also did not drive and thus depended on her daughter for transportation.[50]

After Catherine moved into her daughter's home, she also came under the care of her daughter's physician and attorney, respectively, Dr. Strazzeri, and Mr. Garagozzo,

[49] 6/10/08 N.T. at 64-65 (Nazarok).
[50] 6/10/08 N.T. at 65 (Nazarok).

for intimate medical and legal guidance. When Catherine met with these professionals, her daughter participated. In the words of Dr. Strazzeri, Ms. Nazarok "collaborated" in answers to questions.[51] Attorney Garagozzo's letter of July 19, 2005 to counsel for petitioners inadvertently underscored Catherine's dependence on her daughter when he wrote: "She [Catherine] advised me that she had no need for a will as she had moved in with her daughter, Catherine, and would be selling her house."[52] Metaphorically, will as "independent spirit" might be substituted for will as legal document, suggesting that in moving in with her daughter, Catherine was abdicating independent judgment and control over her own life.

The confused record as to what happened to Catherine's will—the legal document—is also symptomatic of the forceful sway Ms. Nazarok exerted over her mother. Not only did Ms. Nazarok read that will on the evening of her father's death, but she brought it to her home along with her mother.[53] Her attorney testified that Ms. Nazarok had shredded what he believed were two wills in his office although on further questioning he could not be certain what was in that manila folder that was shredded.[54] This testimony was contradicted by the lawyer's earlier letter which stated that he had been told by Catherine that she had destroyed the will shortly after her husband's death on December 3, 2003.[55] All of these events suggest that Ms. Nazarok and her mother did not deal as equals, but that there was a confidential relationship between them.

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[51] 6/17/08 N.T. at 42 & 43-44 (Dr. Strazzeri).
[52] Ex. P-9.
[53] 6/10/08 N.T. at 53-56 (Nazarok).
[54] 6/25/08 N.T. at 10-11 & 20 (Garagozzo).
[55] Ex. P-9

The record also supports the conclusion that Catherine suffered from a weakened intellect at or around the time the power of attorney was executed on January 9, 2004.[56] Weakened intellect for the purposes of establishing a prima facie case of undue influence does not have to constitute mental incapacity:

> As we said before, weakened mentality as relevant to undue influence need not amount to testamentary incapacity. Undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind. The 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon. In other words, the particular mental condition of the testatrix on the date she executed the will is not as significant when reflecting upon undue influence as it is when reflecting on testamentary incapacity. More credence and less weight may be given to the contestant's remote medical testimony. Estate of Clark, 461 Pa. 52, 65, 334 A.2d 628, 634 (1975).

The medical testimony of physicians presented by both the petitioners and respondent agreed that Catherine had a diagnosis of moderate dementia as early as 2000.[57] As a general rule, the opinion of a physician who reviews the medical records of the decedent is accorded less weight than the opinion of the treating physician. See, e.g., Burns v. Kabboul, 407 Pa. Super. 289, 315, 595 A.2d 1153, 1166 (1991). In this case, however, the treating physician, Dr. Strazzeri admitted that she conducted no independent test of Catherine's mental status but relied instead on a mini-mental exam conducted 4 years earlier because she did "not think it would make a difference in her [Catherine's] treatment."[58] Although she sought to check Catherine's mental status by asking her questions, she admitted that Ms. Nazarok "collaborated in those answers" and that the questions did not test Catherine's orientation X3, her knowledge of current events or family circumstances.[59]

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[56] Ex. P-4.
[57] See 6/10/08 N.T. at 19-20 (Dr. Ali) & 6/17/08 N.T. at 49-50 & 53-55 (Dr. Strazzeri).
[58] 6/17/08 N.T. at 54 & 53(Dr. Strazzeri).
[59] 6/17/08 N.T. at 40-44 & 55-56 (Dr. Strazzeri).

Dr. Strazzeri agreed with petitioner's expert witness, Dr. Ali, that Catherine suffered from moderate dementia, acknowledging that her mini-mental score of 14 out of 30 signified a level of dementia that was "great" with "poor cognition."[60] Significantly, Dr. Strazzeri had not been informed by Ms. Nazarok that on the day of her husband's death, Catherine had not realized that anything was wrong for the entire day as his body lay dead on a recliner.[61] This serious lapse in mental awareness or acuity was testified to by both Ms. Nazarok and Marlene Kuehn. It occurred in such close temporal proximity to the execution of the power of attorney to support the conclusion that Catherine suffered from a weakened intellect at that time. See, e.g. Estate of Lakatosh, 441 Pa. Super. 133, 144, 656 A.2d 1378, 1384 (1995)("weakened mentality as relevant to undue influence need not amount to testamentary capacity….for the particular mental condition of the testatrix on the day she executed the will is not as significant when reflecting upon undue influence as it is when reflecting on testamentary capacity").

John Garagozzo, the attorney who drafted the power of attorney, testified in general terms that on the date he met with Catherine, she did not exhibit any problems with memory or formulating sentences.[62] But the accuracy or credibility of this general testimony was seriously undermined by contradictions with the letter he previously drafted in July 2005. Ex. P-9. The contrast between his confused testimony that Catherine's will had been destroyed in his office and his letter stating that Catherine had destroyed her will before coming in to see him strongly supports the conclusion that Mr. Garagozzo did not have a clear recollection of his meeting with Catherine.[63] This is

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[60] 6/17/08 N.T. at 54-55.
[61] 6/17/08 N.T. at 52-53 (Dr. Strazzeri).
[62] 6/25/08 N.T. at 8 (Garagozzo).
[63] ***Compare*** 6/25/08 N.T. at 10-11 (Garagozzo) ***with*** Ex. P-9 (7/19/05 letter by Garagozzo).

compounded by Mr. Garagozzo's admission that he kept no notes of this meeting, and was confused as to whether the wills of both Catherine and her deceased husband had been shredded in his office.[64] Astonishingly, he could offer no explanation for why he might have consented to the destruction of the will of Catherine's deceased husband.[65] Moreover, he conceded that he did not work with Catherine alone but instead Ms. Nazarok, his client, was present when the power of attorney was drafted.[66] Significantly, he conceded that he had no knowledge of Catherine's diagnosis of dementia.[67] All of these factors rendered the scrivener's testimony in this case less than credible.

As to the final element for establishing a presumption of undue influence, the account filed by Ms. Nazarok outlines definitively the substantial financial benefits she—and her close family members—had enjoyed as a consequence of her actions pursuant to the power of attorney granted to her. Petitioner, therefore, presented clear and convincing evidence that Ms. Nazarok had obtained the power of attorney from Catherine by undue influence. In fact, respondent in her brief conceded, "[i]n our case there is no dispute Respondent had a fiduciary duty with the decedent after decedent executed the Appointment of Agent or that decedent was of a weakened mental state."[68]

Ms. Nazarok, as the respondent and proponent of the power of attorney, failed to present credible evidence to rebut this presumption of undue influence as to the execution of the power of attorney. Her medical expert, Dr. Strazzeri merely confirmed the salient testimony of petitioner's medical expert that Catherine had suffered from moderate

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64 6/25/08 N.T. at 17, 20, 32-33 (Garagozzo).
65 6/25/08 N.T. at 32-34 (Garagozzo).
66 6/25/08 N.T. at 8 & 13 (Garagozzo).
67 6/25/08 N.T. at 9 (Garagozzo).
68 Respondent's Trial Memorandum at 8.

dementia since 2000; moreover, Dr. Strazzeri had not conducted her own independent examination to determine Catherine's mental acuity. R

espondent's attorney who drafted the power of attorney gave testimony that was contradictory to a previous letter he had written concerning the destruction of Catherine's will, thereby discrediting his credibility in general. Respondent's husband, Steven Nazarok, was far from a disinterested witness; moreover, his testimony confirmed that Ms. Nazarok was the dominant force in family financial decisions.[69] Finally, respondent's testimony that her mother had directed expenditures for gifts was unsupported by any other corroborative evidence, and ultimately lacked credibility.

II. The $72,448 in Gifts Challenged by the Objectant Were Improper

According to the Account, in the five month period between November 8, 2004 and March 10, 2005, a sum of $72,448 was distributed by Catherine as gifts.[70] Joseph Kuehn, as administrator of Catherine Kuehn's estate, objects that these gifts were invalid because Catherine either lacked the capacity to make those alleged gifts or the gifts were the result of undue influence.[71] The validity of these gifts must be analyzed under two criteria: as the exercise of Nazarok's power of attorney or as an inter vivos gift by Catherine. Upon review of the record, these gifts were invalid under either theory.

A. <u>The $72,448 in Gifts Listed in Nazarok's Account Were Invalid Where the Power of Attorney Was Obtained by Undue Influence</u>

A threshold issue when analyzing the validity of a gift made in cases involving a power of attorney is whether the language of the power of attorney document grants the

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[69] See, e.g., 6/17/08 N.T. at 101-02 (Nazarok, Steven)(testifying that after Catherine's death, Ms. Nazarok transferred $20,000 from decedent's bank account into the personal account of her husband Steven Nazarok, while observing "[m]y wife handles all the bills in our house."

[70] Account at 7.

[71] Objections, ¶ 4.

agent authority to make a gift. See, e.g., Metcalf v. Pesock, 2005 Pa Super. 346, 885 A.2d 539, 541 (2005); Taylor v. Vernon, 438 Pa. Super. 479, 483, 652 A.2d 912, 914 (1995); Franczak Estate, 22 Fid. Rep. 2d 525, 529-30 (Northampton Cty. O.C. 2001). The power of attorney document that Catherine signed did give Ms. Nazarok as agent authority to make "gifts" or "limited gifts" as defined by Section 5603 of the PEF code.[72] The document as drafted, however, did not contain the notice to principal required by 20 Pa.C.S. §5601 (c). Consequently, the agent "shall have the burden of demonstrating that the exercise of this authority is proper." Id.

Ms. Nazarok, however, cannot meet this burden of demonstrating that her exercise of the power of attorney was proper because for the reasons previously set forth at length she obtained the power of attorney be exercising undue influence over Catherine. See In re Schell, 29 Pa. D & C. 4th 504, 509 (Juniata Cty. Ct. Common Pleas 1995)(power of attorney void where proponents failed to rebut presumption of undue influence). Moreover, as petitioners suggest, the mere fact that Ms. Nazarok authorized $72,448 in gifts from Catherine's assets over a 5 month period is another indicia of undue influence.

As agent under a power of attorney, Ms. Nazarok had a fiduciary duty to her principal pursuant to the PEF code. 20 Pa.C.S. § 5601(e). She was moreover subject to the PEF code's "special rules for gifts" which provide:

> **Equity –** An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to the disposition of the estate.
> 20 Pa. C. S. § 5601.2 (e)

[72] Ex. P.-4, para. 12.

The expenditure of $72,000 in gifts by an elderly woman suffering from dementia in the short span of 5 months is hardly consistent with prudent financial management. Moreover, based on the record, of the gifts totaling $72,000 listed in the Account, approximately $58,000 directly benefited either the agent or her children. This distribution did not comport with the intent in the Catherine's will, which according to testimony by both Ms. Nazarok and Marlene Kuehn, provided for an equal distribution among the decedent's three children.[73] For these reasons, the $72,448 in gifts cannot be justified as a proper exercise of the gifting authority under the power of attorney.

B. Ms. Nazarok failed to Meet Her Burden of Establishing Valid Inter Vivos Gifts totaling $72,448

An alternative argument in support of the claimed $72,448 in gifts set forth in the Account is that they were valid inter vivos gifts by Catherine, as donor, to the respondent, her children, and the petitioners, as donees.[74] There are two prerequisites to establishing a valid inter vivos gift: donative intent and delivery. The alleged donee has the initial burden to prove a gift inter vivos by clear, precise and convincing evidence. Once the donee establishes this prima facie evidence of a gift, it is presumed valid and the burden shifts to the party contesting the gift to rebut this presumption with clear and convincing evidence. Lanning v. West, 2002 Pa. Super. 224, 803 A.2d 753, 761 & 765 (2002); Hera v. McCormick, 425 Pa. Super. 432, 439, 625 A.2d 682, 686 (1993). Courts have concluded, however, that "a presumptively valid gift may be rebutted by establishing that donor and donee had a confidential relationship at the time the alleged gift was made

[73] See, e.g., 6/10/08 N.T. at 53-54 (Nazarok); 6/17/08 N.T. at 8 (Kuehn, Marlene).
[74] Respondent specifically asserts that Catherine instructed Nazarok to distribute gifts intervivos. See Respondent's Trial Memorandum at 6.

Hera v. McCormick, 425 Pa. Super. at 439-40, 625 A.2d at 686(citations omitted); Rutter Estate, 22 Fid. Rep. 2d 135, 138 (Phila. O.C. 2001).

On page 7 of her Account, Ms. Nazarok outlines 7 disbursements totaling $72,448 as gifts by decedent while she was alive. The bulk of these "gifts" directly benefited Ms. Nazarok in the form of two payments totaling $45,506.89 to pay Ms. Nazarok's mortgage. Marlene and Joseph Kuehn were each paid $10,000, while two checks ($12,689 and $1,539) were made out to Peasant Motors on behalf of Ms. Nazarok's son, Stephen Nazarok, Jr. for the purchase of a car.[75] The sums expended as gifts ostensibly came from the joint accounts that had been opened, inter alia, to receive the proceeds from the sale of Catherine's house.[76]

Ms. Nazarok conceded that none of her own money had been placed in the joint accounts.[77] Under section 6303(a) of the PEF code provisions relating to joint accounts, ownership of the sums in a joint account during the lifetimes of both parties shall be deemed to be owned according to the contributions of each party. 20 Pa.C.S. § 6303(a). Lanning v. West, 2002 Pa. Super. 224, 803 A.2d 753, 761 (Pa. Super. 2002)(where all of the funds in a joint account were contributed by decedent, they all belonged to her during her lifetime so that agent must establish the validity of the inter vivos gifts); Gallagher Estate, 19 Fid. Rep. 2d 243, 249 (Allegheny Cty O.C. 1998)(under the Multiple-Party Accounts Act, the presumption is that where decedent contributed all the funds in the joint account, during his lifetime decedent owned all of the funds on deposit). Consequently, the money that was in the joint account belonged to Catherine so

[75] 6/10/08 N.T. at 78 (Nazarok).
[76] 6/10/08 N.T. at 55, 70 (Nazarok).
[77] 6/10/08 N.T. at 73 (Nazarok).

long as she was alive, and Ms. Nazarok had the initial burden of establishing Catherine's donative intent as to the gifts set forth in the account.

The only evidence presented that Catherine intended to make $72,000 in gifts was the general testimony by Ms. Nazarok that her mother "told me to do it."[78] As she explained, "we would sit down and pay the bills. She would ask me what I was paying, I would tell her when I was paying the mortgage. Then she said, " I want a roof over my head while I'm alive, let me pay the mortgage."[79] There are several problems with this testimony. It does not clearly state Catherine's intent to give a gift to Ms. Nazarok; it is a self-interested statement by Ms. Nazarok; and it is not substantiated by any other testimony. Her husband, Stephen Nazarok, for instance, offered no testimony in support of these gifts and generally professed no knowledge of the transfer of $20,000 into his savings account after his mother-in-law's death, noting generally the my "wife handles all the bills in our house."[80]

Numerous courts have found the sole testimony of a donee in support of the validity of an inter vivos gift as lacking in credibility where he or she directly benefits from the gift. See, e.g., Hera v. McCormick, 425 Pa. Super. 432, 445, 625 A2d 682, 689 (1993)(even where donee's testimony as to gift from decedent was admissible despite the Dead Man's Rule, it lacked credibility and was "insufficient to prove donative intent"); Cavaiani Estate, 17 Fid. Rep. 2d 364, 366 (Chester Cty. O.C. 1997)(where donee "presented no evidence, other than her own testimony, to show that Cavaiani intended to give her and her daughter…two-thirds of the value of the certificate," "the gifts she made to herself and her daughter are invalid and must be set aside'). Moreover, "[t]ransactions

[78] 6/10/08 N.T. at 78 (Nazarok)..
[79] 6/10/08 N.T. at 79 (Nazarok).
[80] 6/17/08 N.T. at 102 (Nazarok, Stephen).

by which a decedent shortly before his death practically strips himself of all his available property are naturally regarded with suspicion and are to be scrutinized with a keen and somewhat incredulous eye." Herra v. McCormick, 425 Pa. Super. at 450, 625 A.2d at 691. For these reasons, Ms. Nazarok failed to establish the requisite donative intent, and the claimed gifts totaling $72, 448 were invalid.

III. The $31,210.50 in Disbursements by Agent on Behalf of Deceased While Deceased Was Alive Should Be Reduced by the $10,000 Expended to Michelle Eroh and the $9,000 Expended for the Purchase of a Ford Explorer

Ms. Nazarok claims on page 6 of her account that she expended $31,210.50 as agent for Catherine on her behalf. The record, however, establishes that not all of these expenditures benefited the decedent. In December 2004, for instance, the account indicates that Ms. Nazarok spent $10,000 "as reimbursement to Michelle Eroh," her daughter, "for payment of roof on deceased's house."[81] When questioned about this expenditure at the hearing, however, Ms. Nazarok conceded that this had been a gift to her daughter.[82] In addition, there was testimony that Catherine never benefited from the Ford Explorer that had been purchased for $9,000.[83]

It is true, however, that Ms. Nazarok did take her mother into her home to care for her during the final months of her life. The other expenditures set forth on page 6 of the Account are therefore valid especially because the Account did not set forth any typical out-of-pocket expenses that Ms. Nazarok presumably incurred in the care of her mother for such items as food, clothing, laundry or other necessities.

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[81] Account at 6.

[82] 6/10/08 N.T. at 75 (Nazarok).
Q: And it [account] says for payment of roof on deceased home. Wasn't that actually a gift?
A: Yes. (Nazarok)
Id.

[83] 6/10/08 N.T. at 76-77 (Nazarok). Ms. Nazarok testified that the Ford was placed in her name after its purchase. Moreover, the step into the vehicle was quite high for an 86 year old woman. Id.

IV The Disbursements of $27,627.54 of Money Transferred to Agent by Right of Survivorship Were Invalid Because of the Clear and Convincing Evidence of Record that neither Ms. Nazarok nor Catherine Had Intended that the Joint Account Should Have a Right of Survivorship

After Catherine died on May 7, 2005, Ms. Nazarok claims that she properly expended the following sums to herself by right of survivorship from the joint bank accounts:

Purchase of Trailer Home[84]	$9,781.00
Retainer for legal fees for pending litigation	$7,500.
Cruise for Agent's 40th Anniversary	$1,500.
Spending Money for Cruise	$2,000
Balance of monies for expenses	$1,846.54

Under the PEF code, there is a presumption of a right of survivorship to joint bank absent clear and convincing evidence to the contrary:

> **Joint Account -** Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.
> 20 Pa.C.S. § 6304(a)(emphasis added).

In this case, however, the agent's own testimony established that the sole purpose in opening a joint bank account was to provide Ms. Nazarok with ease in handling her mother's finances:

> Q: When you first went to the bank to sets (Sic.) up the account, you and your mother, you did not go there for the purpose of setting up a joint bank account that would result in you getting everything; that's not what you planned to do?
>
> A: (Nazarok) We just went to set up a joint bank account.
>
> Q: And the purpose of setting up the account was for ease of use in terms of being able to handle your mother's affairs
> .
> A: (Nazarok) Yes.

[84] Steven Nazarok testified that Catherine had never been in this trailer. 6/17/08 N.T. at 102 (Nazarok, Steven).

Q: And that was the only purpose for setting up a bank account at that time, correct?

A: (Nazarok) Yes.[85]

Moreover, Ms. Nazarok specifically acknowledged that the money in the account did not belong to her.[86] There was no evidence that Catherine, who based on the record as a whole was financially unsophisticated and had little if any experience with banking, intended to create a right of survivorship in just one of her children. For all these reasons, Ms. Nazarok must return to the estate the $27,627.54 that she distributed after Catherine's death since her claim to a right of survivorship is unsupported by the record.

Conclusion

The account as presented cannot be confirmed. Not only does it contain invalid expenditures for gifts and purchases that improperly benefited the agent or her immediate family, but it contained admitted inaccuracies. For instance, the estimated balance of the joint account at Catherine's date of death on May 7, 2005 was set forth in the account as $53,408.54 but according to bank documents presented by petitioner the actual amount was $64,713.07. The accountant, however, was unable to explain this discrepancy when questioned about.[87]

For all of these reasons, Ms. Nazarok shall be required to return $117,666.96 to the estate of Catherine Nazarok based on the following improper expenditures and the $11,304.53 discrepancy between the balances listed in the joint account and the bank documents:

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[85] 6/10/08 N.T. at 80- 81 (Nazarok).
[86] 6/10/08 N.T. at 88 (Nazarok).
[87] See Ex. P-19 & 6/10/08 N.T. at 80 (Nazarok).

$10,000.00	"Reimbursement" to Michelle Eroh
$ 9,000.00	1998 Ford Explorer
$ 8,136.89	Catherine Nazarok Mortgage Payment
$12,689.00	Peasant Motors, Stephen Nazarok, Jr.
$ 1,539.00	Peasant Motors, Stephen Nazarok, Jr.
$37,370.00	Mortgage payoff for Catherine Nazarok
$27,627.54	Disbursements of Money Transferred to Agent by Right of Survivorship including $ 9,781.00 for Purchase of Trailer Home; $ 7,500.00 for Retainer for Legal Fees for Pending Litigation;$1,500.00 for Cruise for Agent's 40th Anniversary; $2,000.00 for Spending Money for Cruise)
$ 11,304.53	Discrepancy between Estimated Balance of Account as of May 7, 2005 of $53,408.54 and Ex. P-19 with date of death balance of $64,713.07

In addition, Marlene Kuehn and Joseph Kuehn, Jr. shall be required to return to the Estate of Catherine Kuehn the $10,000 each received as a gift from the accountant. Joseph Kuehn, Jr. shall thereafter administer the Estate of Catherine Kuehn, making appropriate distributions to the heirs of Catherine Kuehn as provided by the rules of intestacy since there is no longer a will to probate and contradictory testimony was presented as to its terms.[88]

Date: _____ BY THE COURT:

_____
John W. Herron, J.

[88] ***Compare*** 6/17/08 N.T. at 8 (Kuehn, Marlene)(the Will provided that her deceased husband's bequest under the Will should go to her, as his surviving wife) ***to*** 6/10/08 N.T. at 53-54 (Catherine's Will provided that the assets would be equally divided among her children, or if deceased, to their heirs but not spouse)(Nazarok).