

PHILADELPHIA COURT OF COMMON PLEAS  
ORPHANS COURT DIVISION

Antoinette DiStefano, Intervivos Trust,  
O.C. No. 1450 IV of 2009

Antoinette DiStefano, Power of Attorney  
O.C. No. 1356 PR of 2009

O P I N I O N

*Procedural Background*

On September 23, 2009, Patricia DiStefano (“Patricia”) filed an emergency petition seeking to restrain an attorney, Daniel Glennon, from taking any actions based on either a power of attorney dated August 5, 2009 or irrevocable trust document dated August 18, 2009 that had been executed by petitioner’s mother, Antoinette (“Lola”) Di Stefano. Contemporaneously with filing the emergency petition, Patricia filed two declaratory judgment actions seeking to have these documents declared void ab initio.<sup>1</sup>

Patricia is a beneficiary under the August 18, 2009 irrevocable trust. She had also been named as Lola’s agent under a February 6, 2007 power of attorney. She now maintains that a July 17, 2009 revocation of that power of attorney should be declared void ab initio. Patricia’s initial rationale for why these documents should be declared void is that Lola lacked the requisite

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<sup>1</sup> In a petition filed at O.C. No. 1356 PR of 2009 at control no. 092489, Patricia sought to have the August 5, 2009 Power of Attorney executed by Lola declared void ab initio as well as the July 17, 2009 Revocation of the February 6, 2007 Power of Attorney Lola had granted to Patricia on the grounds that Lola lacked the capacity to execute those documents. On October 20, 2009, Patricia filed an amended declaratory judgment petition seeking to have a Power of Attorney dated September 15, 2009 declared void ab initio. She also asserted a claim that the powers of attorney and the trust had been obtained through undue influence. In a petition filed at O.C. No. 1450 IV of 2009, Patricia sought to have the Irrevocable Trust dated August 18, 2009 declared void ab initio on the grounds that Lola lacked the capacity to execute the trust. On October 20, 2009, she filed an amended petition for declaratory judgment at control no. 092491 seeking a determination that the Irrevocable Trust had been obtained thorough undue influence.

capacity to execute them. She subsequently amended her petitions to assert as well that these documents are void because they had been obtained through undue influence.<sup>2</sup>

Three days of hearings were held to focus narrowly on the issue raised by the emergency petition. After considering that testimony as well as the documents presented, the emergency petition is granted for the reasons set forth below.

### ***Factual Background***

Antoinette DiStefano—or Lola-- is an 89 year old widow. She is also the 100% owner of Victor Café, Inc., a unique restaurant founded by the DiStefano family around 1920 and staffed by aspiring opera singers. Lola is the mother of six adult children: petitioner Patricia DiStefano, Pamela Packard, Claudia Rudner, Alfred Di Stefano, Enrico Di Stefano and Gregory Di Stefano.<sup>3</sup>

All of Lola's children at one point or another in their lives worked at the Victor, and its role within the family dynamic was a central leitmotiv of the hearings.<sup>4</sup> According to Patricia, one of her siblings would run the restaurant until he or she was accused of acting wastefully or dishonestly, at which point Lola would remove the purported dishonest child and replace him or her with the accuser.<sup>5</sup> Evidence was presented at the hearing that Lola frequently changed her estate plans—and especially the ultimate disposition of the Victor.<sup>6</sup>

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<sup>2</sup> See, e.g., 10/10/09 Amended Petitions for Declaratory Judgment at control nos. 092488, 092489 & 092491.

<sup>3</sup> Ex. P-22 at 4; 10/20/09 Amended Emergency Petition, O.C. No. 1356 PR of 2009, ¶¶ 5-8.

<sup>4</sup> Ex. P-22 at 11.

<sup>5</sup> 10/20/09 Amended Emergency Petition, O.C. No. 1356 PR of 2009, Ex. 1, ¶23.

<sup>6</sup> *Compare* Ex. P-9 (11/10/2006 Will of Antoinette DiStefano leaving “all of my shares in Victor Cafe, Inc. to be given equally to GREGORY DISTEFANO and ENRICO DISTEFANO) *with* Ex. P-10 (3/19/2007 Will of Antoinette DiStefano directing “that my shares in Victor Café, Inc. be given to Patricia Bryant”).

Around January 2007, Patricia became involved in the operation of the Victor after Lola asked for her help in dealing with unpaid bills and taxes.<sup>7</sup> According to Patricia, Lola also complained that her brother wanted to sell the restaurant to an outsider.<sup>8</sup> Patricia returned to Philadelphia to replace Gregory in running the business. On February 6, 2007, Lola executed a power of attorney that named Patricia as her agent.<sup>9</sup> Patricia shared her mother's apartment, and her daughter, Clara, came to Philadelphia to assist in operating the Victor during Patricia's absences. During her stays in Philadelphia, Clara lived in an apartment below Lola.<sup>10</sup>

With the passage of time, Patricia asserts that she noted a decline in her mother's mental facility. At one point, Lola introduced Patricia as her mother.<sup>11</sup> Early one morning, Patricia discovered a fire in her mother's bathroom which Lola begged her not to tell anyone else about.<sup>12</sup> On another occasion, Patricia discovered that at five a.m. in the morning, Lola had left three pots on top of the stove with the pilot light clicking.<sup>13</sup> In January 2009, Lola accused Patricia of stealing from a bank account when actually Lola had placed the money in a certificate of deposit.<sup>14</sup> According to Patricia, Lola had numerous car accidents, gave up her car keys on her doctor's advice, but then would steal them back.<sup>15</sup>

In June 2009, Lola was hospitalized for several days, and then was released to her home. Patricia had to return to California because her husband needed a hip replacement. She arranged—with the assistance of her sister Pamela<sup>16</sup>-- for Lola's placement in an assisted living facility, the Watermark. Lola, however, was very unhappy there and within a week had

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<sup>7</sup> 10/2/09 N.T. at 125 (Patricia).

<sup>8</sup> 10/2/09 N.T. at 125-26 (Patricia).

<sup>9</sup> See Ex. P.-1 (Power of Attorney of Antoinette Di Stefano appointing Patricia Bryant signed February 6, 2007).

<sup>10</sup> 10/2/09 N.T. at 126, 129-32, 138 (Patricia).

<sup>11</sup> 10/2/09 N.T. at 128 (Patricia).

<sup>12</sup> 10/2/09 N.T. at 129-30 (Patricia).

<sup>13</sup> 10/2/09 N.T. at 132 (Patricia).

<sup>14</sup> 10/2/09 N.T. at 103 (Patricia).

<sup>15</sup> 10/2/09 N.T. at 131 (Patricia).

<sup>16</sup> 10/6/09 N.T. at 165 (Pamela).

convinced Pamela to take her back to her apartment. Lola was chagrined to discover that Patricia had taken her apartment keys,<sup>17</sup> frustrating her return to her apartment.

After Lola's return from the Watermark, she executed a document dated July 17, 2009 revoking the power of attorney she had previously granted to Patricia.<sup>18</sup> Lola testified that her daughter Pamela had typed up the document, but she was not clear as to where she signed it.<sup>19</sup> On July 21, 2009, Pamela took Lola to meet with an attorney, Daniel Glennon. According to Glennon, Pamela remained in the room for the first twenty minutes of the meeting<sup>20</sup> and then returned for the final portion of the meeting where the fee schedule was negotiated.<sup>21</sup> Glennon stated that Lola had been referred to him by another attorney, Jim Rammey.<sup>22</sup> Lola recalled that it was Pamela who recommended Glennon to her.<sup>23</sup>

Glennon testified that Lola had told him of prior estate planning by an attorney, Douglas Fendrick, but she could not identify attorneys who had worked on her prior wills.<sup>24</sup> Lola told him that her wills had been in a safety box at PNC bank, but she could not get access to that box because the keys were missing.<sup>25</sup> Glennon recalled that Lola told him that she wanted to take control of the business away from Patricia and was annoyed that Patricia had placed her in Watermark.<sup>26</sup> During this first meeting, the concept of Glennon serving as trustee and agent was first explored.<sup>27</sup> Glennon testified that he gave Lola the names of three other attorneys to prepare the power of attorney and trust documents since he could not serve as agent or trustee under

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<sup>17</sup> 10/6/09 N.T. at 58 (Lola).; Ex. P-22 at 5-6; 10/6/09 N.T. at 161 (Pamela).

<sup>18</sup> Ex. P-2.

<sup>19</sup> 10/6/09 N.T. at 44 (Lola).

<sup>20</sup> 10/6/09 N.T. at 103 (Glennon).

<sup>21</sup> 10/19/09 N.T. at 9 & 16 (Glennon).

<sup>22</sup> 10/2/09 N.T. at 160 (Glennon).

<sup>23</sup> 10/6/09 N.T. at 51 (Lola).

<sup>24</sup> 10/2/09 N.T. at 161-63 (Glennon).

<sup>25</sup> 10/19/09 N.T. at 11 (Glennon).

<sup>26</sup> 10/2/09 N.T. at 164-65 (Glennon)

<sup>27</sup> 10/19/09 N.T. at 63 (Glennon). Glennon maintains that during these early meetings with Lola he was serving in an advisory capacity and had not been retained as an attorney. 10/19/09 N.T. at 64 (Glennon).

documents he had prepared.<sup>28</sup> In a subsequent meeting, Glennon alerted Lola to the potential retaliatory actions Patricia might take such as closing the restaurant and transferring the assets or filing a petition to have a guardian appointed for Lola.<sup>29</sup>

Glennon contacted another attorney, Richard Torpey, and told him Lola might be calling him to prepare a power of attorney and an irrevocable trust document.<sup>30</sup> Torpey testified that he did not meet with Lola before preparing these documents. It was Glennon who told Torpey that Lola had asked Glennon to serve both as her agent and as her trustee. According to Torpey, he first met with Lola on August 5, 2009, when she executed her power of attorney in Glennon's office and on August 18, 2009 when she exercised the irrevocable trust agreement, again in Glennon's office.<sup>31</sup> According to both Glennon and Torpey, Torpey explained the terms of both the power of attorney and the irrevocable trust in detail to Lola, and she seemed to understand their terms.<sup>32</sup> Glennon did not find Lola to be confused about what she was being asked to sign.<sup>33</sup> He noted that Lola had expressed a wish that Patricia stay on as manager of the Victor because she knew how to run the business.<sup>34</sup> In fact, the respondents presented a videotape of their August 18, 2009 session with Lola during which Torpey explained the terms of the Irrevocable Trust Document before she signed it. Ex. P-22.

Glennon testified that at the time the Irrevocable Trust document was executed, there had been no plans to sell the Victor. but the plan was that Patricia would remain as its manager.<sup>35</sup> He acknowledged, however, that he had explored the option of selling the café to each of the

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<sup>28</sup> 10/19/09 N.T. at 13 (Glennon). Glennon testified that he did not know if Lola ever called Torpey, but he did. 10/19/09 N.T. at 64 (Glennon). Torpey's timesheets for "Antoinette DiStefano: Estate Planning" indicate that the first contact on 7/27/09 was "telephone conference with Dan Glennon re: potential new trust." Ex. P-19.

<sup>29</sup> 10/19/09 N.T. at 21-22 (Glennon)

<sup>30</sup> 10/19/09 N.T. at 18-19 (Glennon).

<sup>31</sup> 10/2/09 N.T. at 75-81 (Torpey); 10/6/09 N.T. at 83(Torpey).

<sup>32</sup> 10/2/09 N.T. at 79 (Torpey); 10/19/09 N.T. at 27 (Glennon).

<sup>33</sup> 10/19/09 N.T. at 26 (Glennon).

<sup>34</sup> 10/19/09 N.T. at 28 (Glennon).

<sup>35</sup> 10/19/09 N.T. at 47 (Glennon).

children. More specifically, he began negotiating with Gregory for the sale of the café around September 2, 2009. Those plans, however, are presently on hold.<sup>36</sup>

On September 15, 2009, Lola executed another power of attorney. Torpey conceded that after Lola had signed the first power of attorney document in August, he had taken it back to his office to be notarized and witnessed by his secretary who had not been present during its actual signing.<sup>37</sup>

In challenging the validity of the August 5, 2009/September 15, 2009 powers of attorney and the August 18, 2009 Irrevocable Trust, Patricia presented testimony from five witnesses whom she characterizes as “objective.”<sup>38</sup> Jamie Shuster Morgan, an attorney specializing in estate planning, met with Lola beginning in July 2008 and then six times over the course of the subsequent year in her Voorhees, New Jersey office. In July 2008, Lola executed a codicil to her will prepared by Shuster. At that time, Shuster observed, Lola was sharp and in command of what she hoped to accomplish. Lola had provided Shuster with a copy of the will which the codicil amended.<sup>39</sup> Shuster also prepared another will for Lola dated January 29, 2009.<sup>40</sup> Nearly six months later, however, Shuster concluded that Lola did not have the mental capacity to execute another will. Shuster recalled that Lola came to see her in May 2009 at the Voorhees office, upset about family matters and desiring to change her will. After Shuster sent her a draft, Lola returned to Shuster’s office in June 11, 2009 to sign the new will. When Shuster went to greet her, Lola “looked at me with no recognition, asked if we had met before, asked if she had ever been to the office before, expressed concern that she may be having a stroke at that

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<sup>36</sup> 10/19/09 N.T. at 87-88(Glennon). Glennon acknowledged that Gregory was the child Lola referred to during the videotape as the person who had taken money.

<sup>37</sup> 10/2/09 N.T. at 84-87 (Torpey). See also 10/19/09 N.T. at 30 (Glennon)

<sup>38</sup> 10/06/09 N.T. at 112-13 (Prior). Marty Dershowitz, the accountant, was also listed with the four “objective witnesses” for a total of five.

<sup>39</sup> 10/2/09 N.T. at 17-18, 20-21, 23 (Shuster). See also Ex. P-11(Codicil) and P-10(Will amended by codicil); 10/2/09 N.T. at 17-18, 20-21, 23.

<sup>40</sup> 10/2/09 N.T. at 24-25 (Shuster) & Ex. P-12.

particular time, and was clearly struggling to place me.”<sup>41</sup> After talking quietly with Lola for nearly an hour in a conference room, Shuster concluded that Lola lacked the capacity to enter into a testamentary document at that time. Patricia took her home even though Lola vehemently wanted to sign the will.<sup>42</sup>

Another attorney, Charles Ercole, who had represented the Victor in various lawsuits involving claims of harassment by employees, likewise testified Lola had been unable to recognize him in September 2009 even though they had worked together on those cases. Since Lola had been named as a defendant in these lawsuits, Ercole had met with her various times beginning in August 2008 when they discussed the Giansante case for several hours. He had spent several hours with her at a mediation conference in March 2009.<sup>43</sup> But when Glennon brought Lola to Ercole’s office in September 2009 for information on the various legal matters his firm was handling for the Victor, she asked Ercole: “Who are you?”<sup>44</sup> When she subsequently stated that she thought she recalled him, she brought up a case he had never been involved with but which had occurred 15 or 20 years earlier.<sup>45</sup> In response to this memory lapse, Ercole recalled asking Glennon: “Do you understand my problem?”<sup>46</sup>

Joann Baccari, a PNC Bank branch manager who knew Lola for approximately 20 years both through business contacts and frequenting the restaurant, likewise noticed a change in her mental status within the past year. She recalled that Lola, a great cook, had prepared roasted peppers for her but did not remember this gift when she received Baccari’s thank you note.<sup>47</sup>

While Lola had once come to the bank alone to manage the finances, Baccari testified that in

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<sup>41</sup> 10/2/09 N.T. at 27-28 (Shuster).

<sup>42</sup> 10/2/09 N.T. at 28-29 (Shuster).

<sup>43</sup> 10/2/09 N.T. at 36-39 (Ercole).

<sup>44</sup> 10/2/09 N.T. at 43 (Ercole).

<sup>45</sup> 10/2/09 N.T. at 46-47 (Ercole).

<sup>46</sup> 10/2/09 N.T. at 43 (Ercole).

<sup>47</sup> 10/2/09 N.T. at 59-62 (Baccari).

the”past year, year and a half, we told Lola that basically she really needed help writing checks and getting her business in order.”<sup>48</sup> She added that before Pat and Clara had become involved, the finances had been a “disaster,” with checks bouncing, vendors requesting payment, employees having difficulty with their checks.<sup>49</sup> According to the Victor’s accountant, Martin Dershowitz, the cash flow increased greatly after Patricia took over the management. During this time, he noted, Lola played an increasingly passive role in the business operations rarely asking questions about its accounts.<sup>50</sup> Finally, a friend, George Murray, recalled that at a recent Fourth of July celebration (2009), Lola had wandered off and had to be assisted by Penn students to find her way back.<sup>51</sup>

After the petitioner rested, respondent made a motion to dismiss which was denied.<sup>52</sup> Although Richard Torpey initially represented the respondents, separate counsel—Warren Jacoby and Julie Negovan-- subsequently made an entry of appearance on Lola’s behalf.<sup>53</sup> Among the witnesses the respondents presented was Dr. Alison Leff who testified as a fact witness concerning a meeting she had with Lola on September 8, 2009 in Glennon’s office to assess Lola’s mental competency by giving her a mini mental exam. In the course of the hour long meeting, Dr. Leff asked Lola about her feelings, about where she was and the date. She asked Lola to name and remember three objects. Lola was asked to spell “world” backwards, and then repeat the three objects, which she was able to do. Lola was able to write a sentence on her own, and copy a picture Dr. Leff did not, however discuss the irrevocable trust with her.<sup>54</sup> On

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<sup>48</sup> 10/2/09 N.T. at 62 (Baccari).

<sup>49</sup> 10/2/09 N.T. at 62-63 (Baccari).

<sup>50</sup> 10/6/09 N.T. at 75- 77 (Dershowitz). Mr. Dershowitz has been the accountant for the Victor since January 2005. He last saw Lola approximately 6 months ago. Id. at 75.

<sup>51</sup> 10/6/09 N.T. at 64 (Murray).

<sup>52</sup> 10/6/09 N.T. at 111-14.

<sup>53</sup> 10/19/09 N.T. at 5.

<sup>54</sup> 10/19/09 N.T. at 101-04 & 108(Leff).



September 15, 2009, Dr. Leff met with Lola again to witness the signing of the second power of attorney document.<sup>55</sup>

### *Legal Analysis*

The focus of the hearings on Patricia DiStefano's emergency petition was narrow. The issue was whether Patricia DiStefano established that Glennon should be enjoined from taking any actions as agent or trustee. The purpose of a preliminary injunction is "to prevent irreparable injury or gross injustice by preserving the *status quo* as it exists or as it previously existed before the acts complained of in the complaint." Ambrogi v. Reber, 2007 Pa. Super. 278, 932 A.2d 969, 974 (2007). A preliminary injunction, however, "is an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest." Id.

There are six prerequisites that a party must establish before a preliminary injunction may be issued:

The party must show 1) "that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;" 2) "that greater injury would result from refusing an injunction than from granting it, and concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; 3) "that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; 4) "that the activity it seeks to restrain is actionable, and that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits"; 5) "that the injunction it seeks is reasonably suited to abate the offending activity"; and, 6) "that a preliminary injunction will not adversely affect the public interest." Warehime v. Warehime, 580 Pa. 201, 209-10, 860 A.2d 41, 46-47 (2004).

Courts have distinguished between prohibitory and mandatory preliminary injunctions.

While both seek to preserve the status quo, mandatory injunctions command the performance of specific acts, while prohibitory injunctions merely forbid certain acts. Ambrogi v. Reber, 932

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<sup>55</sup> 10/19/09 N.T at 105 (Leff).

A.2d at 974-75. In the instant case, petitioner essentially seeks a prohibitory injunction to prevent Glennon from taking any actions as agent or trustee until the validity of the underlying documents may be determined so that assets may not be lost. In such cases, the “entry of a preliminary injunction for the purpose of enjoining the dissipation of assets in anticipation of a lawsuit is not a novel event.” Ambrogi v. Reber, 932 A.2d at 975. Nonetheless, before Glennon can be enjoined from acting pursuant to either the power of attorney or the Irrevocable Trust documents, petitioner must meet the prerequisites for a preliminary injunction.

The hearing that commenced on October 2, 2009 therefore focused on the emergency petition and not on the merits of the two underlying declaratory judgment actions. Nonetheless, to establish her claim for preliminary injunctive relief Patricia had to establish a likelihood of success on the merits as well as irreparable harm. A critical, narrow issue was whether Lola had the requisite mental capacity to execute the powers of attorney and the irrevocable trust at their time of execution in August and September 2009 as well as the revocation of a prior power of attorney on July 17, 2009.<sup>56</sup>

***A. Standard of Review for Determining Capacity to Execute a Power of Attorney or Irrevocable Trust***

Petitioner Patricia DiStefano does not assert that Lola should be adjudicated as an incapacitated person. Instead, she articulates the more nuanced argument that Lola lacked the mental capacity unique to the two legal documents at issue in this case: an irrevocable intervivos trust and a power of attorney. Both of these documents, she maintains, require a higher degree of mental capacity than is necessary to execute a will. In the alternative, she asserts that in the instant case Lola’s execution of these documents was the result of undue influence.<sup>57</sup>

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<sup>56</sup> 10/2/09 N.T. at 4-6; 10/13/09 Patricia DiStefano Memorandum at 1-2.

<sup>57</sup> 10/2/09 N.T. at 8-10 (Prior); .

Under Pennsylvania law, there is a presumption of mental competency when a person executes a written document. Consequently, if there is a challenge of lack of capacity, the burden of proof is on the person alleging lack of capacity. In re Meyers (Girsh Trust), 410 Pa. 455, 468-69, 189 A.2d 852, 858 (1963); Steinkirchner Trust, 1 Fid. Rep. 2d 29, 32 (Allegheny Cty. O.C. 1979). Moreover, the party having the “burden of proof in cases including incapacity and undue influence must carry that burden by clear and convincing evidence.” Newhart Estates, 22 Fid. Rep. 2d 383, 387 (Montgomery Ct. O.C. 2002).

Plaintiff argues broadly that the mental capacity for executing a trust is higher than that required to execute a will, and there is case law supporting this general proposition.<sup>58</sup> But instead of invoking these broad, general principles, it is more prudent to grapple with the intricacies of relevant statutory authority and case law.

The PEF code provides, for instance, that the capacity to execute a revocable trust is the “same as required to make a will.” 20 Pa.C.S. § 7751. Under case law, testamentary capacity to execute a will is defined as “whether a man has an intelligent knowledge regarding the natural objects of his bounty, the general composition of his estate, and what he desires done with it, even though his memory may have been impaired by age or disease.” Brantlinger Will, 418 Pa. 236, 247, 210 A.2d 246, 252 (1965). Historically, Pennsylvania courts have defined the mental capacity to execute a trust in more specific terms as whether the settlor “had at the time of executing the deed of trust sufficient capacity to understand the nature and effect of the instrument.” Mead v. Sherwin, 275 Pa. 146, 151, 118 A. 731, 732 (1922). See also In re Meyers (Girsh Trust), 410 Pa. 455, 471, 189 A.2d 852, 859 (1963)(mental capacity to execute a trust is

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<sup>58</sup> 10/2/09 N.T. at 9-10 (Prior). See, e.g., McCune Estate, 3 Fid. Rep. 2d 95, 99 (Allegheny Cty. O.C. 1983)(“More capacity is required to execute a valid inter vivos transaction than is sufficient for a will”). Brantlinger Will, 418 Pa. 236, 248, 210 A.2d 246, 253(1965)(“We have held, however, that testamentary capacity need not rise to the level required to conduct business”).

the “ability to understand and appreciate the nature and effect of the trust agreement”); Steinkirchner Trust, 1 Fid. Rep. 2d 29, 31 (Allegheny Cty. O.C. 1979) (“Pennsylvania law requires that, on the date of execution, a person executing a trust agreement must possess mental capacity, i.e. the ability to understand and appreciate the nature and effect of the trust agreement”).

Unfortunately, the PEF code does not set forth a specific standard for capacity to execute either irrevocable trusts or powers of attorney. It is therefore necessary to rely on relevant case law since “the common law of trusts and principles of equity supplement” the PEF code. 20 Pa.C.S. § 7706. In cases involving irrevocable trusts, for instance, courts have concluded that a settlor must understand the scope of the authority granted under the trust document and that he is relinquishing control of his assets. Rebidas v Mirasko, 450 Pa. Super. 546, 554, 677 A.2d 331, 335 (1996). In Rebidas, the Pennsylvania Superior Court held that an irrevocable trust was properly rescinded based on evidence that the settlor did not understand the nature of the trust agreement he signed that named his lawyer brother-in-law as trustee with power that stripped the settlor of control of his personal and real estate. In reaching the conclusion that the trust should be rescinded based on mistake, the court emphasized not only that the settlor did not understand the nature of the trust instrument, but that the brother-in-law, as an attorney, had a confidential relationship with the settlor.<sup>59</sup> Likewise, in a more recent case, a court concluded that the settlor lacked testamentary capacity where there was no direct evidence that he understood the trust

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<sup>59</sup> Rebidas was “questioned” by Basile v. H & R Block, 2001 Pa. Super. 136, 777 A.2d 95 (2001) on the narrow issue as to its “erroneous” statement that to show a confidential relationship it was necessary to show both the superior party’s overwhelming influence and the inferior party’s weakness, dependence or trust. Instead, a confidential relationship may be shown by either. The Rebidas court applied a contract analysis and suggested that once a confidential relationship had been established, the transaction was “voidable.” The proponent then had the burden of establishing that the agreement was ‘fair, conscientious and beyond the reach of ‘suspicion.’ Id., 450 Pa. Super at 553-54, 677 A.2d at 335. Similar analysis applies to inter vivos gifts. See, e.g., Hera v. McCormick, 425 Pa. Super. 432, 447, 625 A.2d 682, 690 (1993) (If “a confidential relationship existed at the time the alleged gift was made, the burden shifts to the alleged donee to show that the alleged gift was free of any taint of undue influence or deception”).

document that he signed and where that document irrevocably deprived him of control of his property-- “a [l]oss of such control [that]would have been anathema” to him. Major Estate, 2 Fid. Rep. 2d 331, 336 (Wyoming Cty.O.C. 1999). In determining whether Lola had the mental capacity to execute the August 18, 2009 trust agreement, therefore, the focus is on whether she had the ability to understand the nature and effect of the trust agreement at the time of its execution. In re Meyers,(Girsh Trust), 410 Pa. at 471, 189 A.2d at 859; Mead v. Sherwin, 275 Pa. at 151, 118 A. at 732; Steinkirchner Trust, 1 Fid. Rep. 2d at 31.

Unfortunately, there is no appellate precedent addressing the issue of the capacity necessary to execute a power of attorney. See generally In re Mckinney, 27 Fid. Rep. 2d 359 (Chester Cty. O.C. 2007)(noting dearth of precedent on the evidentiary standard to be applied in the challenge to a power of attorney). In a recent case involving the validity of a power of attorney, however, Judge Stanley Ott set forth a tripartite test: at a minimum the principal had to understand the nature of the authority given to the agent, he had to understand what assets would be subject to that power, and he had to understand the notice provision. In re Robinson, 28 Fid. Rep. 2d 65, 82 (Montgomery Cty. O.C. 2008).

The respondents in their memorandum of law agree that the same “mental requisite” applies to both a power of attorney and an irrevocable trust: “the ability to understand and appreciate the nature and effect of the trust documents.”<sup>60</sup> Where mental competency is challenged, the focus is on the date when the documents at issue were executed. As a general principle, a person’s competency is an issue of fact based on “the spoken words, the acts and conduct of the person.” In re Meyers (Girsh), 410 Pa. at 466, 468, 189 A.2d at 857-58.

The spoken words and conduct of Antoinette DiStefano as recorded on August 18, 2009 in a videotape deposition together with her testimony at the hearing are therefore critical in

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<sup>60</sup> Respondents’ Memorandum of Law at 3.

determining her mental capacity to execute the powers of attorney and irrevocable trust document at issue.<sup>61</sup> In this case, Lola’s responses to explanations of the trust are particularly revealing. As at least one commentator has observed, while evidence in the form of videotaping is admissible, its “wisdom [is] questioned by many attorneys.”<sup>62</sup>

**B. Petitioner Has Established A Likelihood of Prevailing on the Merits as to her Claim that Lola Lacked the Capacity to Execute the Power of Attorney or the Irrevocable Trust Document**

***1. Lola’s Words and Comments During the August 18, 2009 Videotape Deposition Revealed a Fundamental Lack of Understanding of the Nature and Effect of the Trust Document and the Delegated Authority***

Lola’s videotaped comments and responses to Torpey’s explanation of the terms of the irrevocable trust document that he drafted prior to meeting her provide invaluable, contemporaneous evidence of her mental capacity on the date she executed that document. Her comments reveal serious gaps in communication as well as Lola’s failure to grasp key elements of the document and the authority she had delegated to the trustee.

As a threshold issue, Torpey asked Lola why she selected Glennon to serve as trustee even though he is not a member of her family. Lola’s response suggests that her choice had been strongly influenced by her daughter: “Because Pamela, who has been helping me, was able to find out who was the best in Philadelphia and she selected both of you, and it was her—her—what—what do you call it?—advice.”<sup>63</sup>

In explaining the trust document, Torpey properly attempted to alert Lola to its irrevocable nature. Lola, however, expressed a fundamental misunderstanding of its irrevocable nature that went uncorrected by Torpey:

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<sup>61</sup> Courts repeatedly emphasize that the most compelling evidence of capacity to execute a will (or trust) is “direct” evidence at the time of execution. *See, e.g., Newhart Estates*, 22 Fid. Rep. 2d at 387 (lack of capacity must be shown by direct evidence by those who observed the settlor at or around the time of execution).

<sup>62</sup> Meck, “Contesting Inter Vivos Trusts,” 18 Fid. Rep. 2d 489, 490.

<sup>63</sup> Ex. P-22 at 21.

Q: Do you understand in this trust, and I will go over it in detail with you—  
A: Yes.  
Q:--that you are basically turning over your assets to the trustee?  
A: Yes, I am.  
Q: And—  
A: We went through it all yesterday.  
Q: And you understand it?  
A: Every bit.  
Q: And you understand that this is irrevocable?  
Y: Yes, I understand that.  
Q: **And you won't get it back again?**  
A: **No, I won't, but I will get my business back again.**  
Q: **Very good, very good. Now do you expect to get an accounting from Mr. Glennon when he takes over.**<sup>64</sup>

Lola's statement "but I will get my business back again," reflects a fundamental misunderstanding that under schedule A of the trust document, she was transferring "100% of all corporate shares and my complete ownership in all of the following: VICTOR CAFE, VICTOR CAFÉ PARTNERS GP,LLC,VICTOR CAFÉ PARTNERS LP, VICTOR CAFÉ, INC. including any other corporate entity that may exist as a component or affiliate of The Victor Café, including all corporate rights attendant thereto (referred exclusively as "The Victor Café")."<sup>65</sup> Instead of correcting this misunderstanding, Torpey merely responded: "Very good, very good," and asked if she expected an accounting from Mr. Glennon.

Other evidence of Lola's confusion or incomprehension is the disposition of The Victor. Lola initially emphasizes that "all my children at one time or another worked in the café. That's why I want to be sure they all share in it."<sup>66</sup> She later acknowledges, however, that upon her death, one of her sons, Gregory, would be excluded from sharing in her estate.<sup>67</sup> She observes, however, that "[i]n other words, Gregory will not share in the immediate settlement after I die, but with the condition if we sell the business, he will be entitled to a share of the profits with the

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<sup>64</sup> Ex. P-22, 21-22 (Torpey and Lola)(emphasis added).

<sup>65</sup> Ex. P-4, (Antoinette DiStefano Irrevocable Trust) Schedule A.

<sup>66</sup> Ex. P-22 at 11.

<sup>67</sup> Ex. P-22, at 23; Ex P-4 (Antoinette DiStefano Irrevocable Trust) at 2.

children. Do you understand?”<sup>68</sup> The trust document as executed, however, contains no such provision for Gregory to share in the proceeds of the sale to someone outside the family.

Moreover, the trust document gives the trustee the “sole discretion” to reduce a particular child’s share of principal or income if he concludes that a child has misused funds derived from the Victor Café.<sup>69</sup>

Throughout her August 18, 2009 videotape interview, Lola emphasizes that she does not want the Victor sold during her lifetime. When Torpey asks “[a]s far as the wonderful Victor Café, you don’t want it sold during your lifetime, do you?” Lola responds: “No, I don’t. I want it to go on and on and on, to the honor of the family.”<sup>70</sup> Later in the interview, Lola directly asks Glennon: “You won’t sell the business?” to which Glennon responds: “I don’t plan on it, no.”<sup>71</sup> In his later testimony, however, Glennon stated that as early as September 2<sup>nd</sup>—or approximately two weeks after Lola signed the trust agreement-- he had begun negotiations with Gregory for the sale of The Victor which continued until September 30, 2009.<sup>72</sup> Despite Lola’s apparent understanding to the contrary, these negotiations were not precluded by the terms of the trust. The trust document gives the trustee discretion “to sell any part or all of any such business interest at such time or times, to such persons for such prices, and on such terms as Trustee may consider advisable.”<sup>73</sup> Although there is a specific paragraph in the trust document with the heading “No Sale of Café during Settlor’s Lifetime,” the provision under this heading gives the trustee authority to do so: “I hereby direct that my Trustee shall not have the power to sell my

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<sup>68</sup> Ex. P-22 at 23.

<sup>69</sup> Ex. P-4 (Antoinette DiStefano Irrevocable Trust) at 2.

<sup>70</sup> Ex. P-22 at 31-32.

<sup>71</sup> Ex. P-22 at 45-46.

<sup>72</sup> 10/6/09 N.T. at 107-09; 10/19/09 N.T. at 87-88 (Glennon).

<sup>73</sup> Ex. P-4 (Antoinette DiStefano Irrevocable Trust), at 7 “General Business Powers of Trustee, C.



restaurant, The Victor Café, during my lifetime unless circumstances absolutely require, in the sole opinion of my Trustee, that it be sold.”<sup>74</sup>

The point is not that these provisions of the irrevocable trust document are improper. Rather, the crucial point is the insight the videotape offers into Lola’s mental capacity at the time the trust was executed. By her own words, Lola demonstrated that she did not understand either the authority that she was bestowing on the trustee or critical provisions of the trust.

**2. *Lola’s Testimony During the October 6, 2009 Hearing Revealed a Lack of Understanding or Recognition of the Powers of Attorney She Had Executed***

**a. *Lola Believed That Before the Agent Could Act Under the Powers of Attorney She Had to be Examined by Two Psychiatrists***

In her testimony during the October 6, 2008 hearing, Lola was subjected to a more general examination of her mental capacity and understanding of the trust and power of attorney documents she had executed. Her serious lack of understanding of the powers she had bestowed under the power of attorney was exposed when Lola stated her conviction that the power could not be exercised unless she had first been examined by two psychiatrists:

Q: Do you remember naming Patricia as your Agent under power of attorney?

A: I remember with Scott that I did say that she would be the power—she would have the power of attorney with conditions that where she had to have me examined by two different psychiatrists. That was the condition.

Q: I apologize. I don’t understand what you mean by Pat had to have you examined by two psychiatrists.

A: Before she could use the power of attorney, she had to have me examined by two psychiatrists.....

....

Q: Did the power of attorney that names Mr. Glennon as your agent come with those same conditions?

A: That name who as my Agent?

Q: Dan?

A: Dan, yes.

Q: Did that come with the same conditions?

A: Absolutely.<sup>75</sup>

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<sup>74</sup> Ex. P-4 (Antoinette DiStefano Irrevocable Trust), at 3(emphasis added).

<sup>75</sup> 10/6/2009 N.T. at 26-27 (Lola)(emphasis added).

***b . Lola Was Unable to Identify Specific Powers of Attorney Documents She had Executed***

In the course of her testimony at the October 6, 2009 hearing, Lola was asked to identify prior power of attorney documents that she had executed on February 6, 2007, naming Patricia as her Agent (Ex. P-1) and on August 5, 2009, naming Glennon as her agent (Ex. P-3). Initially, she balked, protesting “I’m supposed to understand this? This is lawyer’s stuff, isn’t it.”<sup>76</sup> More alarmingly, she denied ever having seen either document:

But what is this document (referring to Ex. P-1)? Durable Power of Attorney. I don’t remember seeing this before, but that is my signature. But what is it?<sup>77</sup>

***3. Lola’s Testimony Concerning the Irrevocable Trust Document Was Confused***

On certain key elements of the irrevocable trust document Lola’s testimony was confused. At one point, for instance, she stated that under the trust, she placed her assets under the care of Mr. Torpey.<sup>78</sup> Her views on the implications of the trust agreement on the disposition of the Victor were either unclear or contradictory. When specifically asked what the trust did for The Victor, Lola replied: “What it does for The Victor, I don’t know. But what it does for me is it promises to take care of my business, my assets and anything I wanted.”<sup>79</sup> In contrast to her expressions of reluctance to consider a sale of the Victor during her lifetime in the August 18, 2009 videotape, during her October 6, 2009 testimony, she was willing to entertain a sale of the Victor to a family member if it was profitable.<sup>80</sup> Such a sale, however, she “absolutely” believed required her consent despite the contrary terms of the Irrevocable Trust document:

Q: So I want to make sure I understand you. Your understanding of this Trust is that Dan can only sell The Victor before you pass away with your consent?

A: He can sell the Victor with my consent while I’m living.

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<sup>76</sup> 10/6/09 N.T. at 22 (Lola).

<sup>77</sup> 10/6/09 N.T. at 22 (Lola).

<sup>78</sup> 10/6/09 N.T. at 45-46 (Lola).

<sup>79</sup> 10/6/09 N.T. at 48 (Lola).

<sup>80</sup> 10/6/09 N.T. at 49 (Lola).

Q: Right. Only with your consent?

A: With my consent. And after I'm dead, to keep it in the family, which is what I asked him to do.

Q: So while you're alive, he has to have your consent to sell The Victor?

A: Yes. Absolutely.<sup>81</sup>

This belief that the trust requires Lola's consent before the trustee may sell The Victor is not supported by the trust document which gives the trustee the general power "[t]o sell any part or all of any such business interest at such time or times, to such persons for such prices, and on such terms as Trustee may consider advisable."<sup>82</sup> Even the section of the trust document under the heading "No sale of Café During Settlor's Lifetime," provides for the sale of the Victor during Lola's lifetime if "circumstances absolutely require, in the sole opinion of my Trustee" with no requirement for Lola's consent.<sup>83</sup> When asked about this issue, Glennon testified that under the trust document, Lola's consent was not required before the Victor could be sold:

Q: Does the Trust provide that Mrs. DiStefano has a right to consent to any sale of The Victor Café in her lifetime.

A: No, it doesn't.<sup>84</sup>

Finally, Lola's testimony revealed confusion about key aspects of her life. She could not recall how much money was in the Victor's bank account or how much money she and Glennon had transferred out of that account.<sup>85</sup> She could not recall if she had fallen or been hospitalized before going to reside at the Watermark.<sup>86</sup> Although she agreed that it had always been her intention that she would never give The Victor to one child only, she could not explain why her will dated November 10, 2006 (Ex.P-9) had given the restaurant to Gregory and Enrico, while a later will dated April 19, 2007 (Ex. P-10) gave it to Patricia.<sup>87</sup>

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<sup>81</sup> 10/6/09 N.T. at 50 (Lola)(emphasis added). See also 10/6/09 N.T. at 49 (Lola).

<sup>82</sup> Ex. P-4 (Antoinette DiStefano Irrevocable Trust) at 7 (emphasis added).

<sup>83</sup> Ex. P-4 (Antoinette DiStefano Irrevocable Trust) at 3 (emphasis added).

<sup>84</sup> 10/19/09 N.T. at 37-38 (Glennon).

<sup>85</sup> 10/6/09 N.T. at 51-52 (Lola).

<sup>86</sup> 10/6/09 N.T. at 58-59 (Lola).

<sup>87</sup> 10/6/09 N.T. at 34-35 (Lola).

Lola's words and comments during the videotaped session and the October hearing when combined with the testimony by attorney Jamie Shuster Morgan that in her opinion Lola had lacked capacity to execute a testamentary devise around June 11, 2009 creates a substantial likelihood that petitioner can prevail on the merits as to her lack of capacity claim.

**C. Petitioner Has Presented Evidence of Likely Success on the Merits of Her Claim that the Irrevocable Trust Was Procured by Undue Influence Exercised by Individuals in a Confidential Relationship with Lola When She was Suffering from Weakened Intellect**

Petitioner has filed an amended emergency petition to assert that the Irrevocable Trust was procured by undue influence.<sup>88</sup> In a memorandum dated October 13, 2009, Patricia argues that her sister, Pamela, and attorney Glennon were in a confidential relationship with Lola, so the burden would shift to them to show that execution of the irrevocable trust was not the result of undue influence.<sup>89</sup>

Under the PEF code, a trust "is voidable to the extent its creation was induced by fraud, duress or undue influence." 20 Pa.C.S. § 7736. Where a will or trust is challenged on the grounds of undue influence, the contestant has the burden of proof. To meet this burden, she must establish by "clear and convincing evidence that: (1) the testator was of weakened intellect at the time the will was executed; (2) the proponent of the will stood in a confidential relationship with the testator; and (3) the proponent received a substantial benefit under the will." Burns v. Kabboul, 407 Pa. Super. 289, 307, 595 A.2d 1153, 1162 (1991). See also Newhart Estates, 22 Fid.Rep. 2d at 389 (Judge Drayer concluding that the 3 pronged test for undue influence set forth in Estate of Clark also applies to contests involving revocable trusts). Once the contestant establishes these three criteria, the burden shifts to the proponent to show a lack of undue influence. Burns, 407 Pa. Super. at 307, 595 A.2d at 1162.

<sup>88</sup> See 10/20/09 Patricia DiStefano Amended Petition, Ex. 1, ¶¶ 112, 116, 120.

<sup>89</sup> See 10/13/09 Patricia DiStefano Memorandum at 6.

Weakened intellect for the purpose of establishing undue influence does not rise to the level of lack of testamentary capacity. Estate of Clark, 461 Pa. 52, 63, 334 A.2d 628, 633 (1975). As

Judge Taxis observed:

The closest that we can come, therefore, to a definition of weakened intellect is that it is a mind which, in all the circumstances of a particular situation, is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision and other characteristics of a fully competent mentality. It should be viewed essentially as a *relative* state as the term is applied to cases of undue influence, as these always involve the effect of one intellect upon another....

Heffner Will, 19 Fid. Rep. 542, 546-47 (Mont.Cty.O.C. 1969).

As previously outlined, in her videotaped testimony and her October 6, 2009 testimony, Lola's powers of reasoning, factual knowledge and freedom of thought were unclear as demonstrated by her inability to identify power of attorney documents she had previously executed, her misunderstanding that her agent could not exercise any authority under the power of attorney unless Lola had been examined by two psychiatrists, her conflicting statements concerning whether she would ever sign a will leaving the Victor to only one of her children, her conflicting statements concerning whether the Victor could be sold during her lifetime, and her failure to comprehend the irrevocable nature of the trust. One random comment during the videotaped session underscored Lola's lack of knowledge of key facts as well as a tendency towards dependence on others. When asked if she was looking forward to receiving an annual accounting from her trustee, Lola replied:

A: Yes. I do. I can't wait for that to happen—

Q: All right.

A: --so that I would know what kind of business we are doing. I have never known.<sup>90</sup>

The full import of this comment in terms of Lola's alleged "weakened intellect" and dependence on others must be seen in context. As the 100% owner of The Victor with an accountant in her employ, Lola had had the opportunity of obtaining knowledge of "what kind

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<sup>90</sup> Ex. P-22 at 22 (emphasis added).

of business we were doing” upon request. But as both her accountant, Dershowitz, and daughter, Patricia, observed she had neglected to take the initiative to ask questions about the business finances.<sup>91</sup>

Lola’s testimony demonstrating her inclination to rely on others leads into the third element for showing undue influence, or a confidential relationship. The existence of a confidential relationship can be shown “whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.” Estate of Lakatos, 441 Pa.Super. 133, 142, 656 A.2d 1378, 1383 (1995)(citations omitted). Courts have also suggested that “the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between the parties.” Id., 441 Pa. Super. at 142, 656 A.2d at 1383. Based on the record presented to date, petitioner has demonstrated the likelihood of establishing that both Pamela and Glennon have a confidential relationship with Lola.

Through her testimony, Lola suggested the various ways in which Pamela had exerted a dominance over her during the relevant period. Lola noted, for instance, that Pamela had typed the document revoking the February 6, 2007 Power of Attorney. Pamela, according to Lola, had chosen Glennon as the attorney for Lola. As Lola was signing the Trust document, she observed several times that her hands were shaking.<sup>92</sup> She also noted that “Pamela wanted to be here so much but we were running late.” She then observed that Pamela had extracted a promise that she not open the door when Patricia rang on the morning the trust document was

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<sup>91</sup> As Patricia stated, she was not willing to accept the trustee’s asserted authority because she did not believe he was doing the right thing and “[m]y mother’s incapable of understanding all that they’re talking about. And about my mother not knowing the business facts and figures, my mother did not want to know that stuff. It just confused and upset her.” 10/2/09 N.T. at 123-24 (Patricia).

<sup>92</sup> Ex. P-22 at 40 & 46.

signed.<sup>93</sup> In fact, “Pam pulled me out of the house early this morning. She didn’t want me to answer (the doorbell).”<sup>94</sup> After signing the trust document, Lola stated: “I am so relieved, and so is Pamela. She had been—she has been terrific, but has spent so much time with me that her husband has suffered from it.”<sup>95</sup> With these spontaneous, seemingly random comments, Lola suggests an unequal, dependent relationship with her daughter as far as the documents at issue.

Glennon, likewise, had a confidential relationship with Lola not only by virtue of the power of attorney, but also by the trust and confidence Lola imposed in him as a counselor. See, e.g., Foster v. Schmitt, 429 Pa. 102, 107, 239 A.2d 471, 474 (1968)(a confidential relationship exists “whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interest”). As Lola stated after signing the trust document to Glennon and Torpey, “ I am agreeing to all of this because I trust you both.”<sup>96</sup> An extremely unusual aspect of this trust is how Glennon came to be designated trustee and agent where Lola presumably had consulted him initially as an attorney and scrivener for the legal documents she sought.

As the final element of establishing the presumption of undue influence, the contestant must establish substantial benefit. This can be demonstrated by the terms of the irrevocable trust document. Under that document, upon the death of Lola, Pamela was named as a beneficiary along with 4 of her siblings of the remaining principal and income.<sup>97</sup> Under schedule B of that document, Glennon was to receive substantial financial benefits: an annual fee based on the original market value of the principal at the rate of 1.5% of the first million and 1% for the balance of the trust. He was also to be compensated at an hourly rate of \$325

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<sup>93</sup> Ex. P-22 at 47-48.

<sup>94</sup> Ex. P-22 at 54.

<sup>95</sup> Ex. P-22 at 41.

<sup>96</sup> Ex. P-22 at 46.

<sup>97</sup> Ex. P-4 at 2.

or “Trustee’s then current legal professional rate as that rate may increase from time to time” with a minimum annual fee of \$20,000. Finally, there was an incentive to sell the Victor since Schedule B provided that “my Trustee shall be entitled to an additional commission or bonus amounting to 2% of the gross sales price for the sale of my café, The Victor Café, to be paid at the time of closing.”<sup>98</sup> Not only would Glennon get a 2% commission or bonus based on the gross sale price of the Victor, but those proceeds would then be added to the principal upon which he would incur a fee based on either 1.5% or 1%.

**D. Petitioner Has Established Irreparable Harm Necessitating Enjoining the Trustee and Agent from Taking any Action Pursuant to the Irrevocable Trust or Power of Attorney**

Throughout these proceedings, the respondents have suggested that there is no emergency because the trustee/ agent has been willing to accommodate Patricia’s requests for access to funds to pay the expenses and debts of The Victor. This position, however, is shortsighted and neglects the full implications of the authority granted to the trustee by the documents in dispute. Lola, by virtue of the documents she executed, has delegated to her trustee/agent broad discretion in operating her business. In light of the testimony that she always considered her daughter Patricia best equipped to operate the Victor, and the trustee’s admitted lack of experience in operating a restaurant, this delegation of authority is highly problematic. Equally problematic was the testimony that within weeks of the execution of the trust document, the trustee had commenced negotiations for the sale of The Victor. Lola’s misguided belief that her consent would be necessary for any sale underscores the potential invalidity of the trust as well as the potential for irrevocable harm.

To maintain the status quo until the underlying issue of whether the power of attorney and irrevocable trust document were void ab initio, the most prudent course is to restrain any

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<sup>98</sup> Ex. P-4, Schedule B.



action pursuant to those documents. The parties thereby will be restored to their status before the documents were executed, while the issuance of this restraint would not substantially harm the respondents. Such a restraint, narrowly defined, is reasonably limited to protecting such irreparable harm as the sale of The Victor. Moreover, it would not adversely affect the public interest.

**Conclusion**

For all of these reasons, the emergency petition of Patricia DiStefano is granted and Daniel Glennon, as trustee and agent, shall be restrained from taking any further action under the August 18, 2009 Irrevocable Trust, the August 5, 2009 Power of Attorney and the September 15, 2009 Power of Attorney. He is further ordered to return to The Victor Café operating account any and all funds transferred from that account to any account over which he has signatory authority pursuant to the documents at issue.

BY THE COURT:

Date: \_\_\_\_\_

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John W. Herron, J.