2011 WL 11543122 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Penobscot County

Michael WEATHERBEE, Plaintiff,

v.

Peggy MCPIKE, Defendant.

No. CV2007318.
July 29, 2011.

Plaintiff's Post-Trial Memorandum

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The overarching issue in this case is expressed in a question which Michael Weatherbee began asking his sister in 2002: “What did you do with our parents' money using your POA?” It was a question he asked her directly, it was a question he later had Dean Beaupain ask Pat Locke, and it was-and still is-the principal question raised by this lawsuit.

The evidence indicated that Clarence and Helen Weatherbee were children of the depression, who grew up in modest circumstances, and whose working lives as a probation officer and public health nurse would suggest that they were solidly middle class. Yet, over the course of their working lives, and into retirement, they were able to acquire and own both a home and a camp, debt free, plus a sizeable stock portfolio and significant amounts of cash in the bank. They achieved that financial success by being what Defendant Peggy McPike called “frugal.” That word may not be strong enough to convey the tightness with money they exhibited throughout much of their lives. Although they certainly believed in education, they knew and preached that, to be a success, a person would need to “watch their pennies.” (Testimony of Noah McPike). There is little doubt that is exactly what they did.

Thus, when Clarence and Helen Weatherbee established and apparently funded bank accounts for two of their grandchildren, Noah and Michael McPike, over the course of the boys' lives up until about 2001, they had put aside a total of about $1,975.00. (Plaintiff's Exhibits #5A-5D). These accounts were set up and funded at a time when Clarence and Helen were in full possession of their faculties, and were handling and managing their own money. The amounts in those bank accounts are generous by any standard from a grandparent, and are entirely consistent with the way that, over their lives, Clarence and Helen handled and spent money.

Well before 1999, Clarence and Helen had begun to show signs consistent with dementia. When Peggy McPike swore under oath to the probate court in early 2003 that her father had suffered from signs of dementia for about 10 years (Plaintiff's Exhibit # 41), she was telling the truth. With respect to Helen, whom Dr. Atkins observed (Atkins depo. page 4, line 25) was actually in many respects worse than Clarence, the most obvious jumping off point is Christmas 1999.1 That fateful holiday visit by Michael Weatherbee and his family begins with being met by Clarence and Helen at the airport in a car that had no reverse, by parents, especially Helen, inappropriately dressed and disheveled. A meal at a local restaurant does not go well. When they arrive at the family home in Lincoln, the house was a total wreck, and dirty laundry-to the count of some 23 loads-was undone. Helen was close to incoherent, and it is noteworthy that Clarence, who by all accounts was opinionated and not afraid to speak up, was unexplainedly silent on this state of affairs. Peggy McPike, who testified that she was very close to her parents and either in their home or they in hers, “seven days a week,” was absent although, to be fair, she apparently did have plans to come to Lincoln for the holiday meal. [1]

Around Christmas, as part of the clean-up effort, Janet Weatherbee, Michael's wife, was sorting clothes when she discovered a Ski-Doo hat filled with about $9,500 in cash. Michael and Janet Weatherbee's reaction to this find reflects on their state of mind at that point in time: they immediately called Peggy McPike to tell her about the find. That they believed it was not only proper but important to tell Peggy about this find speaks volumes about their trust in her as of that time. On the present evidence, there is no doubt that Peggy received the money, took control of it, and that it has not been accounted for since that time. Several different and inconsistent explanations have been offered, all rather dubious. There is no evidence that the money ever went back to Helen or to her bank account.

Immediate action was necessary and Michael Weatherbee formulated a plan to deal with the chaos he had found: (1) on Christmas Day, 1999, he would call his old friend Pat Locke, who also knew Clarence and Helen intimately, and would ask her to supervise the giving by Clarence and Helen of Powers of Attorney. Helen signed, but Clarence did not; (2) they would take Helen to the Hospital ER in Bangor (Plaintiffs Exhibit # 1-M); and (3) they would bring Helen with them back to Virginia for a more comprehensive medical work-up.

From January-March of 2000, Helen stayed with Michael and his family in Virginia. Although she received extensive medical evaluation and care, including a new pair of dentures (which she promptly lost), it was evident to Michael and his wife, a registered nurse, that Helen had developed some severe cognitive problems, evidenced by such things as wanting to get up and go to church in the middle of the night, leaving pans on the stove, setting off smoke detectors, incontinence, and even inability to recall her granddaughter's name, whom she referred to as the “big one.” Peggy McPike claimed in her testimony that, when Helen returned, she was “good as new,” but at Helen's very first medical appointment after her return from Virginia, in April 2000, she was assessed as being “very confused” from likely mild dementia.(Plaintiff s Ex. 1-EE).

Unfortunately, Clarence fared little better while his wife was in Virginia. He would forget where she had gone, and believe she was missing. He would call Peggy and ask her where Helen was. He went back and forth between his home in Lincoln, and the McPike's apartment in Bangor, in a confused and agitated state. Several months later, in July, 2000, when Clarence was admitted to Eastern Maine Medical Center, he was not oriented to place, time or year. (Ex. 2-H) “Dementia” was listed as the probable diagnosis, and the discharge summary from several days later recommends an evaluation to see if he is competent. (Pl. Ex. 2-I). A note from Clarence's PCP at EMMC Family Practice on August 4, 2000 notes that his daughter is “worried about dementia” (Pl. Ex. 2-S).

Nevertheless, despite these concerns, and despite the existence of a POA from Helen, Clarence and Helen continued to handle their own money throughout 2000 and into early 2001. Based on Plaintiff's Exhibit 3-A, it appears that Peggy began signing her mother's checks around February 6, 2001. At the outset, these were in very modest amounts. On February 15, 2001, a date when Helen was seen at Family Practice and found to be confused and unable to count change (Pl. Ex. #1-KK), Peggy cashed a $50.00 check from Helen's account.

Several important events occurred in April of 2001. A check to Cindy Coombs in the amount of $120.00 is written around April 5. Michael and Janet Weatherbee came up for Easter and while in Maine, Clarence, Helen, Michael, Peggy and Janet all meet with Mike Tuell, Clarence and Helen's account executive at Means Investment Company. Peggy's take on the meeting, through her testimony, was that Clarence and Helen wanted Janet out of the meeting so that she wouldn't know about their assets. [2] The real meaning of that meeting is that, for the first time, Peggy McPike learned of the extent of her parents' assets. All these years, Peggy had believed that her penny pinching parents were struggling to maintain a middle class lifestyle. Suddenly, she learns that they have amassed, through extreme frugality, a home, a camp on a high value lake, and liquid assets of over half a million dollars! It is not a coincidence that the frequency and amounts of money withdrawn by Peggy increased dramatically after that meeting. In April, 2001, a check to cash totaling $200.00 was written on Clarence's account on April 13, and six checks, ranging from $25.00 to $100.00 and totaling $250.00 were drawn from Helen's account. In May, the upward trend starts, with $1,000.00 in checks to cash from Clarence's account, and $1,065.00 from Helen's account. Cindy Coombs is paid again by check drawn on

Helen's account in the amount of $50.00 on May 24 (PI. Ex. # 3-A). On May 29th, Helen is seen at Penobscot Valley Hospital, and described as "confused" and with a history of "dementia." (Pl. Ex. # 1-B).

June 2001 marks Noah's graduation from high school. On June 2, Peggy writes a check on Helen's account to the Ski Rack in the amount of $472.45, which she now claims was an authorized gift for a bicycle to her son, Michael. On June 15, a Family Practice note indicates that Helen is brought in by a "young man," and that she is confused with her blouse on inside out. (Pl. Ex. # 1-XX). On June 22, Peggy writes a check to cash from Helen's account in the amount of $7,000.00 (Pl. Ex. # 8). Perhaps significantly, she writes "attys fees" on the memo line, although to this day, she has never been able to explain what that signified. That amount was deposited in her Key Bank account the same day (Pl. Ex. # 9). Cindy Coombs is paid by check on June 25 in the amount of $60.00 (Pl. Ex. # 3A).

In July, the floodgates open. However, that was not before the incident of July 6, when Helen Weatherbee "eloped" from Peggy's house[3] on foot, and was eventually found about a mile and a half away, on the other side of busy Stillwater Avenue, at K-Mart. As a result, Peggy went to the Bangor Police Station, and filled out "Alzheimer's Alert" forms for both parents. (Pl. Ex. # 12 & 13). At trial, she tried mightily-and unconvincingly- to indicate that the forms really didn't mean what they say, and she wasn't really claiming that her parents had Alzheimers. In the week of July 9, she withdrew, via checks drawn to cash, $7,000.00 from Clarence's account (Pl. Ex. 4-A) [the first time she has drawn a large check to cash on his account] and $5,000.00 from Helen's account (Pl;. Ex. # 8). The next week, on July 18, she withdraws, $7,000.00 from her parents' money market account, and on the same day, sends a $10,000.00 check to Holy Cross. On July 26, she withdraws $5,000.00 from Helen's account (Pl. Ex. # 8). On the 29th, Clarence is brought to Penobscot Valley Hospital for treatment of a bee sting, and is found to be "disoriented." (Pl. Ex.# 2-A). Thus, in the month of July, Peggy has withdrawn a total of $8,300.00 in cash from Clarence's accounts, and $17,121.00 from Helen's.

On August 10, Peggy withdraws $10,000.00 in cash from Helen's account (Pl. Ex. # 8) and $4,500.00 from Clarence's (Pl. Ex. 3 9). She also pays $270 toward the renewal of the UMO hockey tickets (Pl. Ex # 14). On August 16, Helen is seen at Penobscot Valley Hospital, where a head CT scan is read as showing diffuse moderate "atrophy" of her brain. (Pl Ex. # 1-D)

In June, July and August of 2001, Peggy McPike wrote checks to cash from her parents' accounts totaling $48,431.00. Both before and during the course of this litigation, she has offered varying and inconsistent explanations for her conduct. She told her brother, and the Probate Court (under oath) that all funds had been used by the benefit of her parents. Later, she changed her story and claimed that Clarence had become obsessive about Noah's college expenses and had insisted on paying, and that it was "their money" and in so many words, they could do whatever the hell they wanted to with it. In one version-among several-which Peggy told, Clarence actually accompanied her to the bank for these withdrawals, although his name or signature appears on none of them. At trial, she even claimed that Clarence accompanied her to her own bank, Key Bank, to oversee the deposits! She justified her secrecy and her lies to her brother on the grounds that she didn't want "hurt feelings" that Clarence would so favor Noah and ignore his other three grandchildren, including her other son, Michael.

A fair examination of Peggy's assertions in light of the evidence, and in light of common sense, leads to the inevitable conclusion that her stories are simply not credible. First, she changed the address for the bank statements to come to her house; she claimed that was at Helen's request so that Janet would not know about her financial affairs, but on its face, that explanation is a little short of preposterous, since Janet was in Virginia, and only a few times a year came to Maine. There was no evidence suggesting that Janet was interested in snooping or that she had the ability to do so during her short stays in Maine.

Second, the pattern of withdrawals is revealing here. Starting around late April of 2001, small withdrawals are made-a testing of the waters as it were-with larger amounts in May and then a torrent of withdrawals over the summer. These withdrawals were all in cash, and were written using starter checks, counter checks, out of order check sequences and packets, and alternate between Clarence and Helen's accounts. That pattern is itself evidence of fraud and an intent to conceal. Furthermore, the court heard enough evidence during the trial to get a sense of Clarence Weatherbee's single mindedness to the point of obsession. If Clarence Weatherbee had truly made up his mind to help Noah with Holy Cross, then the court can easily conclude on this

evidence that that is precisely what he would have done, by writing checks directly to Holy Cross, or to Noah. Clarence would not have cared what anyone thought if that truly had been his rational thought process.[4] He would have been rightfully proud of helping his grandson, and wouldn't have cared what anyone else thought. Unfortunately, the true import of the evidence is that Peggy McPike, having first learned in April of 2001, the extent of her parents' holdings, deemed herself to be deserving of a large helping of their wealth, taking advantage of her parents' vastly diminished mental

Peggy's claim that these funds were to help pay for Noah' education are especially cynical in light of the evidence that developed during trial. Defendant's Exhibits #27 and #28 show the extent of cash payments by the McPike family to Holy Cross during the majority of Noah's career there. Put simply, it just doesn't add up. This evidence shows that the majority of money Peggy took from her parents that summer did NOT go to pay for Noah's education. Instead, most of the money is unaccounted for while the family incurred loans to pay for his education. Clarence would be rolling over in his grave at that turn of events!

Peggy offered another exhibit, her personal calendar, Defendant's Exhibit # 9, to buttress her testimony as to how hard she worked to meet the many demands, and thereby indirectly justify her implied claim that it was alright to pay herself from her parents' money for all she did. The problem with that evidence is again that it is refuted by other incontrovertible evidence. On July 9, 2002, a day that Peggy wrote down she had worked eleven hours cleaning, her father's medical records show that Clarence was admitted to the hospital. (Plaintiff's 2-V). On July 11, evidence showed that her mother was admitted to Westgate Manor and Peggy had a meeting with Jane Skleton, yet she claimed on Exhibit # 9 to have worked twelve hours. Caught in those inconsistencies, she then proceeded to say that she had probably tended her father at the hospital and then worked until midnight.

At this juncture, another explanation for use of the cash begins to appear-the claimed need to pay care givers to take care of Clarence and Helen, and the need/practice of paying them “under the table” in cash. Once again, upon close examination, the evidence does not come anywhere near enough to support the huge amounts of cash taken. It was undisputed that Cindy Coombs was the first person hired, and she continued at least into the fall of 2001. In addition to the checks to her mentioned above, in September of 2001, we find checks to her in the amount of $185.00 on September 23 and $120.00 (Pl. Ex.# 3-A). In October, she is paid $90.00 on October 12, $165.00 of October 19, and $240.00 on October 26 (Pl. Exhibits # 3-A & 4-A).[5] This evidence refutes the assertion that all payments were in cash, and further gives a context for amounts of payments which were actually made. While there can be little doubt that coverage increased somewhat into 2002, up to the point that Clarence and Helen went into the nursing home, Jane Weatherbee Trott's testimony bears mentioning that no coverage at all was given, at Peggy's instruction, when one of them was in the hospital, because, according to her thinking, the one left at home was unlikely to wander off alone.

After a relatively quiet September and October of 2001, cash withdrawals increase again in November, with $1,560.00 taken from Clarence's account, and $1,050.00 from Helen‘s, including $1500.00 in one day, November 20, two days before Thanksgiving. (Pl. Exs. # 3-A & 4-A). December 2001 brings cash withdrawals of about $3,700.00, and a rare if not otherwise unprecedented $1,200.00 check dated December 18 written to Peggy McPike herself (Pl. Ex. # 4-B), with no explanation. Of those amounts, $1,600.00, $800 from each parent is written December 24, Christmas Eve.

January 2002 starts with two checks, each in the amount of $400.08, written to Jane Trott on January 2. (Pl. Ex. # 4-B). During January, Helen has multiple medical evaluations, evidencing further mental confusion: Plaintiff's Exhibit 1-Q, January 4 [thinks she has young children at home]; Pl. Exhibit 1-rr, January 16 [“more wacky than usual”]; *Id* record from January 17 [“out of it today, does not know anyone”]. During January, $6,600.00 in withdrawals are made by Peggy in cash from her parents' accounts, in about nine separate withdrawals ranging from $300 to $800. By this time, Jane Trott has become the primary if not only care giver, and her testimony about how much she was paid comes into play. Suffice it to say that, under any view of the evidence, it was no where near $6,600.00 in a month, even taking into account money spent on gas and meals.[6] Between December 2001 and July of 2002, Peggy withdrew the following amounts in cash from her parents' accounts:

December	$ 5,000.00

January 02	5,600.00
February	5,700.00
March	11,300.00
April	9,000.00
May	9,000.00
June	9,200.00
July	9,000.00
TOTAL THIS PERIOD	$ 63,900.00

Once again, as was the case with Holy Cross, we have a claim that the money went to a particular use, with the evidence actually pointing to the opposite conclusion. To be sure, Plaintiff Michael Weatherbee does not claim that all of the cash withdrawn in this time frame was taken by Peggy, since there were undeniably some care giver expenses, and some other expenses. When there is self-dealing, as there has been here, the burden of proof shifts to the self dealer to justify the transaction's fairness. See *Oak Hill Associates v. D'Amato,* 228 Conn. 723, 638 A 2d 31(1994); *Marshall v. Snyder,* 572 F 2d 894 (2d Cir. 1978) [calling it "settled law" that the burden of proof is always on the party to self-dealing to justify its fairness]. Cf. *Dunn v. Record,* 63 Me. 17 (1874) [when attorney acquires a claim from a client, the attorney "is bound to show" he used the utmost good faith in dealing with the client]. The way this works in practice is laid out in a closely related context in *Theriault v. Burnham,* 2A 3d 324 (Me. 2010) which notes that undue influence "may be presumed" when it is shown that there is a confidential relationship and that one party receives a benefit by virtue of that relationship. The same result is reached in jurisdictions which hold that self-dealing raises a presumption of constructive fraud. *Watts v. Cumberland Ct. Hosp. Syst.* 317 NC 110, 16, 343 SE 2d 887 (1986). See M.R.Evid. 301(a) [presumption shifts the burden of proof]. In at least one state, Connecticut, the burden of establishing fairness is not by a preponderance but by clear and convincing evidence. *Konover Development Co. v. Zeller,* 635 A 2d 798 (Ct. 1994). It is therefore Peggy McPike's burden in this case to prove the nature and amount of valid expenses. This she has utterly failed to do, and if the clear and convincing standard is applied, as it should be, even more of a failure of proof is evident. Her testimony that she paid it all over to the care givers was contradicted by the care givers themselves. Jumping ahead for a moment to July 2002, when Clarence and Helen went into the nursing home, we see from then through December 10 a pattern of regular and continuous cash withdrawals by Peggy from her parents' accounts. Typical amounts are $900.00 per week from each account, (Pl. Ex. # 3-B & 4-B), but some are only $500.00 per account per week. In that time frame, Peggy drew about $23,800.00 in cash from her parents' accounts, during a time that both her parents were in the nursing home, and her claim is that she continued to pay the care givers in the belief that her parents might come out of the nursing home and need in home care again! Once again, the testimony of Jane Trott and others refutes that wild claim, to say nothing of common sense. Ms. Trott testified that she was paid for a week, two at most, after the Weatherbees entered the nursing home. She went on to another job, ironically taking care of an older man who happened to be a long time friend of Clarence.

Noteworthy at this point is the total absence of documentary evidence validating any of the cash withdrawals to anyone. At a slightly later point, Alice Drinkwater Leeman happened on the scene through a chance meeting at the nursing home where her then husband was Clarence's roommate. She was tasked with helping Peggy organize the bookkeeping for her parents' then conservatorships, and she described in great detail how Peggy brought in bags and bags of receipts, bank records, and other possibly relevant information, and how she felt upon seeing that pile of paper. Ms. Drinkwater was able to make enough sense of this mess for the time frame commencing in October, 2002 that, by working backwards, she could establish a starting date for a rough accounting system. (See Plaintiffs Ex. # 20). However, her observation was that she was never given sufficient receipts or data to go back any farther than that to delve into the time frame of large cash withdrawals. Peggy blamed her ADD, her disorganization, the stress of caring for two deteriorating parents, and a few more things to boot, but it is again more than

coincidence that the cut off for records she asked Alice Drinkwater to organize just happened to omit the time frame when most of the large cash withdrawals occurred. Her story as told in court is internally inconsistent because she had the same degree of ADD, same demands, same degree of disorganization, and same if not worse stress from her parents' situation in the time frame for which she was able to produce records for Ms. Drinkwater than she did at the other time. Her inability to produce records and receipts for this period is probative of a desire to conceal, and is consistent with the entire pattern of concealment, including changing of the account addresses to her own home, use of starter and out of sequence checks, numerous check registers (at least 17 by our count), checks all written to cash, and untruthfulness to her brother and others about what she was doing. It is even fair on this evidence, in light of Dean Beaupain's testimony, to conclude that she convinced Pat Locke to make assurances to Mr. Beaupain, in response to his inquiries, that everything indeed had been spent for the benefit of her parents. Now, we know from Ms. McPike's own trial testimony that, among other things, she felt justified in paying herself for cleaning her own house (and again concealing that fact). [7]

At trial, Peggy did produce some receipts and claimed that these were at least some of the receipts for items she had purchased for her parents, particularly her mother. These were Defendant's Ex. # 33. A close examination of those receipts in light of her testimony reveals them to be quite different from what she claimed. First, Peggy insisted in her testimony that she used cash because she didn't have any credit cards, and never used them. This was stated to buttress her claim that these receipts would show how cash money she had withdrawn was spent for her parents. Of course, when confronted with the fact that at least several of the receipts which she herself produced were paid for with a credit card, she changed her story. These must have been June Smith's credit cards, or her mother's or someone else‘s, she then said. More to the point, the receipts show numerous purchases from stores such as Abercrombie & Fitch and The Gap, which do not carry any products for the over 30 crowd. It turns out that Peggy's idea of spending money on her mother's behalf is to buy items suitable for Helen's grandchildren, Peggy's children. To hear her tell it, perhaps Helen even accompanied her on an outing from the nursing home, delighting in the purchase of Gap and Aeropostale and other young people's clothing on Helen's nickle. That Peggy would come before the court with a straight face, and try to put one over on the court by describing these receipts as cash purchases for the benefit of her parents, thereby explaining the large sums of cash unaccounted for, can only be comprehended by reference to Mark Twain's observation that some people regard the truth as so precious that they will therefore only use it sparingly!

Defendant has offered several reasons why this conduct should be ignored or excused, but none are legally sufficient. She introduced evidence from several witnesses that she was a dutiful and attentive daughter, and participated actively in their care planning while they were in the nursing home. As it turned out, her advocacy on behalf of her parents was not always on the mark. As Dr. Atkins explained, there were clashes with the staff over what was best, and more than once Peggy ignored the recommendations of the staff. More to the point, her “good conduct” if any in this regard is not probative or even admissible to prove she did the right thing in handling her parent's funds. See M.R.Evid. 402(a) [evidence of a person's character or trait of character not admissible to prove they acted in conformity therewith]. In dealing with her parents' funds as their agent, Peggy was a fiduciary. [8] *See. Defosses v. Notis,* 333 A 2d 83 (Me. 1975). The duties imposed upon a fiduciary include the duties of service, obedience and loyalty. *Id.* In Justice Cardozo's famous words, a fiduciary is held to “something stricter than the morals of the market place.” *Meinhard v. Salmon,* 249 NY 458, 164 NE 545 (1928). Those duties are non-delegable and non-waivable, and there is no legal support for the proposition that a fiduciary can excuse her defalcations by evidence of a condition which affected her ability to organize.

She also offered evidence that, during the period when the money disappeared, she was suffering from undiagnosed ADD, and she apparently wants the court to infer that her problem was disorganization rather than dishonesty. Once again, that evidence is both factually incorrect and legally unsupportable. There was no evidence that ADD makes a person unable to tell the difference between right and wrong. The pattern and artifice used to take the money and to attempt to hide or obfuscate the transactions shows a scheme or plan and not lack of organization. She actually took great pains to hide what she was doing, hardly a sign of disorganization. Moreover, a breach of fiduciary duty can occur without actual fraud or wrongdoing. Under the law, fraud is presumed unless disproven.

On October 2, 2002, four months after her parents went into the nursing home, Peggy McPike traded her father's truck, and bought a used Volvo with 42,729 miles on it. (Plaintiff's Ex. # 17). This purchase was with her parents' funds. Over the course of the next several years, she used her parents' funds to insure, register, repair and fuel that vehicle. She put 60,421 miles on the vehicle before abandoning it at the camp. She did this despite the fact that she lived only a few miles from Westgate Manor, where her parents then resided, and despite the fact, as was shown in late appearing evidence, that Dr. Atkins and other professionals affiliated with Westgate Manor, counseled *against* Peggy taking her parents out of the facility, on grounds that it overstimulated them. (Henry Atkins deposition, page 6, line 9 Defendant Ex.#35A.) In light of that testimony from Dr. Atkins, she claims that the vehicle was necessary to transport her parents for "outings" rings hollow. [9] Rather, what we find is evidence that Ms. McPike considered herself on her parents' business when she drove the Volvo to her own job in Mattawamkeag, and stopped at the Lincoln Post Office on the way home to pick up mail at her parents' mail box. The car was purchased for $21,223.00 in 2002 and was abandoned as

worthless at the camp around 2009, after her mother's death. During that time, it appears that at least $9,000.00 was spent on its maintenance, repair, registration. Assuming without conceding that some amount was in fact spent giving her parents rides (although as noted above, the burden is on her to prove the amount which represents that amount), and understanding that in Bangor, Maine, a $20.00 taxi ride is a pretty long one, the "value" or "substituted cost" of giving rides is about $1,000.00 per year, or about $5,000.00 tops for the years that Peggy drove the Volvo. The balance, or at least $25,000.00, representing the acquisition costs and running expenses should be charged to her as a consequence of her self dealing. Alternatively, the IRS or even state mileage reimbursement rate, which at the time was about 40 cents per mile, would also produce a surcharge of about $25,000.00.

In the grand scheme of things, the University of Maine season hockey tickets which Peggy kept purchasing for five or more years after her parents went in the nursing home at a cost of about $600.00 per year, is not nearly as big an item as the cash taken and unaccounted for, or the Volvo. Nevertheless, it represents more self dealing and the burden is on her to explain and justify. Even before Clarence and Helen went into the nursing home, Jane Weatherbee Trott remembered bringing Clarence and Helen down to a Wendy's or MacDonald's in Old Town, so they could have dinner with Peggy before Peggy went to a UMO hockey game. Jane also remembered other occasions when Peggy said she was going to a hockey game. We also know that the McPike's other son, Michael, was a hockey player. Peggy denies any use or misuse of the hockey tickets and instead claims that they went to Helen's sister, June Smith, and her husband, Don, as thanks for things they had done. Once again, in the same fashion as the elusive $1,000.00 "owed" by Helen to June, there is absolutely no documentation to support this. One would think there would have been other long time fans from the same section who would remember June and Don, both older folks, if they indeed had been sitting in those seats for those five years. In the middle of that time, Don became ill with cancer and died. Even if, as was suggested, the tickets for many games went unused, that in itself is an inappropriate use of conservatorship funds on behalf of two people in a nursing home. The evidence strongly suggests that Peggy and members of her family did use the tickets, and once that self-dealing is shown, as it has been, it is Peggy's burden to justify the expenditure, something she has failed to do, based on the authority given above. The cost of these tickets represent an inappropriate use of funds, and should be charged back to Peggy.

Plaintiff Michael Weatherbee grew up in Lincoln, Maine, and although he went to law school and established a practice in the D.C./Eastern Virginia area, he regularly came home to Lincoln. He came home with his family on holidays and summers, and he came home in the fall to hunt with his father. In fact, it was on one of these hunting trips in the early to mid-1990's when Michael first noticed that his father was having difficulty finding some of the old hunting spots that he used to find practically blindfolded. In hindsight, that was probably an early sign of the dementia that would become so evident later. Because Michael anticipated coming home to hunt, he left two guns which he had purchased in Virginia, at his parents' house in Lincoln. However, he retained the cartons for each gun, and brought those to court (Pl. Exs. #31 & 31A). He also had several guns from his youth which he had never taken. At around the time that the Weatherbee house was sold, Peggy McPike and her husband, took all of the guns, including Michael's, from the house. To be fair, these guns were intermingled with Clarence's guns, and did not have name tags on them, so at first at least, it was probably not unreasonable that they were treated like they all belonged to Clarence. According to the testimony of Alden McPike, they were first brought to the Weatherbee camp at Cold Stream, and

then later, out of concern for safety, they were all brought to the McPike's house in Bangor. By that time, there could be little doubt that Michael had properly identified his guns, as opposed to those rightfully belonging to the estate. Alden McPike, in his testimony at trial, didn't seem to have any confusion over which guns belonged to Michael. And yet, eight years after Clarence's death, Michael has been unable to obtain them through request, and must resort to seeking relief from the court. This issue is one which could and should have been resolved without resort to the court, and one in which Peggy McPike offered no contrary evidence, other than the assertion that if they were found among Clarence's guns, they must belong to Clarence. There is no basis for her to have held those guns and Plaintiff respectfully asks for an order declaring them to be his, ordering them turned over, and awarding him nominal damages for Peggy's wrongful failure to turn them over years ago.

The other personal property implicated in this case is either in Peggy McPike's basement, at the camp, in a storage locker rented by Michael Weatherbee, and unaccounted for. Since Michael Weatherbee was denied in his request to enter and inspect any property held by Peggy, he is at a disadvantage. He described in his testimony what he saw as present at the parents' home in Lincoln just prior to its sale in June 2003. He described that Peggy and Alden McPike removed several trailer loads of furniture, some of which Michael assisted Alden McPike in loading, with Peggy's statement that she had taken what was “hers.” He described how he turned back the estate auctioneer who proposed to load the rest of the furniture without any inventory taken in advance. He testified that he and his cousin loaded and took a large amount of furniture to the camp, and that the rest was put into a storage unit, where it was accessed after Helen's death by an appraiser on behalf of the P.R. He testified that the camp was “filled to the rafters” with furniture when they left, and at a later time, when he went back, it was obvious that things had been moved and taken. The McPike's deny taking any furniture for their own use, or the use of their children, and they claim that they actually brought furniture back to the camp from their home. They further assert that at least some of what they removed from the Weatherbee's house in Lincoln had actually come from the McPike's house in Lincoln when the McPike's sold their house and moved to Bangor in the late 1990‘s. The entire situation is permeated with mistrust arising out of the money handling issues discussed above. Without being given the opportunity to see exactly what the McPike's have taken, and with questions about what, if anything, they really “brought back” to the camp, as opposed to disposing of otherwise, it is difficult to delineate the specific relief the court should provide. Given the credibility issues of Ms. McPike as outlined above, on the question of accounting for the money, it is not surprising that her claims as to what did and did not happen to the furniture are also suspect in the Plaintiff's camp. Perhaps the best way out of this thicket is to order both parties to provide immediate inventories, under oath, to the Personal Representative of the Estate, detailing all property removed from the camp or the Lincoln house, and to direct the PR, Michael Griffin, to establish a procedure whereby each person can establish what actually belongs to them, i.e. childhood toys, beds, guns, etc., those items belonging to Clarence and Helen and now devolving upon Helen's estate which one party, the other or both wishes to have (and a procedure to resolve any disputes), and order that the rest, if any, be sold.

The court specifically requested that the parties in their briefs discuss the specific causes of action and elements and defenses of each as raised by the pleadings. The Plaintiffs complaint raises the following:

I. COUNT I: ACCOUNTING

Horton & McGehee's treatise, *Maine Civil Remedies*, contains a comprehensive Chapter on Equitable Accounting. See, Maine Civil Remedies, Ch. 8 (3d Ed. 1996), to which further reference is made. In general, the Court's authority to order an accounting is based on equity jurisdiction. *Graffam v. Wray*, 437 A 2d 627 (Me. 1981). It is appropriate where there has been a fiduciary duty which is alleged to have been breached. *Gallagher v. Aroostook Federation of Farmers*, 135 Me. 386 (1938); *Webb v. Fuller*, 77 Me. 568, 1 A 737 (1885) [accounting required by sons who managed mother's estate before her death]. It is a method to “award complete relief between the parties.” Horton & McGehee, *supra*, §8-2. It is also important to note that no proof of fraud (beyond the applicability of the “presumed fraud” doctrine from some jurisdictions, if applicable in Maine) is required.

For reasons previously given, it is the Defendant's burden to prove, by at least a preponderance and perhaps by clear and convincing evidence, the propriety and appropriateness of any withdrawals of funds from her parents' accounts. Thus, to the extent she is unable to meet that burden, she is liable in an accounting action, since she will, by definition, have failed to establish

a proper account. Her claim that some of the money was for “gifts” should be quickly disallowed, for the simple fact that the two POA's, Defendant's Exhibits #3 & #4, did not authorize gift giving.

As has been previously stated, it is clear that Peggy spent some money on care givers for her parents, but simply nowhere near as much as she claimed. The failure of her record keeping, her disorganization, her decision to use cash and eschew receipts are all matters which were within her control and for which she bears responsibility. If an expenditure is proven and proven justified, then by all means the Defendant should not have to be held liable for it a second time. The nub of this case is that there are tens of thousands of dollars of cash withdrawals which the Defendant has been and remains unable to justify. Her attempt to introduce “receipts” of her expenditures has backfired, since those actually show an even greater level of inappropriate expenditures for the benefit of her children. In effect, her position was that taking her mother out of the nursing home, taking her shopping and using her mother's money to buy clothing and other items for her children at The Gap is money spent for the benefit of her mother. Plaintiff Michael Weatherbee respectfully requests the court to declare most emphatically that it is not., and that the large and unexplained use of those thousands of dollars by Peggy McPike from her parents' accounts is something for which she must be held to account.

COUNTS II AND VII: IMPROVIDENT TRANSFERS

Under 33 M.R.S.A. §1022(1), an Improvident Transfer occurs when an **elderly** person makes a “major transfer of personal property.” That term is defined in 33 M.R.S.A. § 1021(5) as a “transfer of money or items of personal property which represent 10% or more of the **elderly** dependent person's estate.” Plaintiff's Exhibits 3A-3D show Helen's bank account had a starting balance of around $40,000.00, and Exhibits 4A-4D show Clarence's accounts at just under $30,000.00 as of January 2002. Over the course of time, Peggy McPike took about $140,000.00 in cash payments, plus at least one check to her, plus the “hide”, totaling in excess of $15,000.00. Defendant's Exhibits 21-A through 21-H give a snapshot of the investment accounts, and Plaintiff's # # 3A-E and 4A-D show the bank accounts. The court can infer that the Weatherbees' estates, which have to have been over $1.15 million to be exempt, were smaller than that, and that the cumulative total of these unaccounted-for cash withdrawals were greater than 10% of their estates.

By motion and at various other times, Defendant has argued the inapplicability of the Improvident Transfer Law because no one withdrawal was larger than $10,000.00, and thus the statutory threshold is not reached. Plaintiff would submit that, in these circumstances, it is appropriate to aggregate *all* of the transactions for purposes of determining the applicability of the Improvident Transfer Law. Statutory construction is a question of law for the court. The key word to interpret is “transfer.” Can the diversion of funds over about a year and a half through multiple withdrawals constitute a “transfer” for purposes of the Act? The term “transfer” has in fact been interpreted to have different meanings in different contexts, mostly be federal courts in Maine. Compare *In Re: Mills,* 32 B.R. 507, 83 ALR Fed 523 (1983) [“transfer” can include an involuntary transfer via attachment] with *In Re: Gavreau aff'd Worster v. Gavreau,* 375 BR 14, 381 BR 10D. Me. 2008) [“transfer” does not include receipt of title to spouse's interest in estate, since “transfer” implies something conveyed away, not received]. Since the plain meaning of the statute is not evident, the court can appropriately consider the legislative intent in construing the statute. That intent is clearly to protect the property of a vulnerable **elderly** populace from being stripped of their assets by those close to them. That is exactly what happened here, and the fact that it happened over eighteen months rather than one day is of no moment. After the dust settled, it can easily be said that there had been a transfer of a mammoth amount of Clarence and Helen Weatherbee's assets, and that is sufficient to qualify under the statute.

The relief available for an Improvident Transfer is set forth in 33 M.R.S.A. § 1023(2), and can include several different types of equitable relief designed to restore the ill gotten gains to the original transferor. In this case, Michael Griffin, the PR of both Clarence and Helen's estates, did not want to be in the position of choosing sides, and thus agreed to be joined to this action in order that all parties with an interest be bound. Michael Weatherbee is asking that the funds subject to the relief be turned over to the respective Estates, not to him personally.

COUNT III: UNDUE INFLUENCE

At trial, Peggy introduced evidence suggesting that her parents had voluntarily and freely given her at least some of the money she took, principally during the summer of 2001, and principally for Noah's college expenses. That claim is dubious, in light of the many problems with Peggy's credibility, and the inconsistency of the magnitude of the alleged giving as compared to the way they had lived their life up to that point. There is simply no third party outside evidence, by bank teller, care giver or anyone else to support that claim.

Even if Clarence or Helen in some sense participated in this alleged gift giving, for reasons reflected in the ample medical records which were put in evidence, it is clear that both Clarence and Helen were in the moderate to advanced stages of dementia, and were incapable in any meaningful sense of agreeing to anything with legal significance. See *Bragdon v. Drew*, 658 A 2d 666 (Me. 1995); *In Re: Loomis' Will*, 133 Me. 81, 174 A. 38 (1934). Even if there were a shred of competence left in Helen and Clarence from the summer of 2001 through the end of 2002, then the doctrine of undue influence will still act to void the results of that undue influence. We know from the evidence that, at Christmas 2002, Peggy bought a bunch of Christmas presents for her own children using her parents' money, and that she had told her brother that she would spent $300.00 and send him $300.00 to use for his kids. She did neither, actually spending more than $3,300.00 on her own family, and sending nothing to Michael for his. The Law Court has adopted the Restatement of Contracts (2d) rule. *Russo v. Miller*, 559 A 2d 354 (Me. 1989); see also *Desmarais v. Desjardins* 664 A 2d 240 (Me. 1995). It is clear that Peggy had plenty of motive and opportunity to suggest that money be given to favor a grandchild of Clarence and Helen. There was considerable evidence of Clarence's obsessive thinking, and even a subtle suggestion that Noah might not be able to go to college without help could feed into that obsession. What Clarence and Helen allegedly did of their own free will in that time frame is totally inconsistent with how they had acted throughout their lives, and even in their treatment of their grandchildren by virtue of the college accounts set up before. See Plaintiff's Exhibits #5A-5D.

Based on the evidence, there are severe doubts as to whether Clarence and Helen had any clue what Peggy was doing with their hard earned money using her POA, but to the extent the court should find that they were in any sense aware or amenable to the idea of helping Noah, it is clear from the evidence their assent, if they had legal capacity to assent, was procured by undue influence.

COUNTS IV & V: RESTITUTION AND CONSTRUCTIVE TRUST

Restitution is another topic which has received considerable attention from courts and commentators. See Restatement of Restitution (original version 1937); *Bartner v. Carter*, 405 A 2d 194, 202 (Me. 1979); Horton & McGehee, *Maine Civil Remedies* (3d Ed. 1996) Ch. 7. In simplest terms, restitution is a remedy which follows conduct constituting unjust enrichment. Because of the merger of law and equity, some of the historical distinctions between legal damages and equitable restitution have blurred. See *Defosses v. Notis*, 333 A 2d 83, 88 (Me. 1975) (less material whether the remedy is viewed as an accounting in equity or damages at law, since the measure of recovery is the same). Among the remedies available to the court are a decree in equity awarding title or possession of property. *Rosenthal v. Rosenthal*, 543 A 2d 348, 355 (Me. 1988) [dictum]. The concept here is more in the nature of unjust enrichment, and there is no absolute requirement to prove wrongful conduct by the party against whom restitution is sought. Horton & McGehee, *supra*, § 7-5(b).

A decree in the nature of a constructive trust is another remedy. Horton & McGehee, *Maine Civil Remedies* § 7-6. For example, in *Gaulin v. Jones*, 481 A 2d 168 (Me. 1984), the court noted, in dictum, that a constructive trust may be imposed to do equity and prevent unjust enrichment when property is acquired by fraud, duress, undue influence, or is acquired in violation of a fiduciary duty. That is exactly this case. The point is that, once the court determines the amount wrongfully taken, the court has considerable latitude and discretion to fashion a remedy which will afford a complete remedy and justice between the parties. [10]

Equity declares the trust in order that it may lay its hand on the thing and wrest it from the wrongdoer.

Horton and McGehee devote a separate chapter of their treatise to constructive trusts. See Horton & McGehee, *supra.* Ch. 9. Once again, the basic principle is that it is a remedial device to prevent unjust enrichment. While restitution is a more general remedy and can include an award that for practical purposes is not much different than an award of damages at law, a constructive trust can be imposed *in rem* on specific property.

Chandler v. Dubay, 325 A 2d 6, 8 (Me. 1974). **Abuse** of a confidential relationship is one of the prime areas where a constructive trust may be called into play. Horton & McGehee, *supra.*, §9-3(d). As suggested above, see footnote 10, the court should impose a constructive trust on any sums which Peggy would otherwise receive through her parents' estates, in effect requiring her to disgorge that which she had no right or authority to take.

COUNT VI: INTERFERENCE WITH THE EXPECTATION OF A LEGACY

After lengthy discussion of equity and equitable remedies, Count VI returns us to actions at law. In short, such claims sound it tort. *Voisine v. Tomlinson*, 955 A 2d 748 (Me. 2008). Proof of the tort follows to a certain extent the "undue influence" theory discussed above regarding Count III. Once the elements of the existence of a confidential relationship and a benefit derived from that benefit are shown, the burden shifts to the recipient to prove that the dealings and transaction were proper. See *Theriault v. Burnham* 2 A 3d 324 (Me. 2010). The evidence as to this Count overlaps to a certain degree with the evidence pertaining to the other counts. One difference is that this count is personal to Michael Weatherbee, and any damages would be awarded to him, whereas the relief sought as to most of the other counts is for Peggy to disgorge what she took back to the estates of Helen and Clarence. Michael Weatherbee would prefer that be the remedy, but has pled a claim for wrongful interference to be sure that all of the possible grounds for recovery are stated. It has been and is Michael Weatherbee's position that the principal wrong here, disrespectful in the extreme to the parents of these parties, is the taking of money which they worked and scrimped to save throughout their entire lives. Michael Weatherbee does not desire the award to go directly to him unless the court concludes that this is the only cause of action which actually fits these facts. The amount which would be awarded is effectively one-half of the amount wrongfully appropriated, since he is an heir to one half of the estate of his parents.

CONCLUSION

It is indeed unfortunate that Michael Weatherbee was forced to bring this matter before the Court, but the question which began this matter nine years ago remains unanswered. Based on the evidence, the answer is that Peggy McPike, who, as a fiduciary, has the burden to explain and justify her conduct, has simply not done so. In monetary terms, the amounts and categories of unjustified and unexplained cash missing is as follows:

The Hide	$ 9,500.00
Cash Summer of 2001	48,431.00
Dec. '01-July '02	63,900.00"
Post-admission July-Dec. '02	23,800.00
Volvo	25,000.00
Hockey Tickets	3.000.00
TOTAL	$173,631.00 [11]

As stated above, to the maximum extent possible, Michael seeks that this amount be restored to his parents' estates, and only secondarily and if necessary does he seek an award on Count VII in his favor personally. The particular cause of action or Count under which relief is granted is less important than the Court's judgment that there was inappropriate use and handling of the funds of another. He requests that the Court impose a constructive trust upon any amounts in the Estates of Clarence and Helen due Peggy up to the amount necessary to satisfy the Court's judgment. In addition, Michael requests his guns and a dollar in damages for their return to him. Finally, he requests the court to order a reasonable and practical way to sort out the remaining personal property issues, using, to the extent possible, the Personal Representative rather than the Court.

The Defendant will seek to portray herself as the dutiful but over-stressed daughter, with undiagnosed ADD, trying to do the best she could to care for her deteriorating parents under difficult circumstances and without the help of a sibling whose life and career took him far from his hometown. She may even go so far as to claim this whole affair is because of an angry and vindictive brother, out to seek some sort of revenge on her without any real basis. To refute that baseless claim, one need not look any further than the first two major events in this saga: the discovery of the “hide” at Christmas, and the resultant realization that Clarence and Helen needed to execute POA's. In both cases, Michael Weatherbee and his wife Janet turned immediately to his sister, Peggy, whom at that point they trusted completely to: (a) turn over the $9,500.00 in cash to her; and (b) to be sure that the POA's ran in favor of Peggy, who was there on the scene. Those are hardly the acts of a distrustful and vindictive sibling. It was only after Peggy refused, despite Michael's direct request, and despite requests relayed through Dean Beaupain and Pat Locke, to provide an answer to the simple question which began this summation, that things went downhill. That turn of events is laid right at Peggy's doorstep.

Peggy McPike has already admitted that she lied about, and concealed, the withdrawals in the summer of 2001. She says she didn't want “hurt feelings.” Over time, as the evidence has come out, more and more incredible and inconsistent statements have been scrutinized, it is evident that she is simply unable to justify and explain how the $173,631.00 of her parents' money she used, over $140,000.00 in cash, was spent for the benefit of her parents. The POA's under which she purported to act did not authorize gift giving, and under the applicable legal rules, the type of self-dealing in which she engaged puts the burden on the recipient to justify and explain the amounts received. This, she has utterly failed to do, and judgment in favor of the Plaintiff as requested herein should be awarded.

DATE: July 28, 2011

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Footnotes

1 Plaintiff's Exhibit 1-K, a brain CT scan report for Helen from May 17, 1999 was interpreted as showing organic brain changes consistent with Stage 2 Alzheimers.

2 This thought process, even if true, illustrates the illogic and cognitive impairment of Clarence and Helen. Would it be reasonable to conclude that Janet could be totally denied access to information given out in a meeting attended by her husband?

3 The testimony was that Clarence and Peggy were studying for Clarence's driver's test, since he was threatened with loss of license due to multiple accidents and violations. See Defendant's Ex. # 18.

4 Under federal gift tax laws in effect at the time, the annual excludable gift limit was either $11,000 or $12,000, but payments in the nature of a gift paid directly to the institution of higher living were exempt from that limit.

5 A check to Gloria Coombs in the amount of $18.00 is written October 24 (Pl. Ex. # 4-A).

6 Ms. Trott's testimony poignantly describes Clarence and Helen splitting a hamburger at MacDonald's during one outing. That was the Clarence and Helen Weatherbee who were able to amass sizable savings on the salary of a probation officer and public health nurse.

7 Another transaction which Ms. McPike claimed is the “repayment” of June Smith in the amount of $1,000.00 on account of an alleged “debt.” Once again, there is no evidence whatsoever beyond her testimony to show that such a transaction ever occurred, that such a debt ever existed, or if it did, that it was ever repaid. She should be held to account for that as well.

8 Neither of the POA's entered into evidence, and apparently relied upon by Peggy as her authority, contained gifting provisions. See Defendant's Exhibits # 3 & 4. It appears the Clarence Weatherbee POA, which was apparently signed by Clarence, if at all, at the bottom of the page and not on the signature line, was erroneously dated January, 1999, when it should have been January, 2000.

9 Clarence died in June of 2003, so any benefit to him from this vehicle, especially given his deteriorating condition, was minimal at best.

10 Mr. Griffin, the Personal Representative of the Estates, primarily Helen's Estate, is holding, pending decision in this matter, estate assets which would be sufficient to satisfy most if not all of an award, and thus if a constructive trust is the relief decreed by the court, it is requested that the trust be imposed upon so much of the estate assets as would otherwise pass to Peggy through distribution, as are necessary to satisfy any claim.

11 As stated in the text, some of this amount-based on the evidence from the care givers and the bank records, a relatively small amount-was spent on Clarence and Helen's care, and should be deducted.However, the burden of showing what the amount is falls upon Peggy, and her credibility is so impaired, that any such amount is a small percentage of the total.

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