

2004 WL 5368060 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)  
Chancery Court of Delaware.  
New Castle County

In the Matter of the Estate of Dorothy W. CORNELIUS.

No. 19255-NC.  
June 1, 2004.

**Petitioner's Memorandum of Law in Opposition to Respondent's  
Motion in Limine to Exclude Family Court Documents**

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Filing ID 3661675

**Wills File No. 119475**

Petitioner, Alice Cornelius, solely in her capacity as executor of the Estate of Dorothy W. Cornelius, hereby responds to Respondent's motion in limine to exclude the Family Court Documents from this proceeding. Respondent seeks to exclude the Petition for Protection from Abuse and sworn Affidavit filed by Dorothy W. Cornelius ("Decedent" or "Dorothy") in the Family Court of Delaware on March 27, 1995 (the "Family Court Documents", PX 8) on the grounds that the documents allegedly are hearsay and their probative value is substantially outweighed by their prejudicial effect.

***FACTS***<sup>1</sup>

After the death of her husband in June 1994, Dorothy's health began to decline due to her severe [osteoporosis](#) and her increasing anxiety and stress in attempting to settle her husband's estate. In February 1995, Dorothy sought legal counsel to assist her in straightening out the legal entanglements that arose regarding the family home as a result of her inability to locate her husband's will. Beverly Wik ("Wik") of The Bayard Firm was engaged as Dorothy's counsel in this matter.

Throughout February 1995, Dorothy's counsel sought a means to convert the life estate on the family home that Dorothy possessed to a fee simple estate. The life estate arose because her husband, Mr. Cornelius, was the owner of the property and he had effectively died intestate. The conversion to a fee simple estate in favor of Dorothy reflected the testamentary intent of Mr. Cornelius's missing will.<sup>2</sup> To effectuate the conversion, both Alice Cornelius ("Alice") and her brother, Herbert H. Cornelius, Jr. ("Respondent" or "Herbert"), were asked to waive or disclaim their respective interests in that portion of their father's estate. During this same time period, Dorothy began her own estate planning and Dorothy asked Wik to draft Dorothy's will and a durable power of attorney reflecting Alice as the primary attorney-in-fact and Herbert as the alternate. Dorothy also asked that the will divide her estate equally between Alice and Herbert. Wik did so.

In early March 1995, after agreeing to waive or disclaim his interest in the family home that he received from his father's estate, Herbert belatedly withdrew his consent. Herbert began verbally abusing Dorothy, and she, out of fear of his violent temper and his possession of guns, summoned the New Castle County Police to her home on several occasions during this time. Herbert's irrational behavior, coupled with his violent outbursts caused Dorothy severe anxiety and stress.

After several conversations with counsel and a few close friends, Dorothy decided to change her power of attorney to remove Herbert as the alternate. Dorothy wanted to change her power of attorney because she did not believe Herbert, if called upon to take action under the document, would be impartial and carry out his duties properly. In addition, in an attempt to prevent Herbert from having ongoing confrontations with her and exerting his influence over her estate planning decisions, Dorothy decided to file the Petition for Protection from Abuse on March 27, 1995.

After filing the petition, Dorothy continued to experience undue pressure from Herbert to change her will and power of attorney. On several occasions, he took her to different attorneys in an attempt to alter the estate plan Dorothy had carefully set up with Wik. Due to the constant undue pressure and barrage of screaming outbursts by Herbert, Dorothy was hospitalized just days before the PFA hearing in April 1995. Since she was unable to attend the hearing, it was postponed. However, after Dorothy was transferred to Methodist Country Home for rehabilitation, Herbert convinced her to sign herself out of the facility and return home. Due to the fact that Dorothy “voluntarily” returned to the home with Herbert, her alleged abuser, Dorothy's attorney determined that the petition could not be pursued and it was withdrawn.

The constant drumbeat of Herbert's abuse continued through 1995, when he attempted to force Dorothy to terminate her engagement of Wik, through 1996 when the New Castle County Adult Protective Services agency (“APS”) was called in to monitor Dorothy's physical and mental well-being. Throughout this period, Dorothy was repeatedly hospitalized for depression, anxiety, and other ailments.

Subsequently, Respondent's abusive behavior became more widely known among Dorothy's family and friends. For example, Richard and Elma May Page visited Dorothy and saw signs of abuse.

In July 1997, a check was written on Dorothy's account for the purchase of a new automobile. In May 1998, Dorothy closed her certificate of deposit account at her bank and deposited the proceeds into her savings account. Approximately one month later, Herbert caused Dorothy to withdraw \$120,000 from her savings account and deposit it into an account on which he was listed as the joint owner. Less than five months later, while Dorothy was in the hospital on a respirator just a few months before her death, Herbert transferred the entire amount of the joint account into a new account opened solely in his name.

## **ARGUMENT**

### **I. THE FAMILY COURT DOCUMENTS ARE NOT INADMISSIBLE HEARSAY**

Delaware Rule of Evidence 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Johnson v. State*, 587 A.2d 444, 447 (Del. 1991). If a statement is introduced for a purpose other than its truth, it may be admissible, if that purpose is relevant to an issue of the trial. *Id.* Dorothy's sworn affidavit that was attached to the PFA, is offered as evidence of Dorothy's state of mind, and her susceptibility to the influence of the Respondent - not for “the truth of the matter asserted.”<sup>3</sup> Dorothy's state of mind is critical to a claim of undue influence and is a permissible purpose for which to admit the Family Court Documents.<sup>4</sup> Thus, the Family Court Documents are not hearsay and should be admitted into evidence.

The existence of undue influence or deception involves incidentally a consideration of the testator's inability to resist pressure and susceptibility to deceit, whether in general or by a particular person. *See* 6 John H. Wigamore, *Wigamore on Evidence* § 1738(1976).

This requires a consideration of many circumstances, including testator's state of affections or dislike for particular persons; of testator's inclinations to obey or resist these persons; and, in general, of her mental and emotional condition with reference to its being affected by any of the persons concerned. *All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order*

*that from these conditions at various times (not too remote) may be used as the basis for inferring testator's condition at the time in issue. Id* (emphasis added).

Dorothy's sworn affidavit is being used to establish that Dorothy's mental susceptibility to Respondent's abuse and coercion was a predicate to his exertion of undue influence over her from 1995 until the time of her death. Being frail and weak at the time of the affidavit and her susceptibility to being unduly influence by Herbert is a circumstance that did not miraculously change for Dorothy after she signed that affidavit. Instead, the sworn affidavit clearly states that Dorothy felt susceptible to Herbert's influence and coercion, thus establishing her existing mental and emotional condition which is relevant to the claims. "Though the issue is as to his mental condition with regard to deception or duress at the time of execution, yet his mental state *both before and afterwards is admissible as evidence of his state at that time.*" *Id.* (emphasis added). As discussed more fully below in Section III, the idea that statements made in 1995 are "too remote" to Dorothy's state of mind in 1997 and 1998 regarding Dorothy's alleged intent to cut Alice out of substantial property in favor of the person who Dorothy swore was abusing her is nothing short of absurd.

## **II. THE AFFIDAVIT ESTABLISHES DECEDENT'S THEN EXISTING MENTAL, EMOTIONAL AND PHYSICAL CONDITION BOTH BEFORE AND AFTER THE CHALLENGED TRANSACTIONS**

[Rule 803 of the Delaware Rules of Evidence](#) provides that "a statement of the declarant's then existing state of mind, emotion, sensation or physical condition" is not excluded by the hearsay rule. The foundational requirements for admitting such a statement are that the statement (1) must be relevant and material, (2) must relate to an existing state of mind when made, (3) must be made in a natural manner, (4) must be made under circumstances dispelling suspicion, and (5) must contain no suggestion of sinister motives. *Forrest v. State*, 721 A.2d 1271, 1276 (Del. 1999) (admitting out of court statements of **exploitation** of an infirm adult).

Respondent concedes that Dorothy's sworn affidavit satisfies the second and fifth requirements. However, contrary to Respondent's assertions, Dorothy's statement also meets the other requirements. As established above, Dorothy's affidavit is both relevant and material in establishing her mental state and susceptibility to Respondent's influence during the entire time period from 1995 through 1999. It is clear from the affidavit that Dorothy lived in fear of Respondent and was intimidated by him. The circumstances of the making of the affidavit clearly dispel suspicion since Dorothy made the statements under oath. As for the statements being made in a natural manner, Dorothy's statements were made to her attorneys in as natural a manner as possible, considering the extreme stress she was experiencing during a very trying time in her life.

In *Forrest v. State*, the Supreme Court upheld the trial court's decision in admitting testimony under the exception to the hearsay rule regarding statements made by an **elderly** victim of an alleged scheme to defraud. The court held the statements of the declarant's then existing mental, emotional, or physical condition were relevant in the prosecution of the defendant for **exploitation** of an infirm adult. Similarly, Dorothy's affidavit to the Family Court clearly indicates her then existing mental, emotional and physical condition that is indispensable evidence of Herbert's undue influence over her.

Based on the foregoing, even if the Court finds that Dorothy's sworn affidavit is hearsay, it falls squarely within the exception to [Rule 803\(3\)](#), and, therefore, should be admitted.

## **III. THE FAMILY COURT DOCUMENTS SHOULD BE ADMITTED BECAUSE THEY ARE PROBATIVE OF DECEDENT'S STATE OF MIND**

In order to grasp the dynamics of domestic violence, particularly that of the more evasive and subtle form of psychological abuse which was perpetrated in the case at bar, one must understand the nature of abuse, starting from its very definition. With regard to domestic violence, abuse is often defined as "behavior which dominates or controls someone, or prevents someone

from making a free choice,” by either forcing the victim into involuntary action, or restraining the victim from voluntary action. *Christina L. v. Harry J.L., Jr.*, 1995 WL 788196, \*19 (Del. Fam. Ct. 1995) (citation omitted). In this context, abuse is primarily psychological or emotional, although it can also include physical abuse. *Id.*

Psychological or emotional abuse, which includes intimidation, control, threats and intense and constant degradation, has been likened to brainwashing and often precedes displays of physical violence. *Id.* at \*20 (citing to Robert Geffner et al., *A Psychoeducational, Conjoint Therapy Approach to Reducing Family Violence* (1989)). Domestic abuse experts describe a victim of family violence as a manipulated person whose perceptions are controlled. *Id.* The perpetrator of psychological abuse generally targets his victim and *gradually* erodes the victim's positive sense of self through one or a combination of the following actions: insults, ignores the victim's feelings, name calls, repeats insults/targeted insults, repeats private and/or public humiliation, labels the victim as “crazy,” “bitch,” etc., and threatens violence/retaliation. *Id.* (citing to Emotional/Psychological Abuse, adapted from WEXLER (1990)).

This constant barrage of brainwashing results in the victim suffering a number of possible consequences, including: feelings of powerlessness, sense of dependency, emotional instability, or nervous breakdown and/or depression. *Id.* In emotionally abused women in particular, her sense of self, including any strong feelings of independence or competency, is eroded by her abuser *over time*, and replaced by sensations of helplessness, confusion, isolation, depression and humiliation, as well as guilt and feelings of failure. *Id.* (citing to Robert Geffner & Mildred Daley Pagelow, *Victims of Spouse Abuse, in Treatment of Family Violence* 117 (Robert T. Ammerman & Michel Hersen, eds., 1990)). The effects of such abuse can continue even after the abuse has ended. *Id.*

Here, Dorothy's 1995 sworn affidavit provides an indelible picture of her state of mind in early stages of Herbert's abuse and influence. As noted above, an abuser erodes his victim's will gradually over time.<sup>5</sup> It happens subtly. It does not happen overnight. It may take months, or even years, before it is uncovered. Therefore, the effects of Herbert's abuse may not have been manifested at each and every stage of the abuse, but would have arisen over years. *See id.* In the same vein, undue influence has been characterized as

An excessive or inordinate influence considering the circumstances or the particular case. The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own. *In the Matter of Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983).

Persons who unduly influence a testator to change his or her will normally do it surreptitiously. *In the Matter of the Estate of Konopka*, 1988 WL 62915, at \*\*5 (Del. Ch.). “By its nature such activity is covert and subtle.” *Id.* Herbert's undue influence over Dorothy was exerted gradually and, over time, resulted in the subjugation of her will to his.

Herbert lived with Dorothy nearly his entire life. Essentially, Herbert never left home. His gradual process of intimidation and abuse began at least as early as 1995 (after his father, who also lived in their house, had died), as stated in Dorothy's sworn affidavit. Only two short years elapsed between the filing of the Family Court Documents and the purchase of the Monte Carlo, and only three short years between Dorothy's sworn affidavit and the transfer of \$120,000 of her money into an account owned solely by Herbert. Clearly, these dramatic familial circumstances are inextricably linked to her intent regarding disposition of her property.<sup>6</sup> Add the Family Court Documents to intervening incidents of abuse as observed by Alice and the Pages, who will also testify, and Dorothy's statements in her sworn affidavit are plainly not too remote in time from the challenged transactions in 1997 and 1998. *See, e.g., In re Tinley*, 2001 WL 765177 (Del. Ch.), *In the Matter of the Estate of Reed*, 1995 WL 694423 (Del. Ch.), *In the Matter of the Estate of Konopka*, 1988 WL 62915 (Del. Ch.) (discussing circumstances surrounding and incidents regarding the relationships among family members as probative of decedent's intent and some of which occurred substantially greater than 3 years before the decedent's death).

Finally, Dorothy's statements are not "prejudicial" to the Respondent. This is not a jury trial. He can try to explain his conduct and Dorothy's expressions of fear away.<sup>7</sup> The Court is more than capable of parsing the issues, weighing the credibility of witnesses and placing the proper weight on all the proffered evidence.

#### **IV. DELAWARE STATUTE AND PUBLIC POLICY SUPPORTS ADMISSION OF OUT-OF-COURT STATEMENT OF INFIRM ADULT**

Respondent's argument against the admission of Dorothy's sworn affidavit rests in part on the notion that Respondent's alleged statements in the affidavit must be offered at trial through the testimony of the Decedent, subject to cross-examination. In fact, Respondent's entire argument is a series of illogical contortions which seem to suggest that Dorothy's sworn affidavit is somehow untrustworthy.<sup>8</sup> Respondent's argument should be ignored.

As a matter of public policy, the State of Delaware maintains that this type of out-of-court statement is an exception to the hearsay rule even in cases involving crimes of **financial exploitation** of infirm adults where safeguards regarding the right to cross-examination are even more strenuous. [Section 3516 of Title 11 of the Delaware Code](#) states in relevant part: [§ 3516](#). Hearsay exception for infirm adult or patient or resident victim's out-of-court statement of abuse.

(a) An out-of-court statement made by an infirm adult, as defined in § 3902 of Title 31, or by a patient or resident of a state facility, as defined in § 1131 of Title 16, at the time of the proceeding concerning an act that is a material element of any of the following offenses:

(1) Abuse, neglect, **exploitation** or mistreatment of an infirm adult or a patient/resident, as set forth in § 3913 of Title 31 and § 1136 of Title 16 respectively;

\* \* \* \*

(b) An out-of-court statement may be admitted as provided in subsection (a) of this section if:

\* \* \* \*

(2) a. The victim is found by the court to be unavailable to testify on any of these grounds and there is corroborative evidence to support the out-of-court statement:

1. The victim's death;

\* \* \* \*

b. The victim's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

\* \* \* \*

(d) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(e) In determining whether a statement possesses particularized guarantees of trustworthiness under subparagraph (b)(2)b. of this section, the court may consider, but is not limited to, the following factors:

- (1) The victim's personal knowledge of the event;
  - (2) The victim's communicative and cognitive abilities at the time the statement is made;
  - (3) Certainty that the statement was made, including the credibility of the person testifying about the statement;
  - (4) Any apparent motive the victim may have to falsify or distort the event, including bias, corruption, coercion or a history of false reporting;
  - (5) The timing of the victim's statement;
  - (6) Whether more than I person heard the statement;
  - (7) Whether the victim was suffering pain or distress when making the statement;
  - (8) The nature and duration of any alleged abuse, neglect, **exploitation** or mistreatment;
  - (9) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the victim's mental abilities;
  - (10) Whether the statement is spontaneous or directly responsive to questions;
  - (11) Whether the statement is suggestive due to improperly leading questions; or
  - (12) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the victim's statement.
- (f) The court shall support with findings on the record any rulings pertaining to the victim's unavailability and the trustworthiness of the out-of-court statement.

This statute was enacted in 1998 to circumvent the very problem faced here - the inability of an **elderly** and infirm person to testify at a trial in which one of the issues is his or her **financial exploitation** at the hands of another. *See* Timothy H. Barron, **Financial Exploitation of the Elderly - a Delaware Perspective**, 32 DEC Prosecutor 34 (Nov./Dec. 1998) (see attached).

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests that the Respondent's motion in limine to exclude the Family Court Documents be DENIED.

Dated: June 1, 2004

#### Footnotes

- 1 The facts are drawn primarily from the deposition testimony of Beverly Wik, Esquire, Dorothy's estate planning attorney, who will be called as a witness at the trial by the Estate.
- 2 Dorothy was able to locate an unsigned copy of her husband's will which contained his testamentary intent regarding the family home.

- 3 For example, the affidavit is not offered to prove Herbert had several guns in the house with which he intimidated his mother, only that she believed it to be so. Notwithstanding that fact, Herbert independently corroborated that he has such guns, so the reliability of key facts in the affidavit cannot be doubted.
- 4 As for statements made by Respondent contained in the affidavit, those, of course, are admissible. ORE 801(d)(2).
- 5 “**Financial exploitation** is, after all, a crime which involves a gradual process of cultivating the victim's trust. Far from impulsive, the **exploiter** must attempt to display compassion and caring toward her intended victim so as to slowly gain the victim's confidence. Once trust is gained, the crime becomes a series of crimes over a period of time: ... check writing and a host of other such **financial** transactions all inuring to the victim's detriment.” *See* Barron, 32 DEC Prosecutor 34, 36.
- 6 “If the **exploiter** [or abuser] is a family member, the victim may not want to see a loved on prosecuted like a common criminal. The victim may also be dependent upon the offender and may fear the loss of his caretaker. The status quo is sometimes looked upon by the victim as a far better alternative to being declared incompetent or being confined to a nursing home.” *See* Barron, 32 DEC Prosecutor 34, 38-39.
- 7 Indeed, in his view, Dorothy was improperly influenced to sign the affidavit. Even if that were the case, which it is not, the documents would still be probative of how Dorothy was capable of being influenced by others.
- 8 It should be admissible also under the catch-all, DRE Rule 807.

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