

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE MATTER OF THE ESTATE OF
KAREN H. FRISINA, AN INCAPACITATED
PERSON

APPEAL OF: KATHLEEN BRUNDAGE

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1338 WDA 2013

Appeal from the Order Entered July 15, 2013
In the Court of Common Pleas of Erie County
Orphans' Court at No(s): 160-2012

IN THE MATTER OF THE ESTATE OF
KAREN H. FRISINA, AN INCAPACITATED
PERSON

APPEAL OF: CHRISTINE FRISINA
BROWN

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1386 WDA 2013

Appeal from the Order Entered July 15, 2013
In the Court of Common Pleas of Erie County
Orphans' Court at No(s): 160-2012

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 08, 2014

These consolidated appeals¹ presently before this Court involve the Erie County orphans' court order, dated September 12, 2012, that adjudicated Karen Frisina an incapacitated person and appointed Edith Benson, Esq., as Plenary Guardian of the Person and the Estate of Karen Frisina. Kathleen Brundage (Appellee/Cross Appellant or Ms. Brundage)

¹ By order, dated September 19, 2013, this Court *sua sponte* consolidated these two appeals.

appeals from the order, dated July 12, 2013, and entered July 15, 2013, that essentially denied her exceptions to the accounting of Ms. Frisina's assets managed by Ms. Brundage as power of attorney. Christine Frisina Brown (Appellant or Ms. Brown) appeals from the order, dated and entered on July 15, 2013, that denied the joint cross-exceptions filed by her and Attorney Benson to the accounting of Ms. Frisina's assets managed by Ms. Brundage as power of attorney. After an extensive review, we affirm in part, vacate in part, and remand for further proceedings.²

Ms. Brundage and Ms. Brown are two of the five children of Ms. Frisina and her husband, Francis Frisina, Sr., who died in November of 2002. On August 17, 2012, Ms. Brown filed a petition requesting that Ms. Frisina be adjudicated an incapacitated person and that an emergency guardian be appointed. Following a hearing, the court entered an emergency order, dated August 17, 2012, which essentially accomplished the requests set forth in Ms. Brown's petition, *i.e.*, revoking the power of attorney granted Ms. Brundage, directing Ms. Brundage to provide an accounting, appointing Darlene Vlahos, Esq., as the examiner of Ms. Frisina's assets, appointing

² The orphans' court judge issued two separate opinions with one related to the issues raised by Ms. Brundage and one related to the issues raised by Ms. Brown. Both opinions were issued on the same day, contain the same common pleas docket number, and provide very similar discussions about the facts that gave rise to these appeals. However, they can readily be distinguished by the court's identification of the specific appellant in the first sentence of each opinion.

Attorney Benson as guardian, and declaring Ms. Frisina to be an incapacitated person.

Following Ms. Brundage's submission of her accounting, a hearing was held on September 12, 2012, and the order entered on that date finalized the directives contained in the court's emergency order. Ms. Brown filed objections to the accounting. Hearings on these objections were held on December 21, 2012, February 25, 2013, February 26, 2013, and on March 22, 2013. The court then filed an order on May 28, 2013, supported by findings of fact and conclusions of law. Specifically, the court determined that the transfer of real property from Ms. Frisina to Ms. Brundage was void and Ms. Brundage was directed to transfer the property back to Ms. Frisina. The court also found that the transfer of the Curian Capital LLC account was void and, thus, it required Ms. Brundage to reimburse Ms. Frisina for the full amount of \$145,472.28. Ms. Brundage was further ordered to reimburse Ms. Frisina for the unaccounted for assets in the amount of \$4,318.01 as to the Sammon IRA account and \$5,260.00 regarding the PNC checking account. Ms. Brundage was also directed to pay Attorney Vlahos' fee totaling \$11,395.65. Ms. Brundage filed exceptions relating to the May 28, 2013 order. Ms. Brown joined by Attorney Benson also filed exceptions to the May 28, 2013 order. The exceptions were primarily denied in the orders issued by the court and led to the appeals now before this Court.

We begin with Ms. Brown's appeal in which she raises the following three issues for our review:

A. Whether the trial court erred in failing to direct Respondent Kathleen Brundage to pay Petitioner Christine Frisina Brown's reasonable attorneys' fees incurred in prosecuting the objections to accounting?

B. Whether the trial court erred in refusing to authorize Petitioner Christine Frisina Brown to recover her reasonable counsel fees incurred in processing the objections to accounting from the fund ultimately recovered by the Estate of Karen H. Frisina from Respondent Kathleen Brundage?

C. Whether the trial court erred in refusing to award statutory interest on the monetary judgment entered against Respondent Kathleen Brundage?

Ms. Brown's brief at 2.

Ms. Brown's first two issues concern the orphans' court's refusal to grant attorneys' fees, either directly from Ms. Brundage or from the fund recovered by Ms. Frisina's estate. The orphans' court set forth the following reasons for refusing to grant attorneys' fees to Ms. Brown:

In the instant matter, this Lower Court denied [Ms. Brown's] request for attorneys' fees based on several factors. To begin with, this Lower Court chose not to award counsel fees against [Ms. Brundage] as this Lower Court was already surcharging [Ms. Brundage] for the full amount due to the Examiner of the Assets for services rendered in the instant action, in addition to the unaccounted for monies and the return of the real estate and the monies from the transfer of the Curian Capital LLC account. Additionally, [Ms. Brown] in the instant action failed to present any facts during the instant matter while the record was open, at which counsel had many opportunities at four (4) separate hearings to do so. [Ms. Brown's] counsel failed to establish facts to show that he is entitled to such compensation, such as the hourly rate the firm charged, what services were performed or how much time those services consumed.

Orphans' Court Opinion (O.C.O.) (Brown appeal), 10/14/13, at 25.

The orphans' court further indicated that the "common fund doctrine" did not apply to the circumstances of this case. The court relied on the following language from the decision in **Boeing Co. v. Van Gemert**, 444 U.S. 472 (1980), wherein the Supreme Court stated:

[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. ... The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.

O.C.O. at 25-26 (Brown's appeal) (quoting **Boeing**, 44 U.S. at 478). Thus, the orphans' court reasoned that:

While this Lower Court recognizes that Appellant received no personal benefit from the judgment, the common fund doctrine still does not apply in the instant matter. As cited in the **Estate of Wannamaker**, 460 A.2d 824, 825 (Pa. Super. 1983), the common fund "doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." **Id.** Karen Frisina, Appellant's mother, did obtain the benefit of this litigation and did not have to contribute to the cost of said litigation; however, Karen Frisina has not been unjustly enriched. Unjust enrichment is "[w]here one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied." **Braun v. Walmart Stores, Inc.**, 24 A. 3d 875, 896 (Pa. Super. 2011) *citing Meehan v. Cheltenham Twp.*, 189 A.2d 593, 595 (Pa. Super. 1963). "[T]he most significant element of the doctrine is whether the enrichment of the [one party] is unjust. The doctrine does not apply simply because the [one party] may have benefited as a result of the actions of the [other party]." **Braun v. Walmart Stores, Inc.**, 24 A. 3d 875, 896 (Pa. Super. 2011) *citing Styer v. Hugo*, 610 A.2d 347, 350 (Pa. Super. 1993).

Id. at 26.

Thus, despite recognizing that Ms. Brown did not personally benefit from the judgment, and that her mother, Ms. Frisina, did benefit without any contribution, the court concluded that Ms. Frisina's recovery of her funds was "in no way unjust." **Id.** Simply stated, the orphans' court concluded that no exceptional circumstances existed that would support the awarding of attorneys' fees to Ms. Brown.

Although the orphans' court relied on **Boeing**, we set out the following discussion relating to **Boeing** in **Estate of Wanamaker**, 460 A.2d 824, 825 (Pa. Super. 1983), stating:

The general rule is that each party to adversary litigation is required to pay his or her own counsel fees. In the absence of a statute allowing counsel fees, recovery of such fees will be permitted only in exceptional circumstances. One of the exceptional situations in which counsel fees may be recovered is where the work of counsel has created a fund for the benefit of many. This rule was stated by the Supreme Court of the United States in [**Boeing**], as follows:

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.... The common-fund doctrine reflects the traditional practice in courts of equity ... and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees.... The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." (Citations omitted).

Id. at 478, 100 S.Ct. at 749, 62 L.Ed.2d at 681-682.

It is fundamental that an attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation. The allowance or disallowance of counsel fees rests generally in the judgment of the auditing judge, and his or her findings of fact ... supported by competent evidence, are binding on appeal. The judgment of the auditing judge regarding the allowance or disallowance of counsel fees will not be interfered with except for abuse of discretion or, as some cases express it, palpable error.

Wanamaker, 460 A.2d at 825 (some citations omitted).

Our review of the record reveals that Ms. Brown first raised the issue of attorneys' fees in her proposed findings of facts and conclusion of law submitted to the orphans' court. She also asserted the request for attorneys' fees in in her concise statement and in the joint cross-exceptions she filed along with Attorney Benson. Therefore, an evidentiary hearing should have been held to determine a fair and reasonable fee in light of the fact that Ms. Frisina would have no "fund" if not for the actions of Ms. Brown. **See *In re Trust Estate of LaRocca***, 246 A.2d 337 (Pa. 1968). We understand that Ms. Frisina in reality is not unjustly enriched because she is recovering what was hers to begin with, but under the common fund doctrine she is perceived to have been unjustly enriched because she obtained the benefit of the litigation without any contribution. She is the sole beneficiary of a fund that was created due to the actions taken by Ms. Brown, at Ms. Brown's expense. Therefore, we conclude that Ms. Brown is entitled to recover reasonable attorneys' fees for her efforts. Accordingly, we reverse the court's denial of an award of attorneys' fees to Ms. Brown.

We acknowledge and do not disagree with the court's refusal to surcharge Ms. Brundage individually due to its determination that she was ordered to pay the entire fee for Attorney Vlahos' work as examiner of the assets. We further direct that the matter be remanded for a hearing at which Ms. Brown should be provided with the opportunity to submit evidence of the attorneys' fees she expended. Thereafter, the court should determine the amount of reasonable attorneys' fees to be paid to Ms. Brown from the funds recovered by the estate.

Ms. Brown's other issue concerns the orphans' court's failure to award statutory interest on the judgment entered by it. It appears that the court recognized that "post-judgment interest is imputed by statute...." O.C.O. (Brown's appeal) at 29. Therefore, the court suggested that if Ms. Brundage fails "to pay in full, the amounts as [o]rdered by this Lower Court, including the six percent interest per year that is statutorily imputed," *id.*, either Attorney Benson or Ms. Brown may file a motion for contempt and/or a petition for surcharge. Due to our decision to remand this matter with regard to the attorneys' fees issues, we direct that the issue as to interest be resolved at the same time with the court clarifying the interest due.

We next turn to Ms. Brundage's appeal. She raises the following four issues for our review.

1. The trial court erred in determining that the transfers of the real property at 704 West Smith Street, Corry, Pennsylvania and the Curian Capital Account from Karen Frisina to Kathleen

Brundage were procured through the exercise of undue influence upon Mrs. Frisina by Mrs. Brundage.

2. The trial court erred in ordering Kathleen Brundage to repay Karen Frisina \$145,472.28 to replace Curian Capital Funds transferred by Karen Frisina to Kathleen Brundage in that uncontroverted evidence showed that Mrs. Brundage used the Curian funds for Mrs. Frisina's expenses. The court's decision constitutes an unwarranted and unsupportable penalty against Mrs. Brundage.

3. The trial court erred in assigning the entire cost of the court appointed examiner's fee against Mrs. Brundage in that it was revealed the examiner's report that Christine Brown owned [sic] Mrs. Frisina \$5,000.00 for a loan not repaid prior to these proceedings.

4. The trial court erred in determining that the ABB Pension and Allianz annuity were not provided by Mrs. Brundage to Mrs. Frisina for Mrs. Frisina's personal use and expenses.

Ms. Brundage's brief at 3.

We note that the following guides our review of orphans' court matters:

In reviewing the decision of the orphans' court, our task is to assure that the record is free from legal error and to determine if the chancellor's findings are supported by competent and adequate evidence, and are not predicated upon capricious disbelief of competent and credible evidence. Our standard of review with respect to the factual findings of the auditing judge is clear: The credibility of the witnesses and the weight to be given their testimony is in the first instance to be determined by the auditing judge. His [or her] findings of fact, affirmed by the court en banc, like those of a jury, are conclusive unless they are unsupportable by the record.

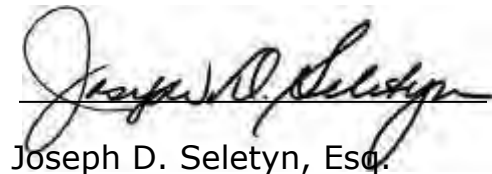
In re Estate of Duran, 692 A.2d 176, 178 (Pa. Super. 1997) (quoting ***In re Estate of Lychos***, 470 A.2d 136, 140 (Pa. Super. 1983)) (citations and quotation marks omitted).

We have reviewed the certified record, the briefs of the parties, the applicable law, and the thorough, well-crafted 41-page opinion of the Honorable Stephanie Domitrovich of the Court of Common Pleas of Erie County, dated October 14, 2013, relating to Ms. Brundage's appeal. We conclude that Judge Domitrovich's extensive opinion correctly disposes of the issues presented by Ms. Brundage. Accordingly, we adopt her opinion as our own and affirm the order on appeal on that basis.

Order appealed in 1338 WDA 2013 affirmed.

Order appealed in 1386 WDA 2013 vacated and remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

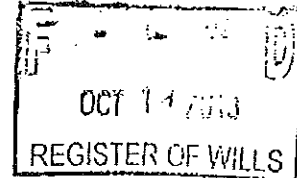
Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/8/2014

IN THE MATTER OF THE ESTATE OF :
KAREN H. FRISINA, :
An Incapacitated Person :

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

No. 160-2012



OPINION

Appearances: Joseph Martone, Esquire, appearing on behalf of the Appellant, Kathleen Brundage
S. Craig Shamburg, Esquire and Matthew Fuchs, Esquire, appearing on behalf of Appellee, Christine Frisina Brown
Edith Benson, Esquire, as Guardian and counsel, appearing on behalf of the Incapacitated Person, Karen Frisina
Darlene Vlahos, Esquire, Examiner of the Assets

Domitrovich, J., October 14, 2013

This matter is currently before the Superior Court of Pennsylvania on the appeal of Kathleen Brundage (hereinafter "Appellant") from this Lower Court's Orders of July 12 and July 15, 2013, which were supported by Findings of Fact and Conclusions of Law filed May 28, 2013. The issues presented by Appellant in the instant appeal are whether this Lower Court erred in determining the transfers of the real property and the Curian Capital Account were the result of undue influence; whether this Lower Court erred by directing Appellant to repay the funds from the Curian Capital account to the incapacitated person, her mother Karen Frisina; whether this Lower Court erred by surcharging the Appellant the full amount of the fees for the Examiner of the Assets; and whether this Lower Court erred in determining the payments from the ABB Pension and the Allianz Annuity were not provided to the incapacitated person, her mother, Karen Frisina. This Lower Court finds all four matters are without merit.

I. Procedural History

On August 17, 2012, Appellee, Christine Brown, filed a Petition to Adjudicate Incapacitated and Appoint Emergency Guardian. Following a hearing, an Emergency Order was

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entered by this Lower Court ordering 1) the revocation of the Durable Power of Attorney; 2) appointing Attorney Darlene Vlahos as Examiner of the Assets; 3) appointing Attorney Edith Benson as Emergency Guardian of the Person and Estate of Karen Frisina; and 4) Appellant provide an Accounting within twenty (20) days of the date of the Order. Appellant filed her Accounting of Assets Managed by Kathleen V. Brundage as Power of Attorney on September 5, 2012. Following a hearing on September 12, 2012, this Lower Court entered an Order adjudicating Karen Frisina an incapacitated person and appointing Attorney Edith Benson as Plenary Guardian of the Person and Estate of Karen Frisina. On September 25, 2012, Appellee, Christine Brown, filed Objections to the Accounting of Assets Managed by Kathleen V. Brundage as Power of Attorney for Karen H. Frisina. A hearing on Christine Brown's objections began on December 21, 2012 and was subsequently held on February 25, 2013, February 26, 2013 and March 22, 2013. On May 28, 2013, this Lower Court entered an Order amply supported by Findings of Fact and Conclusions of Law. On June 17, 2013, Appellant filed Exceptions to Findings of Fact, Conclusions of Law and Order filed May 28, 2013, and the Appellee, Christine Brown and Guardian, Edith Benson, Esquire filed Joint Cross Exceptions to the Findings of Fact and Conclusions of Law on June 26, 2013. This Lower Court addressed the Exceptions filed by Appellant in its Order dated July 12, 2013, and this Lower Court addressed the Joint Cross Exceptions filed by Appellee, Christine Brown and Guardian, Edith Benson, Esquire, in its Order dated July 15, 2013. Appellee, Christine Brown, filed a Notice of Cross Appeal on August 25, 2013, which this Lower Court addressed in a separate Opinion. Appellant, Kathleen Brundage, filed a Notice of Appeal in the above-captioned case on August 12, 2013, which is the subject of the instant Opinion.

II. Background

Karen Frisina, who was born on March 7, 1935, currently resides at Independence Court Assisted Living Facility located at 41 West Gore Road, Erie, Pennsylvania 16509. Karen Frisina is the widow of Francis Frisina, Sr., (hereinafter "Mr. Francis Frisina") who died suddenly on November 20, 2002. Karen Frisina has five children: Christine Brown, Francis Frisina II (hereinafter "Skip Frisina"), Steven Frisina, Scott Frisina and Kathleen Brundage (hereinafter collectively "siblings"). (*Objections Transcript, 3/22/13, morning session, p. 39, line 4-22*).

Christine Brown, the oldest of Karen Frisina's children, lives at 17261 Sligo Road, Kimbolton, Ohio, and is employed as a pediatric occupational therapist. (*Objections Transcript, 2/26/13, Christine Frisina Brown Testimony, p. 4, line 16-17; 3/22/13, morning session, p. 39, line 16-17; 2/26/13, Christine Frisina Brown Testimony, p. 4, line 20-21*). She has lived at this location in Ohio during the entire time period relevant to the instant proceedings. (*Objections Transcript, 3/22/13, morning session, p. 117, line 24-25*).

Skip Frisina, Karen Frisina's oldest son, has lived at 20010 South Center, Corry, Pennsylvania for the past fifteen (15) years. (*Objections Transcript, 2/22/13, p. 40, line 2-4*). Steven Frisina, Karen Frisina's second son, did not testify at any of the hearings in the instant matter.

Scott Frisina, Karen Frisina's third son, (*Objections Transcript, 2/26/13, p. 112-139, 3/22/13, p. 3-37*), graduated from Fordham University with a Bachelor of Science in Psychology. (*Objections Transcript, 2/26/13, p. 137, line 14-17*). Scott Frisina previously lived in Colorado but returned to Corry, Pennsylvania, in October of 1999 when he moved into his parents', Karen and Francis Frisina's, residence. (*Objections Transcripts, 3/22/13, morning session, p. 4, line 1-14*). During this time, Scott Frisina worked with his father researching stocks and bonds. (*Objections Transcripts, 2/26/13, p. 116, line 9-25*). In 2001, Scott Frisina obtained his-own

apartment in the City of Erie and commuted the long distance to Corry, Pennsylvania, each day to work with his father. (*Objections Transcripts, 3/22/13, morning session, p. 4, line 8-14; 2/26/13, p. 114, line 13-18*).

Kathleen Brundage, Karen Frisina's youngest daughter and Appellant in the instant matter, (*Objections Transcript, 3/22/13, morning session, p. 39, line 12-22*), resides at 1725 Center Road, Columbus, Pennsylvania, approximately three (3) miles from Karen Frisina's former residence in Corry, Pennsylvania. (*Objections Transcript, 2/26/13, p. 38, line 9-13*).

Before his death, Mr. Francis Frisina assumed a large majority of the responsibility of caring for his wife, Karen Frisina, and their home, including cleaning, maintenance, shopping, banking, etc. (*Objections Transcripts, 3/22/13, morning session, p. 5, line 3-9; 2/26/13, p.138, line 12 – p. 139, line 12; 2/26/13, Christine Frisina Brown Testimony, p. 4, line 19-25*). Following Mr. Francis Frisina's sudden death, all five (5) siblings gathered for numerous meetings to discuss family matters such as concerns for Karen Frisina's income and expenses going forward; the assets remaining for the care of Karen Frisina; and identification of future caregivers as Mr. Francis Frisina was no longer alive to assume those responsibilities.

The siblings realized Mr. Francis Frisina had no life insurance; the stocks were worth approximately \$150,000; the family home located at 704 West Smith Street, Corry, Pennsylvania, had no mortgage; and an account existed with Aunt Josephine Frisina, the sister-in-law of Karen Frisina and the paternal aunt of the siblings. The siblings discovered over \$300,000 existed in cash, and a monthly income of approximately \$2,000 to \$2,500 existed. They further discovered Karen Frisina had her own Macy's credit card, a Kohl's credit card and a Citibank credit card. (*Objections Transcripts, 2/26/13, p. 9, line 6-8, 3/22/13, morning session, p. 99, line 18 – p. 100, line 16, pg. 101, line 1-17*).

After realizing the status of the Estate, Skip Frisina assumed the responsibility of paying Karen Frisina's monthly bills and organizing her paperwork for approximately three (3) months after Mr. Francis Frisina's sudden death. (*Objections Transcript, 3/22/13, morning session, p. 43, line 10 - p. 47, line 2*). His responsibilities included coordinating Karen Frisina's receipt of her late husband's pension and social security payments, and initially securing health insurance for Karen Frisina through Mr. Francis Frisina's pension, which had a low monthly premium to cover her medications. (*Objections Transcripts, 3/22/13, morning session, p. 47, line 3-25*).

Before paying the bills, Skip Frisina stated he would first inform Karen Frisina as to the amount and nature of her bills and then ask her to sign the checks. Skip Frisina stated he believed that although Karen Frisina signed these checks, Karen Frisina did not understand the reasons for doing so. This procedure was common practice amongst all the siblings. (*Objections Transcript, 3/22/13, morning session, p. 45, line 6-25; 3/22/13, afternoon session, p. 7, line 1-24*). In fact, Skip Frisina explained from the time Mr. Francis Frisina died, Karen Frisina "was basically incapable of any financial decisions." (*Objections Transcript, 3/22/13, morning session, p. 46, line 12-14, p. 56, line 22 - p. 57, line 3, p. 76, line 17-18*). Furthermore, Skip Frisina explained, and most of the other siblings concurred, Karen Frisina would sign anything without hesitation and without reading it if one of her children, the siblings, requested her to do so. Karen Frisina trusted her children to do whatever they thought was in her best interests. (*Objections Transcript, 3/22/13, morning session, p. 88, line 18 - p. 89, line 3, p. 124, line 17 - p. 125, line 3*). Eventually, in 2003, Kathleen Brundage and Christine Brown excused Skip Frisina from his responsibilities of managing Karen Frisina's bills. (*Objections Transcript, 3/22/13, morning session, p. 48, line 5 - p. 49, line 5*).

In January or February of 2003, the siblings were all present at another family meeting with Aunt Josephine Frisina. (*Objections Transcripts, 2/26/13, p. 13, line 22 - p. 14, line 5*;

Christine Frisina Brown Testimony, p. 8, line 3-20). At this meeting, Aunt Josephine Frisina handed over approximately \$300,000 to the Frisina siblings, with the explicit instructions that said monies were to assist in the care of Karen Frisina due to Karen Frisina's declining mental condition. (*Objections Transcripts, 2/26/13, p. 12, line 9-20, p. 14, line 6-10, p. 31, line 20-25, p. 131, line 14-22; 3/22/13, morning session, p. 98, line 14-24; 2/26/13, Christine Frisina Brown Testimony, p. 9, line 13 - p. 10, line 14*).

Additionally, the siblings also discussed future caregivers for Karen Frisina. (*Objections Transcript, 2/26/13, Christine Frisina Brown Testimony, p. 10, line 25 - p. 11, line 24*). Initially, the siblings decided that after Mr. Francis Frisina died in 2002, Skip Frisina and Steven Frisina, his brother, would stay with Karen Frisina every night. This arrangement lasted for approximately two weeks. Their plan changed to where Karen Frisina was staying with Skip Frisina and his wife, Cheryl, at their home. This arrangement lasted approximately a month and a half. (*Objections Transcripts, 3/22/13, morning session, p. 42, line 18-25 - p. 43, line 1-9; 2/26/13, Christine Frisina Brown Testimony, p. 8, line 16-17*). Eventually, in 2007, Kathleen Brundage hired some at-home assistance to monitor Karen Frisina on a daily basis. (*Objections Transcript, 2/26/13, Christine Frisina Brown Testimony, p. 25, line 14-25*). Later that same year, Christine Brown raised concerns to Kathleen Brundage about their mother, Karen Frisina, living at home alone. Christine Brown was concerned Karen Frisina would fall and not be able to get back up. (*Objections Transcript, 3/22/13, morning session, p. 110, line 13 - p. 112, line 4; 2/26/13, Christine Frisina Brown Testimony, p. 26, line 1-7*). However, Kathleen Brundage responded to Christine Brown stating that Karen Frisina could not afford twenty-four (24) hour care. (*Objections Transcript, 3/22/13, morning session, p. 112, line 23 - p. 113, line 6*). Finally, in July of 2010, Kathleen Brundage placed Karen Frisina into an assisted-living home located at Colonial Terrace because Karen Frisina needed more assistance than the limited assistance home

caregivers were able to provide. (*Objections Transcript*, 2/26/13, *Christine Frisina Brown Testimony*, p. 26, line 1-13).

Previously in 2003, Karen Frisina's met with her attorney, Paul Carney, Esquire, to prepare her Will and Power of Attorney. (*Objections Transcript*, 12/21/12, p. 104, line 16 – 24). Attorney Paul Carney explained Karen Frisina should have a Power of Attorney because her husband, Mr. Francis Frisina, had recently died leaving no one to make decisions for her. (*Objections Transcript*, 12/21/12, p. 110, line 18 – p. 111, line 19). All five (5) siblings agreed Karen Frisina needed a Power of Attorney because she was incapable of making financial decisions and had a failing mental state. (*Objections Transcript*, 3/22/13, *morning session*, p. 75, line 16-24). Most of the siblings agreed Kathleen Brundage would serve as Karen Frisina's Power of Attorney based upon a note with instructions, which Mr. Francis Frisina had written in case of his demise. (*Objections Transcript*, 3/22/13, *morning session*, p. 102, line 3-14). Scott Frisina agreed Kathleen Brundage would be Karen Frisina's Power of Attorney because Kathleen Brundage lived in the closest proximity to Karen Frisina; (*Objections Transcript*, 3/22/13, *morning session*, p. 28, line 22-24, 2/26/13, p. 130, line 2-6); however, Skip Frisina did not agree to Kathleen Brundage being appointed to said position. (*Objections Transcript*, 3/22/13, *morning session*, p. 70, line 16-18). Instead, Skip Frisina believed two siblings should be appointed to exercise the Power of Attorney because Karen Frisina possessed such a great amount of monetary assets. (*Objections Transcript*, 3/22/13, *morning session*, p. 81, line 6-14).

Based on the above, Attorney Paul Carney prepared Karen Frisina's Will and Durable Power of Attorney in favor of her daughter, Kathleen Brundage, on January 9, 2003. Karen Frisina executed each of these documents in the presence of Attorney Paul Carney, Skip Frisina and Kathleen Brundage. (*Objections Transcript*, 3/22/13, *morning session*, p. 109, line 5-10).

The Durable Power of Attorney remains in effect until August 17, 2012, the date of the hearing to adjudicate Karen Frisina's incapacity. (*See Order of Court dated August 17, 2012*).

During the time period Kathleen Brundage served as Power of Attorney, Karen Frisina's assets were as follows: Allianz Annuity (original deposit \$139,499.62); real property in Corry, Pennsylvania (transferred to Kathleen Brundage September 13, 2005); Sammons Securities Non-IRA Account (liquidated and transferred into the Midland National Annuity); Sammons Securities IRA Account (liquidated in the amount of \$4,318.01); Curian Capital Account (balance of \$145,472.28 transferred to Kathleen Brundage on February 8, 2005); Midland National Insurance Company Annuity (balance remains); Note receivable from Christine Brown (balance of \$5,000.00, paid in full); PNC Bank Checking Account; TD Waterhouse Account (withdrawals in the amount of \$13,000.00 payable to Scott Frisina and Christine Brown); and a Certificate of Deposit (maturity value of \$3,227.92 deposited in PNC Bank Checking Account in December 2006). (*See Report of Examiner of the Assets filed May 28, 2013*). Darlene Vlahos, Esquire, as Examiner of the Assets, concluded \$11,683.10 was given as gifts to various family members from the PNC Checking Account, (*Objections Transcript, 2/25/13, p. 21, line 3-18*), and the amount of \$138,732.46 was withdrawn from the Curian Capital LLC account and later deposited into the PNC Checking Account. (*Objections Transcript, 2/25/13, p. 18, line 10-16*).

Eventually, the siblings became concerned about the character of Kathleen Brundage's decisions while acting as Power of Attorney when Christine Brown found credit card statements from Karen Frisina's account. The statements revealed Kathleen Brundage's unauthorized usage of Karen Frisina's credit card for Kathleen Brundage's own personal purchases, including vacations, which did not involve or benefit Karen Frisina. (*Objections Transcript, 2/26/13, p. 56, line 18 – p.57, line 22; 2/26/13, Christine Frisina Brown Testimony, p. 30, line 19 – p. 32, line 7*).

ii. Unaccounted for and Misuse of Karen Frisina's Funds

Darlene Vlahos, Esquire was appointed as the Examiner of the Assets, pursuant to 20 Pa. C.S. §751, by Order of Court dated August 17, 2012. *(See Order of Court dated 8/17/12)*. Darlene Vlahos, Esquire filed the Report of the Examiner of the Assets (hereinafter the "Report") on December 17, 2012, and provided testimony about her Report during the hearings held on December 21, 2012 and February 25, 2013. *(See the Report of the Examiner of Assets and Objections Transcripts dated 12/21/12 & 2/25/13)*. Darlene Vlahos, Esquire explained the Report only covered an examination of the assets, income and expenses commencing August 1, 2006 through August 10, 2012 because Kathleen Brundage failed to maintain accurate records and Kathleen Brundage had co-mingled funds to the point Kathleen Brundage was unable to produce records from January 9, 2003 through August 1, 2006. *(Objections Transcript, 2/25/13, p. 13, line 15 - p. 14, line 14)*.

Kathleen Brundage admitted she reviewed the Power of Attorney with Attorney Paul Carney before Karen Frisina signed it in 2003. *(Objections Transcript, 2/26/13, p. 41, line 21 - p. 42, line 22)*. Despite reviewing the responsibilities she had as the Power of Attorney with Attorney Paul Carney, Kathleen Brundage admitted she violated her fiduciary duties as Power of Attorney for her mother, Karen Frisina. *(Objections Transcript, 2/26/13, p. 48, line 11 - p. 49, line 1)*.

a. Misuse of Funds

During the time period of the Report, Kathleen Brundage co-mingled her individual and family's personal funds with that of Karen Frisina's funds. *(Objections Transcript, 2/25/13, p. 42, line 23 - p. 43, line 10)*. Kathleen Brundage admitted to using the PNC Checking account, which was in both her and Karen Frisina's name, to pay for not only Karen Frisina's personal needs but also for the personal needs of Kathleen Brundage and Kathleen Brundage's own

immediate family. (*Objections Transcript*, 3/22/13, afternoon session, p. 61, line 19 – p. 63, line 7).

Kathleen Brundage admitted to using Karen Frisina's credit card for Kathleen Brundage's own personal expenses such as cellphones (*Objections Transcript*, 2/26/13, p. 64, line 19 – p. 65, line 10, p. 68, line 4-23), computers (*Objections Transcript*, 2/26/13, p. 64, line 5-12), furniture for Kathleen Brundage's own Recreational Vehicle (*Objections Transcript*, 2/26/13, p. 69, line 12-25) and vacations to Cancun (*Objections Transcript*, 2/26/13, p. 57, line 5-10), New York City (*Objections Transcript*, 2/26/13, p. 65, line 22-25), Las Vegas (*Objections Transcript*, 2/26/13, p. 75, line 2-11) and Myrtle Beach (*Objections Transcript*, 2/26/13, p. 73, line 7-19). Kathleen Brundage admitted to applying for and opening a new credit card with Karen Frisina to pay Kathleen Brundage's personal debts because Kathleen Brundage did not have one of her own. (*Objections Transcript*, 3/22/13, afternoon session, p. 50, line 22 – p. 51, line 9, p. 82, line 24 – p. 83, line 23). Kathleen Brundage testified her reason for using her mother's credit cards for her own expenses was that Kathleen Brundage did not feel it was appropriate to use her husband's business credit card for their personal purchases. (*Objections Transcript*, 3/22/13, afternoon session, p. 33, line 18 – 24).

Kathleen Brundage charged over \$85,000.00 on Karen Frisina's credit cards during the seventy-two (72) month time period Darlene Vlahos, Esquire was able to examine Karen Frisina's assets. (*Objections Transcript*, 2/25/13, p. 41, line 12-21, p. 48, line 8-12). Darlene Vlahos, Esquire concluded the PNC Checking Account was used to pay for \$62,023.03 of the credit card purchases. (*Objections Transcript*, 2/25/13, p. 39, line 3-13). Kathleen Brundage is also responsible for the late fees charged on Karen Frisina's credit cards for failing to timely pay the bill. (*Objections Transcript*, 2/26/13, p. 61, line 17-21, p. 59, line 10-17).

Darlene Vlahos, Esquire concluded a total of \$26,142.71 was used for home maintenance repairs, pool expenses and real estate taxes relating to the real estate located at 704 West Smith Street, Corry, Pennsylvania. (*See the Report of the Examiner of the Assets, p. 9*). Darlene Vlahos, Esquire divided these amounts into categories reflecting the dates Karen Frisina was living in the assisted living home and the dates she was living at the property in Corry. However, during both of these time periods, Kathleen Brundage was the record owner of the real estate located at 704 West Smith Street, Corry, Pennsylvania. (*See the Report of the Examiner of the Assets, p. 7*).

b. Unaccounted for Funds

As explained above, the Report by Darlene Vlahos, Esquire, was only able to cover from August 1, 2006 until August 10, 2012 because Kathleen Brundage failed to maintain accurate records and co-mingled her mother's funds. Therefore, all monies, transactions and purchases between January 9, 2003 and August 1, 2006 are also unaccounted for. As it relates to August 1, 2006 until August 10, 2012, Darlene Vlahos, Esquire concluded Kathleen Brundage did not properly account for all payments received by Karen Frisina from the ABB Pension in the amount of \$18,620.70, for the time period covered in the Report. (*Objections Transcript, 2/25/13, p. 19, line 12 – 24*). Darlene Vlahos, Esquire concluded Kathleen Brundage did not properly account for payments received by Karen Frisina from the Allianz Annuity benefits in the amount of \$21,721.20, for the time period covering the Report. (*Objections Transcript, 2/25/13, p. 20, line 5-15*). Again, these amounts do not include the monies unaccounted for from the ABB Pension and Allianz Annuity received by Karen Frisina between January 9, 2003 and August 1, 2006.

Darlene Vlahos, Esquire concluded Karen Frisina's Sammon IRA Account was liquidated in the amount of \$4,318.01, of which the total amount could not be traced. (*See the*

Report of the Examiner of the Assets, p. 3). Darlene Vlahos, Esquire concluded \$9,639.35 was spent for miscellaneous expenses which could not be identified other than as provided by Kathleen Brundage. (*Objections Transcript*, 2/25/13, p. 21, line 19 – p. 22, line 15).

Darlene Vlahos, Esquire concluded a total of \$30,212.42 was unaccounted for by Kathleen Brundage from the PNC Checking Account via several different avenues. (*Objections Transcript*, 2/25/13, p. 18, line 17-25). \$24,932.42 were funds withdrawn from the Curian Capital Account but were not deposited into the PNC Account; \$5,260.00 were funds directly withdrawn from the PNC Checking Account; and \$20.00 was cash withheld from the ABB Pension deposit. (*See Court Exhibit i*).

IV. Karen Frisina's Cognitive Decline

Three (3) or four (4) years prior to Mr. Francis Frisina's demise in 2002, he had his wife, Karen Frisina, evaluated with respect to her declining mental condition. (*Objections Transcripts*, 3/22/13, morning session, p. 56, line 5-7). Thereafter, on April 4, 2000, Karen Frisina was evaluated by Dr. Schwabenbauer, a neuropsychologist, on the referral of Jeffrey Espers, D.O., a neurologist. (*Objections Transcript*, 2/25/13, p. 87, line 2 – p. 88, line 8, 3/22/13, morning session, p. 96, line 4-20; 2/25/13, p. 84, line 20 – p. 85, line 11). Dr. Schwabenbauer performed neuropsychological evaluations and a battery of tests to determine the extent of Karen Frisina's memory issues on seven (7) different occasions: April 4, 2000, April 15, 2003, September 9, 2003, November 16, 2004, April 4, 2007, May 16, 2007 and September 10, 2012, in response to family members' observations that Karen Frisina's memory, decision-making and problem-solving abilities were impaired. (*See Exhibits 3-8*).

a. Neuropsychological Evaluations

Following the assessment performed on April 4, 2000, Dr. Schwabenbauer's expert Report revealed scientific results indicating Karen Frisina's comprehension appeared mildly

compromised when more complex phrasing was introduced. Her immediate recall of verbal and nonverbal information fell to the "low end" of the average range; her insight into her current level of cognitive function was judged "poor;" she displayed delayed recall of verbal information which fell at the "borderline" range; and she had a significant reduction in verbal recall due to her loss of detail when recalling more meaningful, paragraph-length material and information derived from extended word lists. Dr. Schwabenbauer recommended Karen Frisina complete a follow-up neuropsychological examination in six (6) to nine (9) months to rule out the presence of a dementia process. Karen Frisina's daughter, Kathleen Brundage, accompanied her to this evaluation. (*See Exhibit 3*).

Following the assessment performed on April 15, 2003, Dr. Schwabenbauer's expert Report revealed scientific data demonstrating Karen Frisina had a consistent decline in memory function on select verbal recall. Karen Frisina's results also revealed her performance had declined to produce scores in the "extremely low" range; however, Karen Frisina's date of performance demonstrated her remaining memory scores, including language and perceptual function, remained well within expected limits. Dr. Schwabenbauer recommended Karen Frisina have prescribed medication and continue to follow up with her therapist, Mr. Bailey, in dealing with the loss of her husband. Dr. Schwabenbauer further recommended the family continue to supervise Karen Frisina, given her identified retrieval limitations. Karen Frisina's daughter, Kathleen Brundage, and one of her sons accompanied Karen Frisina to this evaluation. (*See Exhibit 4*).

Following the assessment performed on September 9, 2003, Dr. Schwabenbauer's expert Report revealed scientific test results consistent with those of a progressive dementia process. Karen Frisina continued to function within the average range in regard to general intellectual resources. Overall, Karen Frisina's dementia process had "stabilized" to some degree, in

contrast to the prior assessment. Dr. Schwabenbauer recommended the following: the family continue to monitor closely Karen Frisina's cognitive function and report any significant changes; Karen Frisina complete a driver's evaluation due to Karen Frisina's family raising serious concerns as to her ability to drive; and Karen Frisina continue to take her prescribed antidepressant medication. Karen Frisina was accompanied to this appointment by one of her sons. *(See Exhibit 5).*

Following the assessment performed on November 16, 2004, Dr. Schwabenbauer's expert Report revealed scientific results wherein Karen Frisina continued to experience difficulty with recalling basic information and continued to need someone to make transactions with her checking account. Although Karen Frisina's thought processes were logical, coherent and free from loose associations, Dr. Schwabenbauer recommended Karen Frisina continue to take Aricept (for dementia) and for Dr. Espers to add Namenda to further stabilize her cognitive function. He recommended a follow-up assessment be performed in three (3) to four (4) months to evaluate the impact of these new medications. Kathleen Brundage and Christine Brown accompanied Karen Frisina to this appointment. *(See Exhibit 6).*

Following the assessments performed and prepared on April 4, 2007 and May 16, 2007, Dr. Schwabenbauer's expert Reports revealed scientific test results wherein Karen Frisina evidenced a continued, consistent decline in cognitive functioning. Karen Frisina's verbal and visual memory performance consistently fell to the extremely low range. Karen Frisina demonstrated limited insight into the extent of her own cognitive limitations. Dr. Schwabenbauer recommended Karen Frisina's diagnosis remained consistent with that of a dementia process, "probably" Alzheimer's type, moderate level, with depression. Dr. Schwabenbauer further recommended Karen Frisina be supervised for medication and daily living activities, including Karen Frisina being enrolled in an assisted living program. Kathleen

Brundage, Christine Brown and Steve Frisina accompanied Karen Frisina to these appointments. (See Exhibit 7).

Despite the recommendation from Dr. Schwabenbauer and the concerns raised by Christine Brown about Karen Frisina falling and not being able to get back up, (*Objections Transcript, 3/22/13, morning session, p. 110, line 13 – p. 112, line 4; 2/26/13, Christine Frisina Brown Testimony, p. 26, line 1-7*), Kathleen Brundage indicated to her siblings that Karen Frisina could not afford twenty-four (24) hour care and Kathleen Brundage did not remove Karen Frisina from the Corry Property until July 2010 when Karen Frisina was placed into an assisted-living home, Colonial Terrace. (*Objections Transcript, 2/26/13, Christine Frisina Brown Testimony, p. 26, line 1-13*). Kathleen Brundage chose Colonial Terrace for Karen Frisina, indicating Colonial Terrace was all Karen Frisina could afford. (*Objections Transcript, 2/26/13, Christine Frisina Brown Testimony, p. 26, line 6 – p. 28, line 9; 3/22/13, morning transcript, p. 18, line 20 – p. 19, line 3*). Scott Frisina and Christine Brown believed placement in Colonial Terrace was temporary and Karen Frisina would be moved to a better facility with an Alzheimer's unit once a more appropriate facility could be secured. (*Objections Transcript, 3/22/13, morning session, p. 19, line 4-13, p. 114, line 3-11; 2/26/13, Christine Frisina Brown Testimony, p. 26, line 14-24*).

The siblings' concerns about Colonial Terrace included the lack of sufficient number of qualified staff at Colonial Terrace and the small sizes of the rooms, as well as the lack of stimulation and therapeutic care for the residents. (*Objections Transcript, 3/22/13, morning session, p. 114, line 9 – p. 115, line 1*). Additionally, the siblings learned staff at Colonial Terrace would leave Karen Frisina sitting in her room alone, lying on the floor when she fell, etc. (*Objections Transcript, 2/26/13, p. 99, line 11 – p.100, line 3; 2/26/13, Christine Frisina Brown Testimony, p. 27, line 7-22*). Christine Brown had contacted Kathleen Brundage regarding these

concerns to discuss removing Karen Frisina from Colonial Terrace. Kathleen Brundage informed Christine Brown that Karen Frisina was on a waiting list and would be moved to something better when available. (*Objections Transcript, 3/22/13, morning session, p. 115, line 12-18*). However, Kathleen Brundage never moved her mother, Karen Frisina, to a better, appropriate facility until this Lower Court appointed Edith Benson, Esquire as Plenary Guardian for Karen Frisina on August 17, 2012. (*Objections Transcript, 3/22/13, morning session, p. 115, line 9-11*).

Following the final assessment conducted on September 10, 2012, Dr. Schwabenbauer's expert Report revealed scientific data showing Karen Frisina had a marked degree of cognitive dysfunction, and a decline in measures of memory, executive function and language processing. Karen Frisina's level of self-awareness had markedly declined, and Karen Frisina had little comprehension of her surroundings. At that point, Karen Frisina required twenty-four (24) hour maintenance to ensure her own safety as she was "dependent" for all activities of daily living. Dr. Schwabenbauer opined as of his September 2012 analysis, he considered Karen Frisina as an incapacitated individual in regards to her decision-making capabilities. (*See Exhibit 8*). Dr. Schwabenbauer was not able to opine as to Karen Frisina's ability to make sound decisions during any of the relevant time periods because his evaluations focused mainly on Karen Frisina's memory problems; however, Dr. Schwabenbauer did state he would describe Karen Frisina's intellect as weakened. (*Objections Transcript, 2/25/13, p. 117, line 10-12*).

b. Family Observations

Aunt Josephine Frisina stated she believed her brother, Mr. Francis Frisina, was good at hiding Karen Frisina's true mental condition from the family. (*Objections Transcripts, 2/26/13, p. 15, line 14-15*). Aunt Josephine Frisina explained Mr. Francis Frisina managed the marital banking because Karen Frisina could not manage the finances due to her declining memory problems. (*Objections Transcripts, 2/26/13, p. 16, line 13-21*).). As an example, Aunt Josephine

Frisina explained an instance where Karen Frisina forgot she had already crossed the street to pick up the daily newspaper and was going to cross the street to pick up the same newspaper again. (*Objections Transcripts*, 2/26/13, p. 21, line 1-4). Aunt Josephine Frisina stated she believed Karen Frisina was exhibiting beginning stages and signs of dementia based on her daily experiences with Karen Frisina. (*Objections Transcripts*, 2/26/13, p. 17, line 17-18). Aunt Josephine Frisina recognized Karen Frisina's signs of dementia from witnessing her own sister suffer from similar symptoms of Alzheimer's disease. (*Objections Transcripts*, 2/26/13, p. 29, line 18-25).

Christine Brown visited Karen Frisina in Erie, Pennsylvania, either every other month or every third month after the demise of Mr. Francis Frisina in 2002. (*Objections Transcript*, 2/26/13, *Christine Frisina Brown Testimony*, p. 7, line 6-11, 3/22/13, morning session, p. 118, line 21 – p. 119, line 17). Over time, during these visits, Christine Brown noticed Karen Frisina forgetting within a five (5) minute time period what she had just eaten. (*Objections Transcript*, 2/26/13, *Christine Frisina Brown Testimony*, p. 16, line 1-6). Christine Brown described Karen Frisina in 1999 or 2000 as being on “a seven minute reel,” explaining Karen Frisina would say or ask something which she had mentioned minutes before. (*Objections Transcript*, 3/22/13, morning session, p. 96, line 4-23). She observed Karen Frisina not showering or changing her clothes daily. Christine Brown also recalled Karen Frisina not remembering to take her medication for the day. (*Objections Transcript*, 3/22/13, morning session, p. 110, line 18 – p. 111, line 22; 2/26/13, *Christine Frisina Brown Testimony*, p. 16, line 8-21). Christine Brown cited an instance in 2007, where Karen Frisina had planned on leaving her home in crop pants and sandals even though snow was on the ground outside. (*Objections Transcript*, 3/22/13, morning session, p. 110, line 18 – p. 111, line 22).

Additionally, Christine Brown cited occasions when she had taken Karen Frisina to the mall and Karen Frisina would wander away to the extent security had to be called to locate her. (*Objections Transcript*, 3/22/13, morning session, p. 94, line 7-15; 2/26/13, *Christine Frisina Brown Testimony*, p. 6, line 10-12), or where Karen Frisina would forget the meal she ordered at a restaurant and would become upset with the server when the food was brought to the table. (*Objections Transcript*, 3/22/13, morning session, p. 95, line 6-10).

In 2002, Scott Frisina had moved back into his mother's home where, Karen Frisina, resided in Corry, Pennsylvania. During the time Scott Frisina lived with Karen Frisina, he observed, on several occasions, Karen Frisina forgetting to take her medication and thereafter arguing that she had already taken her medication despite being shown the pill was still in the pill container. (*Objections Transcript*, 2/26/13, p. 117, line 4-18). Karen Frisina would fail to extinguish burning candles, turn off the stove and often lose the television remote control. (*Objections Transcript*, 3/22/13, morning session, p. 5, line 1 – page 7, line 11, p. 36, line 1-3; 2/26/13, p. 117, line 4-18). She argued with Scott Frisina about whether or not she had showered that day. She argued she had showered while Scott Frisina was out of the house but Scott Frisina knew this not to be true because the shower stall was dry. (*Objections Transcript*, 2/26/13, p. 116, line 2-8). Scott Frisina explained how Karen Frisina could not understand grocery shopping. He cited an incident in which he took Karen Frisina to the store with him and “split up” the list. When he returned after finding the items on his part of the list, he found Karen Frisina standing in the same location he left her, with nothing from her half of the list. (*Objections Transcript*, 2/26/13, p. 118, line 16 – p. 119, line 12). Karen Frisina lost interest in previous hobbies such as reading books and socializing with her friends. (*Objections Transcripts*, 2/26/13, p. 113, line 14 – p. 114, line 7). Scott Frisina also explained Karen Frisina became obsessed with making sure doors to the house were locked to the extent she would awake

multiple times per night to re-check these doors. (*Objections Transcripts*, 2/26/13, p. 117, line 19 – p. 118, line 7).

Scott Frisina remained in Corry until August of 2004, when he returned to living in the City of Erie, Pennsylvania, for a new and better-paying job. (*Objections Transcript*, 3/22/13, morning session, p. 4, line 12-21; 2/26/13, p. 125, line 5-6). He acknowledged Karen Frisina needed someone to care for her, even in 2004, despite his decision to leave and return to the City of Erie, Pennsylvania. (*Objections Transcript*, 2/26/13, p. 125, line 3-25).

Skip Frisina explained he began having concerns regarding Karen Frisina's mental health condition dating back to 1996 or 1997. Skip Frisina cited family vacations where Karen Frisina would forget which umbrella was theirs at the beach, and she could not remember the type of meal she ordered at a restaurant. (*Objections Transcript*, 3/22/13, morning session, p. 40, line 11 – p. 41, line 4). Skip Frisina also cited an incident where Karen Frisina was arrested for shoplifting approximately nineteen (19) to twenty (20) years ago because she had forgotten to pay for an item when shopping in a store. (*Objections Transcript*, 3/22/13, morning session, p. 41, line 19-25).

Skip Frisina visited with his mother four (4) to six (6) times a week to bring her food and help her find the television remote control as she often lost it. (*Objections Transcript*, 3/22/13, morning session, p. 52, line 1- p. 53, line 19). Skip Frisina also assisted Karen Frisina with grocery shopping and cleaned her refrigerator of spoiled food. (*Objections Transcript*, 3/22/13, morning session, p. 54, line 17 – p. 55, line 4). Skip Frisina also observed Karen Frisina was not bathing or showering to clean herself regularly, was incontinent and routinely forgot to take her medications. (*Objections Transcripts*, 3/22/13, morning session, p. 51, line 17-25, p. 61, line 12-16).

Kathleen Brundage admitted she accompanied her mother, Karen Frisina, to Dr. Schwabenbauer's office in 2004 based on her concerns with Karen Frisina's memory and depression. (*Objections Transcript*, 2/26/13, p. 91, line 18 – p. 92, line 24). Also, due to Kathleen Brundage's admitted concerns over her mother's ability to drive as early as 2005, Kathleen Brundage requested the doctor remove Karen Frisina's driver's license (*Objections Transcript*, 2/26/13, p. 76, line 6-17, p. 90, line 14-21) based on conversations between Kathleen Brundage and Karen Frisina where Karen Frisina had an obvious misunderstanding of the rules of driving. Her misunderstandings included driving through a drive-thru backwards and she believed she always had the right-of-way at traffic intersections. (*Objections Transcript*, 2/26/13, p. 89, line 4 – p. 90, line 1). The doctor revoked her license in 2005 based on this request. (*Objections Transcript*, 2/26/13, p. 90, line 14-21; 3/22/13, afternoon session, p. 78, line 16 - 25).

V. Transfer of the Curian Account and the Real Property

Michael Palmer and Bruce Palmer are financial consultants from Palmer Financial LLC, located in Erie, Pennsylvania, (*Objections Transcript*, 12/21/12, p. 60, line 17 – p. 61, line 6), who worked with Kathleen Brundage and Karen Frisina in creating the Curian Capital LLC account on February 17, 2004, with an initial deposit amount of \$146,274.46. (*Objections Transcript*, 12/21/12, p. 62, line 21 – p. 63, line 3, p. 92, line 18 – p. 93, line 1, See Report of the Examiner of the Assets, Exhibit C). In 2005, Michael Palmer and Bruce Palmer also worked with Karen Frisina and Kathleen Brundage, at multiple meetings, regarding the transfer of the Curian Capital LLC account to Kathleen Brundage. (*Objections Transcript*, 12/21/12, p. 80, line 12-20). Eventually, Michael Palmer wrote a letter dated February 8, 2005, which transferred Karen Frisina's Curian Capital LLC account to Kathleen Brundage. Michael Palmer witnessed Karen Frisina sign this letter. (*Objections Transcript*, 12/21/12, p. 63, line 12 – p. 64, line 6, See Report

of the Examiner of the Assets, Exhibit D). Kathleen Brundage admitted she never informed her siblings that Karen Frisina had transferred the Curian Capital LLC account to herself personally. (*Objections Transcript*, 3/22/13, afternoon session, p. 40, line 11 -18).

Michael Palmer explained Karen Frisina transferred the Curian Capital LLC account to Kathleen Brundage personally as part of Karen Frisina's estate planning and that said transfer would start the "look-back" period for determining medical assistance. (*Objections Transcript*, 3/22/13, morning session, p. 125, line 15-18; 12/21/12, p. 66, line 10 – 7, p. 65, line 2-9). Bruce Palmer stated he observed Karen Frisina during their meetings, and he was not concerned that Karen Frisina did not understand the nature of her actions. (*Objections Transcript*, 12/21/12, p. 94, line 17 – p. 95, line 18). However, both Michael and Bruce Palmer stated they had no knowledge of any treatment Karen Frisina was receiving, and they admitted they are not trained physicians or trained to analyze someone's emotional or cognitive functions. (*Objections Transcript*, 12/21/12, p. 72, line 29 – p. 73, line 6, p. 99, line 2-24). Michael Palmer admitted he had heard some discussion regarding Karen Frisina's mental health before the transfer. He remembered one specific instance where he was informed about Karen Frisina putting flour in her coffee instead of sugar. (*Objections Transcript*, 12/21/12, p. 71, line 9-22). The Curian Capital LLC account had been closed by the time of the instant hearings as said account was depleted of funds. (*Objections Transcript*, 3/22/13, afternoon session, p. 72, line 4 – 14).

As early as February 3, 2005, Karen Frisina met with Paul Carney, Esquire to discuss the advantages and disadvantages of transferring Karen Frisina's home located at 704 West Smith Street, Corry, Pennsylvania. (*Objections Transcript*, 12/21/12, p. 104, line 19 – p. 105, line 18). Attorney Paul Carney also discussed the upcoming changes occurring with Medicaid at that time (*Objections Transcript*, 12/21/12, p. 107, line 4 – p. 108, line 2), and whether or not it would be beneficial for Karen Frisina to transfer the real estate to Kathleen Brundage sooner rather than

later. (*Objections Transcript*, 12/21/12, p. 108, line 7-14). Thereafter, Attorney Paul Carney prepared a Quit Claim Deed, which was executed on September 13, 2005, (*See Report of the Examiner of the Assets, Exhibit B*), transferring her home, the real estate located at 704 West Smith Street, Corry, Pennsylvania from Karen Frisina to Kathleen Brundage personally. Attorney Paul Carney did not personally witness the signing of this Deed. (*Objections Transcript*, 12/21/12, p. 108, line 21 – p. 110, line 5). Attorney Paul Carney stated he believed Karen Frisina was aware of her assets at the time of the transfer of her home located at 704 West Smith Street, Corry, Pennsylvania; he considered his client's mental status and the time period he was with Karen Frisina there appeared no concerns. (*Objections Transcript*, 12/21/12, p. 106, line 3 – 24).

Scott Frisina and Christine Brown were neither present at, nor aware of, the transfer of their mother's home located at 704 West Smith Street, Corry, Pennsylvania, until a couple of months after the transfer occurred, (*Objections Transcript*, 2/26/13, p. 126, line 4 – p. 127, line 15) nor were Scott Frisina and Christine Brown aware of the transfer of the Curian Capital LLC account until the beginning of the instant case, after Kathleen Brundage provided the Accounting as directed by this Lower Court. (*Objections Transcript*, 3/22/13, morning session, p. 10, line 14-21, p. 109, line 21 – p. 110, line 5). Scott Frisina believed at the time Karen Frisina transferred the real estate located at 704 West Smith Street, Corry, Pennsylvania, Karen Frisina was incapable of comprehending anything beyond the intent of this type of major decision being for estate planning only. (*Objections Transcript*, 2/26/13, p. 127, line 21 – p.128, line 5).

Skip Frisina agreed his mother's home located at 704 West Smith Street should have been transferred out of Karen Frisina's name for estate planning purposes. He explained this planning was necessary in order to sell the home for Karen Frisina's future care. (*Objections Transcript*, 3/22/13, morning session, p. 82, line 12 – p. 83, line 8). However, Skip Frisina was

also not involved in, nor present, at either of the instances where Karen Frisina transferred the Curian Capital LLC account (*Objections Transcript*, 3/22/13, morning session, p. 70, line 23 – pg. 71, line 1) or the real estate to Kathleen Brundage. (*Objections Transcript*, 3/22/13, morning session, p. 72, line 1-4).

Darlene Vlahos, Esquire expressed concerns regarding the transfer of the Curian Capital LLC account and the real estate, located at 704 West Smith Street, due to Kathleen Brundage's failure to document appropriately the transfers with the Internal Revenue Service. Kathleen Brundage failed to file the appropriate Gift Tax Return despite being aware that she had to file a record of these transfers. Attorney Vlahos stated although no tax was due on the transfers, a Gift Tax Return was required to be reported since the transfer of assets exceeded the Gift Tax exemption limits. (*Objections Transcript*, 2/25/13, p. 20, line 16 – p. 21, line 1).

Kathleen Brundage admitted at the time she transferred Karen Frisina's real estate, located at 704 West Smith Street, Corry, Pennsylvania, to herself, said transfer was for the purpose of estate planning, under Kathleen Brundage's assumption this real estate would be returned to Karen Frisina to pay for Karen Frisina's future care. (*Objections Transcript*, 2/26/13, p. 96, line 6 – p. 98, line 11). However, Kathleen Brundage stated during the instant hearing this real estate is no longer available because she needs this real estate, her mother's home, asset to pay for Kathleen Brundage's own personal debts such as counsel fees from these instant proceedings. (*Objections Transcript*, 2/26/13, p. 101, line 13-20, p. 106, line 25 – p. 107, line 21).

VI. The Guardian's Position

Attorney Edith Benson's position as counsel and Guardian for Karen Frisina is "that at a minimum [Kathleen Brundage] should be directed to either transfer ownership of the house or the 2013 tax assessed value to Ms. Frisina's estate and to return all untraceable funds....This does not take into consideration funds possibly due from the time the Power of Attorney was

executed to the beginning of Atty. Vlahos' Report or inappropriate credit card purchases. The guardian's position is based on the need for funds for Ms. Frisina, not the total amount for which she may be entitled to." (*See Guardian's Memorandum, filed 5/6/13*).

VII. Analysis

As previously stated herein, Appellant, Kathleen Brundage, filed a Notice of Appeal on August 12, 2013. This Lower Court then directed the Appellant, Kathleen Brundage, to file her Concise Statements of Matters Complained of on Appeal within twenty-one (21) days, which were subsequently filed on August 30, 2013. Petitioner filed a Notice of Cross Appeal on August 23, 2013, which this Lower Court will address in a separate Opinion attached hereto as Exhibit A) as the cases were not consolidated upon appeal in the Superior Court.

In her Pa. R.A.P. 19(25)(b) Concise Statement of Matters Complained of on Appeal, Appellant, Kathleen Brundage, raises four issues, which are stated verbatim herein:

- (1) The Trial Court erred in determining that the transfers of the real property at 704 West Smith Street, Corry, Pennsylvania and the Curian Capital account from Karen Frisina to Kathleen Brundage were procured thru the exercise of undue influence upon Mrs. Frisina by Mrs. Brundage;
- (2) The trial court erred in ordering Kathleen Brundage to repay Karen Frisina \$145,472.28 to replace Curian Capital funds transferred by Karen Frisina to Kathleen Brundage in that uncontroverted evidence showed that Mrs. Brundage used the Curian funds for Mrs. Frisina's expenses. The court's decision constitutes an unwarranted and unsupportable penalty against Mrs. Brundage;
- (3) The Trial Court erred in assigning the entire costs of the court appointed examiner's fee against Mrs. Brundage in that it was revealed by the examiner's report that Christina Brown owed Mrs. Frisina \$5,000.00 for a loan not repaid prior to these proceedings; and
- (4) The Trial Court erred in determining that the payments from the ABB Pension and Allianz annuity were not provided by Mrs. Brundage to Mrs. Frisina for Mrs. Frisina's personal use and expenses.

Pertaining to the first matter complained of, this Lower Court addressed this issue in it's Findings of Fact and Conclusions of Law entered on May 28, 2013 and the Order dated on July 12, 2013 entered in response to the Exceptions filed by Appellant. Appellant asserts this Lower

Court erred in determining the transfers of her mother's real property at 704 West Smith Street, Corry, Pennsylvania and the Curian Capital account from Karen Frisina to Appellant were procured through the exercise of undue influence upon Mrs. Frisina by Appellant.

In order to effectuate properly a valid inter vivos gift, the alleged donee must prove by clear, precise and convincing evidence the prerequisite necessary elements of donative intent and delivery. *Hera v. McCormick*, 625 A.2d 682, 686 (Pa.Super. 1993) referring to *Estate of Korn*, 480 A.2d 1233 (Pa.Super. 1984) and *In Re Pappas Estate*, 239 A.2d 298 (Pa. 1968). "Donative intent" is defined as the donor intending to make a gift to be done immediately, not at an uncertain future time. *Wagner v. Wagner*, 353 A.2d 819 (Pa. 1976). Furthermore, "[a]s between parties so related, if it appears that there was a voluntary delivery without explanatory words and a retention by the transferee, it can be assumed that there was an intention to give." *Brightbill v. Boeshore*, 122 A.2d 38, 42 (Pa. 1956) referring to *Vogan v. Jordan*, 92 Pa.Super. 519.

The Pennsylvania Supreme Court has described the clear and convincing evidence standard as follows:

'(T)he witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue'

Hera v. McCormick, 625 A.2d 682, 689 (Pa.Super. 1993) citing *In re Fickert's Estate*, 461 Pa. 653, 658 (1975) (quoting *La Rocca Trust*, 411 Pa. 633, 640, 192 A.2d 409, 413 (1963).

In the instant matter, the evidence clearly demonstrates the element of delivery has been met in regards to both the transfer of the real property and the transfer of the Curian Capital LLC account. The deed to the real estate, located at 704 West Smith Street, Corry, Pennsylvania, was transferred from Karen Frisina to Appellant on September 13, 2005, via a Quit Claim Deed. This transaction is evidenced by Exhibit B attached to the Report of the Examiner of Assets filed

by Darlene Vlahos, Esquire. Additionally, the entirety of the Curian Capital LLC account was transferred from Karen Frisina (Account RA0329600J) to Appellant, Kathleen Brundage, (Account P00000248584) via letter dated February 8, 2005. This transaction is evidenced by Exhibit D attached to the Report of the Examiner of Assets filed by Darlene Vlahos, Esquire.

The element of donative intent is also sustained in the instant matter. In regards to the real estate, located at 704 West Smith Street, Corry, Pennsylvania, testimony provided by Attorney Paul Carney revealed he had met with Karen Frisina on February 3, 2005 to discuss the advantages and disadvantages of transferring her real estate for estate planning purposes. Due to the transfer of her real estate being beneficial sooner rather than later because of upcoming changes in the law regarding Medicaid at that time, Attorney Carney prepared a Quit Claim Deed to effectuate this transfer, which was completed and signed on September 13, 2005. This Quit Claim Deed is clear evidence of proper donative intent as it relates to the home of Karen Frisina located at 704 West Smith Street, Corry, Pennsylvania.

In regards to the Curian Capital LLC account, Michael and Bruce Palmer, Karen Frisina's financial consultants, revealed Karen Frisina and Kathleen Brundage have had multiple meetings with them to discuss the benefits of transferring the Curian Capital LLC account as part of Karen Frisina's estate planning. Following these meetings, Michael Palmer prepared the letter dated February 8, 2005 from Karen Frisina to Curian Capital LLC to effectuate the transfer of the Curian Capital LLC account to Kathleen Brundage. These meetings and the letter are clear evidence of proper donative intent as it relates to the Curian Capital LLC account. Therefore, based on the above, this Lower Court concludes the aforementioned evidence amply supports the finding of a prima facie case of inter vivos gifts by clear and convincing evidence.

As this Lower Court has concluded the necessary elements of an inter vivos gift have been met, the burden then shifts to the Appellee, Christine Brown, to rebut the validity of the

gifts. To prove undue influence, the contestant must establish three elements by clear and convincing evidence: 1) there was a confidential relationship between the proponent and donor; 2) the proponent received a substantial benefit; and 3) the donor had a weakened intellect at or around the time of the transfer. *In re Angle*, 777 A.2d 114, 123 (Pa.Super.2001)(internal citations omitted); *See In re Estate of Clark*, 461 Pa. 52, 334 A.2d 628 (1975). Once the contestant has met her burden by establishing these three elements, the burden then shifts to the proponent to establish the absence of undue influence. *In re Estate of Jakiella*, 353 Pa.Super. 581, 585-86, 510 A.2d 815, 817-18 (1986)(citing *Estate of Ross*, 316 Pa.Super. 36, 462 A.2d 780 (1983)). Each of these three elements will be addressed in turn.

"[A] confidential relationship exists whenever circumstances make it certain that the parties did not deal on equal terms but that on one side there was an over-mastering influence, and on the other, dependence or trust, justifiably reposed." *In re Estate of Jakiella*, 353 Pa.Super. 581, 586, 510 A.2d 815, 817- 818 (1986)(citing *Estate of Ross*, 316 Pa.Super. 36, 462 A.2d 780 (1983). "It is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." *In re Estate of Fritts*, 906 A.2d 601, 608 (Pa.Super.2006) (citing *eToll Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 23 (Pa.Super.2002) (citing *Basile v. H & R Block*, 777 A.2d 95, 102 (Pa.Super.2001), *appeal denied*, 569 Pa. 714, 806 A.2d 857 (2002)).

The existence of a power of attorney has been used as evidence in establishing a confidential relationship. *See Estate of Lakatosh*, 441 Pa. Super. 133, 141, 656 A.2d 1378, 1383 (1995)(stating existence of a power of attorney given by one person to another is a clear indication of a confidential relationship and this is particularly true when holder of the power of attorney has spent a great deal of time with decedent or assisted in decedent's care); *Foster v.*

Schmitt, 429 Pa. 102, 108, 239 A.2d 471, 474 (1968)(stating “if there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former’s entire life savings, this Court has yet to see such indicia.”); *In re Estate of Clark*, 461 Pa. 52, 63, 334 A.2d 628, 634 (1975)(stating “a confidential relationship between the deceased and John H. Smith is clearly supportable by the evidence of the power of attorney over [decedent’s] sizeable checking account”). The clearest indication of a confidential relationship is where an individual has given power of attorney over savings and finances to another party. *In re Estate of Fritts*, 906 A.2d 601, 608 (Pa.Super.2006) (*In re Estate of Lakatos*, 656 A.2d 1378, 1383 (1995) (citing *In re Estate of Bankovich*, 496 A.2d 1227, 1229 (1985)). Furthermore, a parent-child relationship is a factor to be considered when evaluating whether a confidential relationship exists. *Estate of Keiper*, 454 A.2d 31, 34 (Pa.Super. 1982).

In the case at hand, Appellant exercised an “over-mastering influence” over Karen Frisina. This finding and conclusion are supported throughout the testimony provided by Dr. Schwabenbauer, Skip Frisina, Christine Brown and even includes Appellant herself. Directly following Mr. Francis Frisina’s death in 2002, Skip Frisina initially assumed the responsibility of ensuring Karen Frisina’s monthly bills were paid as the siblings knew Karen Frisina was unable to manage her own financial affairs. Skip Frisina explained when he assumed this financial responsibility, the process became that he would inform Karen Frisina as to the purpose for each check and then ask her to sign it. Karen Frisina never hesitated to sign any checks. Skip Frisina explained although he would tell Karen Frisina the purposes for each check, Karen Frisina did not appear to comprehend but would just routinely sign each check regardless based on her trust of her children. Skip Frisina also explained Karen Frisina would sign anything, not just checks, without hesitation or question if asked to do so by one of her children.

Furthermore, in 2003, Christine Brown explained all five siblings were aware Karen Frisina needed a Power of Attorney because Karen Frisina was incapable of managing her own financial affairs. Appellant was appointed as Karen Frisina's Power of Attorney on January 9, 2003, and from then on, Kathleen Brundage was solely responsible for managing all of Karen Frisina's financial affairs until 2012 when this Lower Court appointed a Plenary Guardian for Karen Frisina. Christine Brown explained the normal procedure which was followed when something needed to be signed by Karen Frisina. The siblings would explain the purpose of the document to Karen Frisina, who would respond by stating her children should do whatever they thought was in her best interests. Karen Frisina never questioned any of her children's requests nor sought separate counsel when it came to her own financial or physical care. Appellant, herself, even admitted and conveyed to Dr. Schwabenbauer that Karen Frisina could not handle transactions regarding her own checkbook. It is clear from the facts Appellant had full control over Karen Frisina's entire life savings from the day the Power of Attorney was signed on January 9, 2003, as evidenced by her repeated misuse of Karen Frisina's funds. It is also clear that not only did Karen Frisina completely trust her daughter, Appellant, with her life's savings without any hesitation, but also Karen Frisina could not comprehend or understand whether or not something was in her financial best interests.

In the Exceptions, Appellant admitted Karen Frisina was unable to manage her own financial affairs. However, Appellant still argued a confidential relationship did not exist between Karen Frisina and Appellant because all of Karen Frisina's children consulted with her on financial matters. The examples Appellant gave included the money Scott Frisina received on a weekly basis and the \$5,000.00 loan given to Christine Brown. However, what Appellant failed to recognize is that while Scott Frisina did receive a salary of \$300.00 a week and Christine Brown did borrow \$5,000.00, both of these situations were with the consent of and as a

result of actions by Appellant, their sister, as Power of Attorney for their Mother, Karen Frisina. More importantly, Appellant's argument failed to address the simple fact that only Appellant served as the Power of Attorney for Karen Frisina, not any of the other four children. As previously explained in this Lower Court's Conclusions of Law and the instant Opinion, the law is clear that a confidential relationship is presumed to exist as a matter of law between principal and agent. *Leedom v. Palmer*, 177 A. 410, 411-12 (Pa. 1922). The caselaw clearly establishes that a parent-child relationship is a factor to be weighed heavily when evaluating whether a confidential relationship exists. *In re Estate of Bankovich*, 496 A. 2d 1227, 1229-30 (Pa. Super. 1985); *Estate of Keiper*, 454 A.2d 31, 34. When determining whether a parent-child relationship rises to the level of confidential relationship, courts will often look to whether the child exercised any control over the parent's finances and decision-making as well as the degree of control the child exercised over the parent. *Gordon v. Gordon*, 9 Phila. 528, 535 (C.P. 1983). Appellant was not only Karen Frisina's daughter, but also Karen Frisina's agent as Power of Attorney, and Appellant clearly exercised significant and abundant control over Karen Frisina's finances and physical well-being. Appellant boldly used Karen Frisina's assets for Appellant's own personal expenditures, which clearly did not benefit Karen Frisina, and Appellant was the individual who accepted responsibility for ensuring Karen Frisina received adequate daily care and was entrusted by Karen Frisina to do so. Therefore, a confidential relationship clearly existed between Appellant and Karen Frisina at the time of the transfers which Appellant made.

The second element which must be fulfilled in order to establish undue influence is the proponent must have received a "substantial benefit." A substantial benefit is a benefit that is "of sufficient size to lend credence to the position that undue influence is presumed to have been exerted." *Huber Estate*, 26 Fiduc. Rep. 180, 184 (O.C. Dauph. 1976). In the instant case, Appellant became the sole recipient of two gifts totaling an approximate value of \$250,000.00 in

the transfer of the real estate, located 704 West Smith Street, Corry, Pennsylvania, and the transfer of the Curian Capital LLC account.

In the Exceptions, Appellant argued she allegedly did not receive a substantial benefit from the transfer of the Karen Frisina's home, located at 704 West Smith Street, Corry, Pennsylvania, and the Curian Capital LLC account because Appellant allegedly used the entirety of the funds from the Curian Capital LLC account for Karen Frisina's expenses and that by transferring the real estate in Corry, Pennsylvania, the house is still available for funds for Karen Frisina's care. However, at the time of the hearings, Appellant admitted that although the transfer of the real estate was initially for estate planning purposes, Appellant is no longer willing to utilize or transfer this property back to Karen Frisina because she, Appellant, claims she needs the real estate to pay for her own personal litigation debts. (*Objections Transcript*, 2/26/13, p. 96, line 6 – p. 98, line 11, p. 101, line 13-20, p. 106, line 25 – p. 107, line 21). Furthermore, Appellant's assertion that the entirety of the funds were used for Karen Frisina's expenses is completely unfounded in the record as Appellant admitted she comingled her individual and immediate family's personal funds with that of Karen Frisina's funds and she failed to maintain accurate records of the disbursements/expenses of the purchases and expenditures from the PNC Checking Account, thereby rendering it impossible for the expert, the Examiner of the Assets, Darlene Vlahos, Esquire, to confirm or prove the funds deposited were used solely for Karen Frisina's benefit. (*Objections Transcript*, 2/25/13, p. 42, line 23 – p. 43, line 10; 2/26/13, p. 44, line 2 – p. 45, line 24, p. 46, line 25 – p. 47, line 4). Therefore, Appellant received a substantial benefit from these transfers.

To establish the final element of undue influence, sufficient evidence must exist to demonstrate the donor suffered from weakened intellect. Weakened intellect "need not amount to testamentary incapacity. Undue influence is generally accomplished by a gradual, progressive

inculcation of a receptive mind.” *In-re Estate of Clark*, 334 A.2d at 634. “Although our cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation.” *See Owens v. Mazzei*, 847 A.2d 700, 707 (Pa.Super. 2004). Physical infirmities alone are not sufficient to establish a weakened intellect. *Estate of Glover*, 669 A.2d 1011 (Pa.Super.1996).

Petitioner has presented ample evidence to prove and has proven Karen Frisina indeed suffered from a weakened intellect at the time of these transfers in 2005. Dr. Schwabenbauer had performed numerous psychological tests, evaluations and assessments, on Karen Frisina, resulting in scientific data beginning as early as the year 2000 in response to the family’s concerns for Karen Frisina’s mental condition. Dr. Schwabenbauer’s initial expert Report following the 2000 assessment revealed Karen Frisina acknowledged she repeated her conversations frequently. Dr. Schwabenbauer’s expert Report further revealed Karen Frisina’s comprehension level appeared mildly compromised when more complex phrasing was introduced and a significant drop occurred in her verbal recall as a result of her loss of detail in recalling more meaningful, paragraph-length material, as well as information from extended word lists. Two more evaluations were completed by Dr. Schwabenbauer in 2003 due to Karen Frisina’s family’s additional concerns regarding Karen Frisina’s cognitive function, specifically her memory. Following these evaluations, Dr. Schwabenbauer observed Karen Frisina demonstrating a consistent decline in memory function and opined these scientific results of the evaluations were consistent with those of a progressive dementia process. Dr. Schwabenbauer’s final evaluation prior to the transfers of the real estate and the Curian Capital LLC account, performed in 2004, was performed as a result of concerns expressed by Appellant herself. Appellant informed Dr. Schwabenbauer of Karen Frisina evidencing an increase in rumination

and preoccupation within her home. Appellant further reported Karen Frisina would frequently ask for answers to questions which Karen Frisina had already been provided, particularly when any novel event had taken place.

Karen Frisina's family was also able to provide numerous and different credible examples of Karen Frisina evidencing signs of persistent confusion, forgetfulness and disorientation in the years leading up to these transfers. Most of her family members, including Aunt Josephine Frisina, noticed differences in Karen Frisina's behavior even before Mr. Francis Frisina died, despite his efforts to conceal his wife's behaviors. Aunt Josephine Frisina explained she witnessed Karen Frisina repeatedly going across the street to pick up the newspaper in the same day because Karen Frisina had forgotten she had already done so. Skip Frisina explained instances of Karen Frisina getting lost and becoming confused while on a family vacation in Myrtle Beach, specifically noting Karen Frisina was unable to remember the hotel where her family was staying; Karen Frisina forgot which umbrella was theirs on the beach; and Karen Frisina forgot what meals she had ordered at restaurants. When visiting Karen Frisina at home, Skip Frisina also noticed she was not showering on a regular basis; she was incontinent; and she consistently forgot to take her medication.

Scott Frisina, who lived with Karen Frisina following Mr. Francis Frisina's death and prior to these transfers, also observed Karen Frisina consistently forgetting to take her prescribed medications. Scott Frisina reported Karen Frisina would argue over whether she had taken her proper dosage of medication, even though her medication remained in the pill container. Additionally, Karen Frisina forgot to turn off the stove or extinguish burning candles, and often Karen Frisina lost items such as the television remote control. Scott Frisina also explained Karen Frisina became obsessed with making sure the doors to her house were locked to the extent she would awake multiple times at night to check physically the doors again and again. Scott Frisina

explained he would have arguments with Karen Frisina about whether or not she had showered that day. Karen Frisina would claim she had showered, but Scott Frisina knew she had not showered because either she was still in the same clothes as the previous day or the shower stall was still dry. Scott Frisina also explained an incident where he took Karen Frisina grocery shopping and "split up the list" with Karen Frisina in the grocery store. He explained when he had finished collecting the items on his list at the grocery store, he found Karen Frisina in the same location in the store where he had left her and she had nothing in her hands.

Christine Brown also provided numerous and different credible examples of Karen Frisina exhibiting signs of persistent confusion, forgetfulness and disorientation. Christine Brown explained an incident where she had taken Karen Frisina to the shopping mall with her, and Karen Frisina had gotten lost to the point of requiring the assistance of mall security to locate her. Christine Brown also explained an incident when she had taken Karen Frisina to lunch. Karen Frisina would order food and then when the server brought the food she ordered, Karen Frisina became argumentative with the server claiming not to have ordered that food. Christine Brown explained during her visits, Karen Frisina would forget she had just eaten approximately five minutes prior and repeatedly asked when she would be fed again. Karen Frisina would argue with Christine Brown regarding changing her clothes for the day, taking her medication and bathing. Christine Brown also explained Karen Frisina needed help in dressing herself appropriately for the weather outside. For example, Christine Brown cited an incident where despite the snow outside, Karen Frisina dressed herself in crop pants and sandals to go to the store.

Additionally, Kathleen Brundage herself stated she had concerns over Karen Frisina's memory, believing Karen Frisina could no longer understand the safety rules of the road as a driver. Kathleen Brundage cited instances wherein Karen Frisina drove through a drive-thru

backwards and expressed her belief that she always had the right-of-way at traffic intersections. Because of these incidents, Kathleen Brundage requested the doctor take Karen Frisina's driver's license away.

In the Exceptions, Appellant argued this Lower Court erred when it determined that Karen Frisina suffered from a weakened intellect. This Lower Court did not err in making such a determination based on the ample evidence and conclusions made within the Findings of Fact and Conclusions of Law filed May 28, 2013. Appellant argued this Lower Court overlooked the testimony and expert Reports of Dr. Schwabenbauer relating to his findings of Karen Frisina's memory loss. However, this Lower Court carefully considered such evidence as this Lower Court outlined, with particularity, Dr. Schwabenbauer's testimony and findings in Findings of Fact 70-79. Most importantly, this Lower Court found in Finding 79 that Dr. Schwabenbauer was not able to opine as to Karen Frisina's ability to make sound decisions during any of the relevant time periods because his evaluations focused mainly on Karen Frisina's memory problems. However, Dr. Schwabenbauer did state he would describe Karen Frisina's intellect as weakened. (*Objections Transcript, 2/25/13, p. 117, line 10-12*).

Appellant also argued that many of the examples cited by this Lower Court from the family members occurred after the transfers were complete in 2005. This argument is also unfounded. The examples given by Aunt Josephine Frisina occurred prior to Mr. Francis Frisina's demise in 2002. (*Objections Transcripts, 2/26/13, p. 15, line 14-15, p. 21, line 1-12*). The examples given by Skip Frisina range from as early as 1996 or 1997 until 2005. (*Objections Transcripts, 3/22/13, morning session, p. 40, line 11 – p. 41, line 4, p. 51, line 17-25, p. 61, line 12-16*). All but one example given by Scott Frisina occurred during the time period in which he was living with Karen Frisina directly following Mr. Francis Frisina's demise in 2002 until the time he moved out in 2004. (*Objections Transcript, 2/26/13, p. 116, line 2-8, p. 117, line 4 – p.*

118, line 7, p. 113, line 14 – p. 114, line 7, p. 118, line 16 – p. 119, line 2). The examples given by Christine Brown occurred around the years 2000 through 2005. (*Objections Transcript*, 2/26/13, *Christine Frisina Brown Testimony*, p. 5, line 10 – p. 6, line 15, p. 15, line 11 – p. 16, line 6, p. 20, line 16 – p. 21, line 15). The examples provided by Kathleen Brundage herself occurred during the time period prior to 2005 when Karen Frisina had her license revoked. (*Objections Transcript*, 2/26/13, p. 76, line 6-17, p. 90, line 14-21, p. 89, line 4 – p. 90, line 1, p. 90, line 14-21; 3/22/13, *afternoon session*, p. 78, line 16 – 25). This Lower Court confirms it's Conclusion that Karen Frisina exhibited persistent confusion, forgetfulness and disorientation. Therefore, this Lower Court finds and concludes, based on the clear evidence presented, Karen Frisina suffered from a weakened intellect at the time of the transfers of the real estate and the Curian Capital LLC account.

Based on all of the above, Petitioner established all three elements necessary to establish undue influence. Furthermore, Appellant failed to present any credible evidence to rebut the presumption of undue influence. Therefore, this Lower Court concludes Appellant's first matter complained of is without merit.

As it pertains to the second matter complained of, this Lower Court addressed this issue in the Order entered on July 12, 2013. Appellant asserts this Lower Court erred in ordering Appellant to repay Karen Frisina \$145,472.28 to replace Curian Capital LLC funds transferred by Karen Frisina to Appellant. Appellant argues that there is uncontroverted evidence which shows that Appellant used the Curian Capital LLC funds for Karen Frisina's expenses. Lastly, Appellant complains that this Lower Court's decision constitutes an unwarranted and unsupportable penalty against Appellant. This Lower Court did not err in ruling the transfer of the Curian Capital LLC account from Karen Frisina to Appellant is void or in ordering Appellant reimburse Karen Frisina \$145,472.28. While Appellant argues she has already turned over

\$150,000.00 to or for the use of Karen Frisina, this assertion cannot be verified by the record due to Appellant's self-admitted comingling of Appellant's personal funds with that of Karen Frisina's funds and her failure to maintain proper and accurate records while serving as Power of Attorney for Karen Frisina. Therefore, neither Appellant nor Attorney Darlene Vlahos, as the Examiner of the Assets, was able to locate or verify whether every amount of the funds deposited into Karen Frisina's PNC account from the Curian Capital LLC account was used for Karen Frisina's benefit or the benefit of Appellant and her family. Therefore, this Lower Court concludes Appellant's second matter complained of is without merit.

Pertaining to the third matter complained of, this Lower Court addressed this issue in the Order dated July 12, 2013. Appellant asserts that the Lower Court erred in assigning the entire fee for the Court Appointed Examiner of the Assets against Appellant arguing that Christine Frisina Brown should incur some of the expenses because she borrowed and repaid a \$5,000.00 loan from Karen Frisina. However, this Lower Court found ample support for this Lower Court's assessment of the entirety of the examiner's fees against Appellant as indicated by the Findings of Fact in the instant case regarding Kathleen Brundage's misuse of funds entrusted to her as Power of Attorney over her Mother's entire estate.

Chapter 56 of the Probate, Estates and Fiduciaries Code sets forth the provisions for Powers of Attorney. Specifically, Section 5601(e), which codifies the fiduciary relationship which exists between a principal and agent, states:

- (e) Fiduciary relationship.—An agent acting under a power of attorney has a fiduciary relationship with the principal. In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to:
 - (1) Exercise the powers for the benefit of the principal.
 - (2) Keep separate the assets of the principal from those of an agent.
 - (3) Exercise reasonable caution and prudence.

(4) Keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

20 Pa.C.S. §5601(e). Furthermore, Section 5601.2(e) provides “[a]n agent...shall be liable as equity and justice may require to the extent that...a gift made by the agent is inconsistent with financial management for the principal or with the known or probable intent of the principal...”

20 Pa.C.S. §5601.2(e). The Pennsylvania Supreme Court has stated “[i]t is hornbook law that ‘(a fiduciary) is required to use such common skill, prudence and caution as a prudent man, under similar circumstances, would exercise in the management of his own estate; and, if he negligently causes a loss to an estate he may properly be surcharged for the amount of such loss.’” *In re Estate of Ellis*, 333 A.2d 728, 732 (Pa. 1975) referring to *In Re Estate of Denlinger*, 297 A.2d 478 (Pa. 1972). A surcharge is a penalty for failure to exercise common skill, prudence and caution in the performance of one’s fiduciary duties and is imposed to compensate beneficiaries for loss caused by a fiduciary’s failure to meet her duty of care. *In re Estate of Lux*, 389 A.2d 1053, 1057 (Pa. 1978).

The evidence provided in the instant case also supplies abundant support for this Lower Court’s findings that Appellant breached her fiduciary duty of care to Karen Frisina on a number of occasions. Moreover, Appellant admitted to breaching her fiduciary duty by failing to maintain accurate records of all actions, receipts and disbursements during the time she served as Power of Attorney for Karen Frisina. This is evidenced by Kathleen Brundage’s failure to provide the Examiner of Assets, Darlene Vlahos, Esquire, with the necessary records from the time that she served as Power of Attorney from January 9, 2003 until August 2006, when the records could be obtained and supplemented by PNC Bank because Appellant failed to maintain them herself. Appellant further admitted during her testimony she failed to keep her personal assets separate from Karen Frisina’s assets during the time she served as Power of Attorney for

Karen Frisina specifically evidenced by Appellant's admission to using Karen Frisina's credit cards to make her own personal purchases in amounts exceeding \$18,000.00, which Appellant eventually used funds from Karen Frisina's PNC Checking account to make payments on.

Based on Appellant's failure to maintain an accurate record of all of her actions as Power of Attorney as well as receipts and disbursements during the time she served as Power of Attorney for her mother, Karen Frisina, Darlene Vlahos, Esquire, as Examiner of the Assets, was unable to account for the following assets disposed of by Appellant as Power of Attorney (this only includes the amounts for the time period in which Darlene Vlahos, Esquire was able to compile records): (1) \$4,318.01 from the Sammon IRA Account which was liquidated; (2) \$18,620.70 from the ABB Pension Benefits; and (3) \$21,721.20 from the Allianz Annuity payments. Additionally, the Report from the Examiner of the Assets detailed a total of \$3,620.00 in personal expenses of Kathleen Brundage paid from Karen Frisina's PNC Checking account. Finally, this Report from the Examiner of the Assets demonstrated \$5,260.00 in funds were directly withdrawn from the PNC Checking Account by Appellant and \$20.00 in cash withheld from an ABB Pension deposit by Appellant, the use of which were not verified by Kathleen Brundage.

Based on the evidence provided and the admissions by and from Appellant herself, this Lower Court made its ruling to assess the full amount of the Examiner's fees against Appellant due to the fact Appellant failed to maintain accurate records while serving as Power of Attorney for Karen Frisina, and, therefore, failed to produce a sufficient Accounting when directed to do so by this Lower Court. This Lower Court had to appoint an Examiner of the Assets and caselaw is well established in Pennsylvania that when an accountant must incur attorney's fees to restate an account due to the defectiveness or insufficiency of prior accountings, such fees must be borne by the fiduciary rather than the principal. *Marcella Estate*, 12 Fiduc. Rep. 2d 224, 228

(Phila. 1992). As Appellant was the only person to serve as Karen Frisina's Power of Attorney, she and only she had the fiduciary responsibility to keep and render accounts for Karen Frisina. Therefore, this Lower Court properly assessed the full amount of Attorney Darlene Vlahos' fees as the Examiner of the Assets against Appellant. Therefore, this Lower Court concludes Appellant's third matter complained of is also without merit.

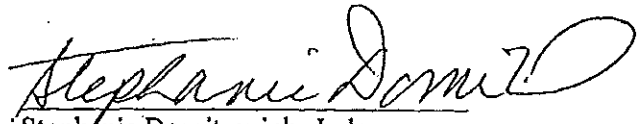
Pertaining to the fourth matter complained of, this matter is also without merit. Appellant asserts that the Lower Court erred in determining the payments from the ABB Pension and Allianz annuity were not provided by Appellant to Mrs. Frisina for Mrs. Frisina's personal use and expenses. Appellant's argument in this case is completely unfounded and misdirected. In fact, this Lower Court, in the Findings of Fact and Conclusions of Law entered on May 28, 2013, in Finding 110, specifically found, Karen Frisina, after cashing the monthly checks received from ABB Pension and Allianz Annuity, would spend the money for herself as a daily spending allowance.

Furthermore, Appellant appears to have raised this same issue in the Exceptions filed by Appellant. However, upon close examination, Exception 16 specifically addresses Findings 87 and 88, which concluded Kathleen Brundage did not properly account for all payments received by Karen Frisina from the ABB Pension in the amount of \$18,620.70 and from the Allianz Annuity Benefits in the amount of \$21,721.20. In her Exceptions, Appellant complained that the conclusions of Darlene Vlahos, Esquire concerning the ABB Pension and the Allianz annuity should not be accepted by this Lower Court because the Appellant testified those accounts were paid in monthly installments and distributed to Karen Frisina as spending cash over the years that Karen Frisina maintained independent living. This Lower Court does not dispute Kathleen Brundage testified Karen Frisina would cash the monthly checks from ABB Pension and Allianz Annuity; however, this Lower Court does maintain Kathleen Brundage failed to properly account

for those funds. Furthermore, a review of the Order dated May 28, 2013 reveals this Lower Court chose not to surcharge Appellant for the amounts unaccounted for from the ABB Pension and the Allianz Annuity, despite Appellant failing to produce any evidence to corroborate her testimony as to the use of those funds. Therefore, this Lower Court concludes Appellant's fourth matter complained of is also without merit.

For all of the foregoing reasons, the issues raised by Appellant regarding this Lower Court's Orders entered on July 15, 2013, are without merit.

BY THE COURT:


Stephanie Domitrovich, Judge

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