STATE OF RHODE ISLAND PROBATE COURT
PROVIDENCE, SC CITY OF PROVIDENCE

ESTATE OF BRANDT H. JEPSON No. 98-189

Decision

This case is before this court on the Petition to allow the will of Brandt H. Jepson ("decedent", "Brandt" or "testator") dated February 19th, 1996. Brandt died on May 14th, 1998 at his own hand. The petition is brought by the two named Co-Executors under the will: Katherine Kelly, Brandt's former wife and Attorney Thomas Pearlman, the draftsman and attorney for the decedent (collectively "Proponents"). None of the named beneficiaries under this will have entered in the case, but have had their depositions taken which are a part of the court record.

The decedent's father and heir at law, Herbert Jepson ("Herbert') filed an Objection to the allowance of the will and a Petition requesting that the court appoint Donald Jepson ("Donald"), the decedent's brother, as Administrator of the decedent's intestate estate.[i] Herbert also filed a disclaimer in this estate, thus allowing his two(2) surviving sons, Donald and Stephen Jepson ("Stephen") to have standing in this case. (Herbert, Donald and Stephen may be collectively referred to as "Contestants"). Shortly after these petitions were filed, this court appointed Mark A. Sjoberg, Esquire as Custodian of this estate to inventory and marshal the estate assets and attend to basic probate administrative tasks.

Thereafter, both the Proponents and the Contestants to the allowance of the will engaged in extensive discovery, including depositions (some video) [ii] and the proponents propounded interrogatories to Herbert which answers were signed by Donald as attorney in fact for his father. Certain medical records of the decedent[iii] were submitted by the Contestants for consideration by this Court, although no medical testimony was offered by either the Contestants or Proponents at trial or by deposition. Police records from the

Cumberland Police Department concerning incidents involving Brandt and his brothers and father in March,1996 and an incident involving Brandt and his family in June of 1997 are a part of this record as well as records from the Northhampton/ Braintree Police Department concerning an incident that occurred at the complex were Herbert was being treated in March of 1996, involving Brandt , his father and Donald (no charges resulted from this incident). No police officers were called to testify at the court hearings or by deposition. Herbert's medical records concerning his medical condition in early 1996 was also filed into the record.

Hearings were held in Probate Court on January 21st, 22nd, and 25th 1999 at which time the Proponents offered the testimony of Deborah Bradford, Attorney Pearlman's secretary and a witness to the decedent's execution of the will submitted herein. Ms Bradford testified that the statutory requirements for execution of a will as set forth in RIGL 33-5-5 were met. She also testified that as far as her observations of the decedent at the law office indicated, he was competent to make a will and understood the document presented herein, although she had only been recently been acquainted with him. She stated that she had met Brandt in late January or early February, 1996 and that he presented as a neat appearing, affable, intelligent individual and thereafter did not do anything in her presence to cause her to change this opinion.

The other witness to the will, Attorney Philip Rosen, had his deposition taken and did not testify at the hearing, due to health reasons. He testified that he represented Brandt in his mother's probate case in Cumberland as a result of a referral from Attorney Pearlman and was paid by Mr. Pearlman from retainer funds deposited with him by the decedent. He also testified that he witnessed the execution of the subject will in controversy, that the RIGL statutory requirements as previously referred were met and in his opinion Brandt was competent to make a will and understood the document presented herein as his last will.

Attorney Thomas Pearlman testified that the decedent was referred to him by his son Roger Pearlman[iv] in late January, 1996. Initially, he was hired to assist Brandt in recovering funds allegedly due him from certain probate proceedings involving his mother's estate in Cumberland[v]. In early February, 1996, the decedent asked him to

prepare a will for him. Pearlman testified that he gave an Estate Planning sheet to Brandt to complete for the preparation of his will; on cross examination, it was apparent to the court that the decedent had actually completed very little of the form and that the majority of the form had notes inserted thereon by Attorney Pearlman. He testified that Brandt expressed a desire to leave his entire estate to certain members of the Davis family, a family he had befriended in 1988 and with whom he maintained a relationship with.[vi]

Attorney Pearlman testified that he was present when the decedent executed his will, understood its contents and that the will was executed in compliance with RIGL statutory requirements. He testified that Brandt ,at the time of the execution of the will, was not under the influence of any drugs or alcohol. He testified that the decedent, during the time he represented him, had never manifested any behavior that would demonstrate a use or dependence on drugs of any type. Mr. Pearlman testified that he[vii] represented the decedent in all of the litigation the decedent was involved in up to his death[viii].

Katherine Kelley, the other Co-Executor named in the will, testified about her relationship with Brandt from the summer of 1972 up to his death. She was married to him from 1979 until 1985. She described him as a habitual user of marijuana and alcohol during this entire time. She also testified extensively what she knew about his relationships with his family, the Davis family (including the beneficiaries under the purported will), his friends, his employment, certain of his character traits, and her observations of him from the time of the execution of the will until his death. She also opined that based on her observations, Brandt was capable of understanding and making a will in February of 1996. She described a short period in 1985 (April to July) when Brandt sought psychiatric help from Marisa Allegra, MD. He was allegedly having problems with relationships at his work and sought counseling. Ms Kelly testified that he stopped counseling because the doctor insisted he stop using illegal drugs. No such indication appears in any of the doctors records[ix]. Rather, these records indicate he was prescribed an anti-depressant and was diagnosed as having clinical depression. He voluntarily ceased treatment in July, 1985, saying he felt he was able now to cope with his problems at work.

She testified at length about her relationship with Brandt for most of his adult life. Throughout her entire testimony, she never opined that Brandt lacked the mental capacity to make a will. She opined that she knew of his long term relationship with the Davis family and the special feelings he had for young Jonathan Lehr, Jr. She was not surprised at the testamentary dispositions that the decedent made. She also testified that she knew Brandt was having financial problems with his family from the time his mother died in 1994 until his death and that he was having difficulty coping with her death and his father's advancing age and infirmities.

Ms. Kelley testified that, upon learning of Brandt's disputes with his family, she advised Attorney Pearlman of his drug abuse and told him that this might be affecting Brandt's view of his family and could be a factor contributing to Brandt's relationship with his family[x]. She also stated that Mr. Pearlman did not react to this information.

The deposition of Charles O., Charles F. and Beverly Davis as well as Melissa and Jonathan Lehr, Sr. were submitted to the court. Each testified to knowing the decedent for varying lengths of time (from 1988 forward) and in different degrees of closeness. Brandt, up until August of 1997, spent a lot of time with the family; had a special relationship with Jonathan Lehr, Jr. and spent time with him. The relationship with the family ended abruptly in August, 1997 when Brandt "came on" to Melissa. They all testified that based on their observations of him, he was mentally competent to make a will on February 19, 1996. Charles O., Charles F., Beverly, and Melissa knew he had left Charles F., Melissa and Jonathan, Jr. his estate in the February, 1996 will shortly after it was executed.

The Contestants presented Adam J. Zuckerman, a security guard whose testimony was irrelevant in the court's mind to these proceedings.

Richard Grubb, a neighbor of Herbert and Brandt in Cumberland testified as to certain events that he observed concerning the decedent and his family and two specific confrontations that he personally had with the decedent in January, 1996 and in June of 1997. He testified that Stephen , in December of 1995, asked him to look out for Herbert in his home and to administer his medication to him. Mr. Grubb stated that his encounters with Brandt frightened him and were not caused by any specific act he had done. His

observations of the decedent's behavior led him to believe that the decedent was not in control and posed a real threat of physical harm to him.

Bertram Hoeke, Herbert's accountant, testified about a confrontation he observed involving Brandt, his father and Donald in March, 1996, in the nursing facility in Massachusetts after the family had read a copy of the will that is the subject of this proceeding. He also testified as to a conversation he had with the decedent on a car ride to the medical complex where Herbert was being treated[xi] and where the previous referred confrontation took place. He stated that he attempted to resolve the family disputes[xii] and serve as a mediator to do same, without any reaction from Brandt.

Stephen gave extensive testimony concerning his observations of the decedent from his high school days to the time of his death. He testified about conversations he had with Brandt in October and December of 1995, the decedent's apparent disregard of Herbert's frail mental and physical condition in December of 1995[xiii] , and his discovery of a "bizarre list" allegedly prepared by Brandt in December of 1995[xiv]. He also testified as to the condition of the Jepson family home from January, 1996 to March of 1996[xv]; and the confrontations that he had with Brandt from the time he discovered a copy of the will that is the subject of this controversy in March of 1996 up to the time of the decedent's death. He testified that Brandt, to the family's dismay, retained Attorney Pearlman as his lawyer in the litigation that pitted family members collectively against Brandt and caused Herbert to give a letter to Brandt in the nursing facility in March of 1996, setting out his conditions for his continued financial assistance for Brandt[xvi]. He **opined** that Brandt was not competent to make a will in February of 1996 and **was being used** by Attorney Pearlman for his own (Pearlman's) economic gain. Regardless of these feelings and beliefs on Stephen part, he acknowledged that in April of 1996 a check for $25,000.00 was given to Brandt as a partial distribution from the Eleanor Jepson Estate.[xvii]

He testified that from when their mother died in late 1994 up to his own tragic end, the decedent was out of control and not competent to make rational decisions concerning his life, his family, any business transactions and certainly not able to

understand the business of making a will **at any time** during this period, until shortly before he died.

The contestants submitted the deposition of Attorney Paul DiMeo. He had consulted with Brandt two weeks before he died and was an old family friend. According to Mr. DiMeo, Brandt did not at this time in 1998 remember the contents of his February 19,1996 will and wanted to revoke it[xviii], claiming he was "whacked out" on drugs at the time he made it and didn't remember its contents[xix]. However, Mr. DiMeo testified that based on his observations of Brandt at this time (late April early May 1998), he was competent to make a will.

All of the other depositions, medical records, videotapes, and police reports submitted by both parties herein were reviewed and are made are a part of the court record and will be referred to as appropriate in the rendering of the court's decision herein.[xx]

Findings Of Fact and Conclusions of Law

The court finds that the proponents through the testimony of Deborah Bradford and Attorney Philip Rosen , the two subscribing witnesses to this will, have met their **initial** burden of proof as to compliance with the basic statutory formal requisites for making a will.

Ms Bradford testified that the formalities for the execution of a will were met on February 19,1996 and that in the brief time that she knew the decedent, he appeared to be competent to make a will and was over the age of majority. Mr. Rosen confirmed this in his deposition that was filed in this case. Rosen testified that he met with the decedent before the execution of the will on an unrelated legal matter involving Brandt's mother's estate in Cumberland Probate Court and also met with him after February 19, 1996 and in his opinion the statutory requirements to make a will were met. Attorney Pearlman's statements as to the events surrounding the preparation and execution of the will only buttress this position.

In Rhode Island, the burden of proof in a will contest is a shifting one, with different evidentiary standards for the Proponents and Contestants. Initially, the Proponents for the allowance of a will must establish its validity as to its *statutory*

compliance. The testator must be eighteen (18) years old, **appear** to be of sound mind to the two (2) subscribing witnesses RIGL 33-5-5 , not be coerced to declare the document as his last will and testament, and appear to understand its contents and be of sound mind and belief. The witnesses testify that the will was executed by the testator or signed at his direction, acknowledged by him as his last will and testament, in their presence and they then subscribe in his/her presence and in the presence of one another that all the formal requisites to a valid will have been met. RIGL 33-7-26 and Hazard v Bliss 43 RI 431.

If there were no objections to the allowance of the will, the establishment of a *prima facie case*[xxi] by its proponents for its proof would suffice. Obviously, this is **not** the case herein; the proponents here must establish by a fair preponderance of the evidence either directly or circumstantially that the testator possessed the mental capacity to make a will when it was executed. McSoley v McSoley 91 RI 61, among other cases.

The Contestants' first allegation is that the decedent lacked testamentary capacity at the time he executed his will on February 19, 1996. There argument is based on their theory that as a result of his habitual and continual use of drugs for the better part of his adult life (before he made his will and thereafter, up to his demise) the decedent was incapable of possessing the necessary elements of mental capacity for an individual to make a will in Rhode Island. He either did not possess the basic mental ability to execute a will because of his mental deficiencies **or** he was suffering from insane delusions wherein he adheres against reason and evidence in his dispositions in the will.

RIGL 33-5-2 provides that an individual must be of "sane mind" to make a will.

Our Supreme Court has set forth the standards to determine an individual's mental competency to make a will. In Tavenier v McBurney 308 A2d 518 , the elements needed by a testator for testamentary capacity were elicited. Summarily stated, they are:

- that the testator must possess sufficient mind and memory to understand the nature of the business of making a will;
- know and understand the property he has and wishes to dispose of by the will;
- know and remember the natural objects of his bounty and his relations to them.
- appreciates and understands these elements in relation to one another

To apply these standards to the facts at hand, the court initially examined all of the decedent's medical records submitted. Those records and my summary of them is as follows:

- Doctor Marisa Calzolari Allegra's notes for Brandt's 1985 treatment allude to the decedent's interpersonal problems at work and that he may be clinically depressed, and was prescribed a medication for this. No substance abuse problems are referred to or mentioned in the records provided.

- The records from Doctor Harris, his personal physician from 1984 through 1992, are not at all dispositive of any substance problem serious enough to be of concern to the doctor. These records indicate his abstinence from alcohol commencing in late 1992.

- The medical records from Blackstone Valley Center of Internal Medicine in November of 1993 indicate his continual abstinence from alcohol, although he admits to smoking pot 3x a week. In September of 1995 an "urgent visit" is noted and the decedent is worried about his blood pressure. No other entries appear until March of 1998 when the decedent makes another "urgent visit", claims he is paranoid, has admitted to again abusing alcohol and continues to abuse "pot". The records indicate he doesn't like detox, doesn't trust the medicines given him and has suicidal thoughts. He also has problems with his relationship with his father and has financial concerns.

- Records from RI Hospital in November and December of 1997 indicate Brandt sought assistance for depression, and drug abuse.

- On December 19,1997, the decedent was at the Providence Center. Their records indicate that Brandt was under family stress at the time, abused marijuana and alcohol, was depressed and stated to them that he had bi-polar illness (the record does not indicate any diagnosis of this). He was referred to detox at Talbot House administered by Sstarr of Rhode Island, Inc. He was found not to be motivated to take care of himself, had substance dependent depression and suicidal thoughts.

- In January of 1998, he was treated at Butler; their notes indicate "rule out" major depression. No other hospital records were presented for February, March or April

of 1998, although he visited his internist at Blackstone Valley Center of Internal Medicine in March of 1998.

- He again treated at RI Hospital on 5/4/98 being admitted by Ms. Kelley. The records indicate he hated being alone and had suicidal ideas.

- The reports from the Newport Hospital in May of 1998 suggest that Brandt, shortly before his death may have been suffering from **non-biological** depression, which I infer to be a depression brought on by external factors (substance problems, relationships with family, work other problems not brought out in this proceeding) rather than internal ones.

No expert hypothetical medical testimony was provided, nor were any medical treatises/studies offered to the court by either side concerning the effect of habitual usage of marijuana/ alcohol on an individual. No medical records for 1996 for the decedent were provided so that I conclude that the decedent did not receive any medical assistance during this entire calendar year. The court is required to make reasonable inferences do concerning the effect that habitual use of drugs for a period in excess of 25 years had on this testator.

I find that the medical testimony **alone** does not support a finding that the decedent was incompetent under RI law to make a will on February 19th , 1996 because of his alleged substance abuse, clinical or non-biological depression or other alleged mental or physical problems.

However, these medical records taken with the lay testimony by deposition and at the court hearings provides the court insight as to the effect the use of drugs had on Brandt before and after the execution of his will . Lay testimony as to mental capacity is admissible provided it is based on personal knowledge and observations of the witness. Id at 81, McSoley v McSoley and Rynn v Rynn 55 RI 310. It is reasonable for me to make inferences concerning drug usage together with **all the other evidence** in its totality rather than fragments of it. Judge v Janicki 374 A2d 547.

Ms Kelley one of the two Proponents of the will, alluded to Brandt's substance abuse problem **consistently** in both her deposition and testimony in court. She testified that as far back as their courtship in the early 70's, during their marriage and up to shortly

before his death, Brandt had regularly, perhaps daily, used marijuana. She indicated that he also had abused alcohol up to **1992** and then stopped until **July of 1997** when she believed he began abusing this drug again. She described his behavior when under the influence of marijuana as being passive, non-communicative, "out of it" and wild and reckless when abusing alcohol. She also testified that Brandt knew he had problems with both of these drugs, but could never stop his use of "pot".

Charles O. Davis, a friend of the decedent and father of two of the named beneficiaries and grandfather of the other ultimate beneficiary, testified in his deposition that from the time he met Brandt in 1988 up to August of 1997, when Brandt stopped visiting, he knew Brandt smoked marijuana regularly and in fact had observed him smoking dope.

Melissa Lehr, a beneficiary under this will, daughter of Charles Davis and mother of Jonathan Lehr, Jr. (a minor and a named beneficiary under a trust established by the will proposed herein) testified in her deposition that she also knew Brandt regularly used marijuana.

Stephen, one of the contestants to the will, testified as to his personal knowledge **and** Brandt's admissions to him **and** members of his immediate family of his habitual use of marijuana.

Attorney DiMeo, in his deposition, testified that the decedent admitted to being a habitual abuser of drugs including but not limited to marijuana, cocaine[xxii] and alcohol.

The court finds as a matter of fact that Brandt H. Jepson was, for at least 25 years prior to his death in May,1998, a **habitual, continual, regular user of marijuana** and secondarily, to a lesser degree, **of alcohol**. The evidence before the court is overwhelming and uncontroverted: the decedent's use of drugs was consistent in these proceedings.

No evidence was submitted to the court by the Contestants that when he executed the will, the decedent was high, intoxicated or under the **immediate influence** of any drugs. Therefore, this court finds as a fact that on the day he executed his will the decedent was not under the immediate influence of drugs. I find that this alone is not probative of testamentary capacity at the time the will was signed.

Contestants allege that the decedent's drug abuse for an extended period of time together with his other alleged mental problem (depression) rendered him incapable of making a will and not to be of "sane mind" because he was mentally deficient at the time he made his will **or** was suffering from insane delusions that affected his testamentary dispositions.

However, proof of alcohol and/or drug abuse in and of itself does not establish a lack of testamentary capacity; the Contestants must prove that the habitual, continued usage of the offending substance(s) before and after the will was executed somehow made him mentally incompetent to make a will; 9 ALR 3rd § 3,4 and see Succession of Sturgis 516 SO 2nd

In order to sustain such a finding, the Contestants herein must prove **either** that:

- the testator's mind was not "rational" when he made his will. The drug abuse must permanently impair or derange the testator's mind to render him incapable of possessing the necessary testamentary capacity to execute a will even when he was not under the immediate influence of drugs and intoxicants. Evidence of habitual, prolonged drug abuse and the apparent effects of such use upon mental functioning over time is relevant to a determination of mental capacity. Crabtree v Gerard 911 P 2nd 266 **and/or**

- that the testator was suffering from insane delusions which affected the dispositions in the will. An insane delusion is a legal not a psychiatric concept; it is a false belief for which there is no reasonable foundation. It is adhered to against all evidence and reason to the contrary. The delusions must substantially affect the will and one or more provisions of it must be the product of it. Rynn v Rynn, supra. 9 ALR 3rd § 5,10.

The court has examined all the actions of the decedent before and after the execution of the will and has analyzed the evidence in its totality, considered reasonable inferences from it, but not applying equal weight to it. Caranci v Howard 708 A2d 1321.

The evidence submitted does not support the premise stated above that the decedent was suffering from insane delusions, in the legal sense, when he executed his will on February 19,1996.

Without acknowledging the admissibility of all the clauses in the will, I do not find that the will is in part or in its entirety the product of insane delusions of the testator.

The test is not the objective reasonableness of the will but rather the rational character of the testator's mind at the time the will was executed.

The Contestants site several specific examples of the decedent's behavior in their brief which, according to their interpretation of the evidence in this case, demonstrate that he lacked the mental ability under Rhode Island law to make his will because of the effects of alcohol and marijuana on his mind. I have examined these points as they relate to the evidence and summarize my findings as follows herein.

The evidence is that Brandt was, for at least ten (10) years before his death, totally dependent on his mother and father for his personal care; after his mother's death his deficiency in this area became more pronounced, eventually leading to his expression to Stephen that he " couldn't take it any more" referring to the responsibilities with his father and resulting in his visiting his brother in November, December 1995. The family, because of Brandt's weakened condition and inability to do this, was forced to ask an elderly neighbor, Mr. Grubb, to look after Herbert. Instead of recognizing his father's need to have this type of assistance, the decedent developed an intense dislike for Mr. Grubb and attacked him. He expressed a belief in December of 1996 that his infirmed father should / could "shop" for groceries. (Exhibit 3)

He felt threatened by his father's advancing age and health problems and he was devastated by his elderly mother's death; the evidence provided concerning these latter finding is overwhelming and demonstrates to the court reactions that are beyond a normal range as accepted in society.

A home video taken by the decedent shows the extent of his inability to take care of his home, living surroundings and himself and thus evidences his diminished mental condition. He "housebroke" his puppy and apparently ignored any chores (including thorough cleaning) in the Cumberland home for a three (3) month period: (January-March, 1996). I find that this video depicts a person with severe mental problems, allowing himself to live in such squalor, **contrary** to the testimony of Attorneys Rosen and Pearlman that the house was in "normal" living condition at this time. (In direct

contrast to this, he presented personally during this same period at least ostensibly in a normal, hygienic manner.)

During this same time, he believed that his brothers were unjustifiably keeping his father away from him and that he (Brandt) was capable of caring for Herbert at home following his hip surgery and despite his infirmed condition, contrary to all the independent medical advice provided the family.

I find this behavior to be indicative of a person out of touch with reality and not being of sound mind

The testator, despite the families obvious support of him, believed his brother's were "out to get him" and that they somehow were conspiring with his father to reduce his share of the family wealth, both during the life of Herbert and apparently upon Herbert's demise. The evidence submitted (testimony of Stephen, Ms. Kelley) demonstrates that over the years, his family had consistently supported him financially. I find that the decedent was an unmotivated and passive individual, based on his checkered employment record, life style and general outlook on life. He had difficulty maintaining relationships at work, with his family and certainly on the marital front (although he remained friendly with his ex-wife up to his own death); he disdained responsibility and was content to be supported in every way (financially and for personal needs) by his family. No evidence of his acquisition of wealth by his own efforts was submitted, which is significant in light of his good physical condition, education, family background and lack of personal expenses. Clearly, to my mind, his behavior and outlook was a product of his drug use and demonstrated paresis.

I find that Mrs. Jepson's estate was complicated and dependent in part on funding from two other estates. There were serious tax and legal implications in this estate; despite these problems, in the decedent's view, it was not being paid out to him "fast" enough and he believed his brothers were improperly influencing Herbert to undertake an estate plan that would reduce Herbert's estate tax liability (testimony of Bertram Hoeke.)

Brandt hired Attorney Pearlman, who proceeded to aggressively (in some ways unjustifiably), undertake a total adversary posture on behalf of Brandt against the family. Rather than resolve the problems between Brandt and his family, Attorney Pearlman's

actions served to incite the family against his client. To some extent, their response was justifiable (Exhibit 5- letter to Brandt which summarizes the family position: since all the wealth you have was given to you by your parents, please drop Attorney Pearlman; **get help for your drug problems** or not receive more monetary support;.) Herbert, never the less, in April of 1996, sent him a partial distribution of Mrs. Jepson's estate through his attorney (Exhibit 1 of Proponent and Contestant, a check payable to Brandt for $25,000.00 and marked as a partial distribution from the Eleanor Jepson Estate).

It is my findings that Brandt's responses to his father and brothers action were not supported by the facts or evidence in this case, but were rather demonstrative of his paranoia (delusions of persecution and jealously of him by his family) and envy of his brothers. The court finds that these states of mind existed both before and after he executed his will up until he received professional intervention in the months before he died.

Brandt drew up a bizarre list in December, 1996 (Exhibit 4) predicting future or present harmful events relative to certain family members and himself, for no apparent reason; he was unreasonably mean and irritable to his brother (assaults on Stephen) , Mr. Grubb, and Bertram Hoeke in the months just before and after his execution of his will. In taking these facts collectively ,the court finds that this is overwhelming evidence of a person not in touch with **rationality** during the time before and after the execution of his will.

The Proponents argue that the will should be admitted since Brandt had the necessary mental capacity to make his will on February 19th, 1996.

They present Attorney Pearlman as a witness. He was not at all credible to the court on the decedent's mental capacity during this time. I find it incongruous that throughout his representation of Brandt he was unaware of any substance problems affecting the decedent. The very nature of the litigation against his family ,the decedent's manner as demonstrated in the early 1996 home video, the living conditions of the Cumberland home and the September, 1996 videos give ample evidence of a person experiencing serious mental problems throughout this time period. In July, 1997, Ms Kelley testified that she alerted him to Brandt's drug dependence, to no avail. He either is

naive in assessing individuals or is being less than candid with the court. Either way, his statements as to the decedent's competency are not believable to me. He allegedly is a creditor of the decedent estate and is not an objective witness for the Proponents.

Katherine Kelley's testimony concerning the effects of the decedent's drug use on him, mental condition at the time he made his will and thereafter, and his relations with his family was especially informative to me. The court finds her to be, for the most part, a credible, objective witness. The only problem with her testimony is that her conclusion that the testator was competent when the will was executed is not at all supported by her testimony.

I find her testimony concerning his drug problems and their effect on his **rationale** especially compelling; she believed his marijuana problem permeated his entire self and weakened his mind.. She thought his drug problems significant enough to question Attorney Pearlman in July of 1997 as to whether he considered the effect of Brandt's drug abuse on the disputes he was having with his brothers and father.

I find that her testimony supports a finding that the decedent was mentally deficient when he made his will, even though there is no testimony as to the specific effects of the continual drug abuse **precisely** at the instant of his will execution. The time frames are not so far removed as to render her testimony objectionable because of remoteness from the specific time of will execution.

Her opinion that Brandt had a "special" relationship with Jonathan Lehr, Jr. is not supported by her observations and detailed testimony; she recalled only one incident when Brandt was alone with him, not dispositive to the court of the decedent's affection for him, justifying a devise of 50% of his estate to him.

The decedent could not, shortly after he executed his will, according to her, recall its contents in more than a perfunctory way. She brushes off this inability to recall any details of his will as being the "way he was", never concerned with specifics. To the contrary, I believe her testimony indicates that he did not then understand the consequences or contents of his will.

The testimony of the Davis family as provided in their depositions was as I would expect from beneficiaries who were largely out of touch with the decedent. His

presence was tolerated and accepted: no more and no less. They routinely described the decedent as competent although they could not describe in any convincing way evidence of this. I determined from their testimony that Brandt was very passive and unobtrusive when he visited them, often sitting alone before their TV, watching auto races. He occasionally smoked dope on their property.

Their testimony was that Brandt told them he was well off and that his brothers were unjustly attempting to deprive him of his perceived birthright. No particular close relation with young Jonathan, Jr. or Melissa was described (however, in August, 1997, the decedent made a unwelcome pass at Melissa while sleeping; thereafter at the request of the family, his visits ceased until a final visit before he died). There was no evidence of a special relationship between Brandt and any members of the Davis family. The elder Mr. Davis's testimony concerning the incident at the rehabilitation facility in Braintree involving Brandt and his family is significant to me. It describes Brandt's out of control behavior shortly after he executed his will, for no rational reason.

The Proponents also rely in part, as support for allowance of the will, the lack of specific, objective medical evidence finding the decedent incompetent to make a will. As stated previously, the lack of such specific medical evidence is not in and of itself fatal to either proponents or contestants. This court must rely on the totality of **all** the evidence submitted which by the very nature of will contests will be circumstantial and must include lay-testimony in determining the competency for the admission of a will.

The Proponents argue that Brandt's family did not believe that he was incompetent to make a will when they learned of its existence(March, 1996). Otherwise, they allege, why was a $25,000.00 check rendered to him through his attorney in April of the same year ? This argument holds no weight for me; the family's belief as to Brandt's mental condition at this time is no more dispositive in and of itself than the apparent objective testimony of Attorney DiMeo that two weeks before he died, Brandt recognized the error of his ways and was now competent to make his will.

What I do believe from these encounters is that his family in April of 1996, was desperate in their attempts to resolve their "problems" with Brandt; and that, in the weeks

shortly before he died (and probably right after he executed it), the decedent did not recall or understand the contents of his will and was not competent to make his will.

The court, in rendering its decision, must weigh the credibility of all the witnesses provided and examine all the evidence before it, assigning different weight to a particular portion(s), considering reasonable inferences therefrom. Will contests must be decided on the subjective, practical evidence found in it, considering eccentricities and peculiarities of the testator in applying the testamentary standards as set forth in Tavenier v McBurney, supra.

I find that the Proponents have **not** met their standard of proof in establishing by a fair preponderance of the evidence that the testator was competent to make his will on February 19, 1996. Rather, I **infer from** Brandt's **habitual marijuana use that his** mind was in such a weakened state at the time he made his will that he lacked the necessary mental ability to make his will. The weight of the evidence on his lack of testamentary capacity is, in the courts mind, persuasive and overwhelming. It is doubtful to me that the testator **at any time from November, 1995 until shortly before he died** was competent to make his will, so destructive was his drug abuse.

Before proceeding further, I would be remiss if I did not comment on the personal animosities between the Jepson family and Attorney Pearlman; it often seemed to the court that the "battle lines" were drawn when Brandt retained Attorney Pearlman. The distaste that the Jepson family had for Attorney Pearlman as well as his aggressive advocacy against them, soon became **"the problem".** Tragically, and because of this , Brandt was deprived of the desperate help he needed to overcome his drug problems.

Having disallowed the will on the grounds of incompetence, the court will not assess the other arguments made by the Contestants. However, the standard for proving undue influence in Rhode Island is clear and convincing evidence on the part of the party alleging the improper influence, a very steep hill to climb.

The court will grant the Petition for Administration and appoint Donald Jepson as Administrator and Appraiser, with appropriate local agent. Bond is set at $700,000.00, no surety.

The Custodian is ordered to render his first and final account; he will be discharged upon its acceptance. Counsel will prepare an appropriate order.

ENTER:_____

BY ORDER:_____

Endnotes:

[i] If the will of Brandt is not allowed, under RIGL he will be deemed to have died intestate and his estate will pass to his heirs at law.

[ii] The following witness depositions were submitted: Philip Rosen, Esquire, Thomas Pearlman, Esquire, Paul DiMaio, Esquire, Roger Pearlman, Katherine Kelley, Donald Jepson, Deborah A. Bradford, Charles F. Davis, Charles O. Davis, Beverly Davis, Jonathan Lehr, Melissa Lehr.

In addition, copy's of the decedents video deposition(s) from September 1996 in unrelated litigation involving Citizen,s Bank, the decedent and his father was submitted for review by the court.

[iii] The following medical records were submitted for Brandt Jepson and are part o the record in these proceedings: Marisa Calzolari Allegra, MD, Butler Hospital, SSTAR of Rhode Island, Blackstone Valley Center of Internal Medicine, Inc., Lifespan/RI Hospital, Talbot House & Providence Center, Newport Hospital.

[iv] Roger Pearlman managed rental garages for his father and mother and had rented garages to Brandt for a number of years before the execution of the will in controversy herein.

[v] Mrs. Jepson died in 1994; apparently ,to reduce estate taxes Herbert filed a disclaimer of his interest in her estate in the amount of $600,000.00, thus giving $200,000.00 to each son. However, this Jepson estate was effected by the activity in the Ruth Law Estate(Mrs. Jepson's sister) in Cranston Probate Court.

[vi] In August, 1997, decedent became estranged with the entire Davis family because of his unwanted advances on one of the named beneficiaries of the will, Melissa Lehr.

[vii] Attorney Rosen represented Brandt in his mother's probate estate.

[viii] Both the proponents and Contestants in their briefs filed listing of the court actions the decedent was involved in from January of 1996 up to his death.

[ix] The medical records submitted for the doctors/facilities that treated Brandt herein indicate histories, as provided by the decedent, of frequent, habitual use of marijuana and to a lesser degree, alcohol.

[x] By this time, Brandt had been evicted from Herbert's home in Cumberland and appealed same, had criminal complaints filed against him by the Cumberland Police as a result of complaints filed by Stephen; had civil litigation pending against his brothers and father and Citizen's Bank, as well as litigation involving his mother's estate. Attorney Pearlman represented him solely or with attorney Rosen in all of these matters.

[xi] Herbert's medical records were submitted concerning his treatment, etc. for hip replacement and recuperation thereto as well as dementia.

[xii] Apparently, after Mrs. Jepson died, Herbert changed his will, reducing Brandt's share to 20% as opposed to 40% each for Donald and Stephen. In addition, Donald was given financial power of attorney by Herbert and the equal gifting by Herbert to Donald, Stephen and Brandt ceased. Donald and Stephen family were now included in Herbert's gifting plan.

[xiii] Contestants Exhibit 3

[xiv] A list dated 12/10/95 containing bizarre references to certain family members and allegedly prepared by Brandt was submitted by Contestants as Exhibit 4

[xv] A video allegedly taken by the decedent was submitted showing his lack of house keeping skills and hygiene while he was housebreaking his puppy in the Cumberland home

[xvi] Contestant's Exhibit 5 for identification

[xvii] Proponent and Contestant #1 Exhibit.

[xviii] Brandt did not return to Attorney DiMeo's office to execute a revocation before he died.

[xix] RIGL 33-5-10 sets forth the means and methods for revocation of a will in Rhode Island; none were used in this case.

[xx] The parties herein had agreed to the submission and review of same.

[xxi] Riedel on Wills, Trusts, Gifts δ 94, page 36

[xxii] No evidence of cocaine or other drug use other than marijuana and alcohol was ever submitted.