SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4532-14T1

IN THE MATTER OF THE
ESTATE OF ALFRED
FINOCCHIARO, SR., Deceased

ESTATE OF ALFRED FINOCCHIARO, JR.
Deceased, CHAD FINOCCHIARO, KELSEY
FINOCCHIARO and NICHOLAS FINOCCHIARO,

Plaintiffs-Appellants,

v.

FRANK FINOCCHIARO,

Defendant-Respondent.

Telephonically Argued November 1, 2016 -
Decided November 30, 2017

Before Judges Fuentes, Simonelli and Carroll.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Morris County, Docket No. P-1257-2012.

Frank M. Williams argued the cause for appellants.

Robert W. Mayer argued the cause for respondent.

The opinion of the court was delivered by

FUENTES, P.J.A.D.

This appeal concerns the validity of the last Will and Testament of Alfred Finocchiaro, Sr., who died in Dobson, North Carolina from cardiac arrest on August 18, 2011 at the age of eighty-nine. On July 2, 2012, decedent's son Frank Finocchiaro[1] successfully admitted his father's 2007 non-resident Will to probate in the Office of the Surrogate of Morris County. On October 16, 2012, Peggy M. O'Dowd, the estranged wife of decedent's late son Alfred, Jr., and his children Chad, Kelsey and Nicholas, filed a verified complaint in the Morris County Chancery Division, Probate Part, seeking to nullify the 2007 Will and revoke the letters testamentary issued to Frank.

The case was tried before Judge Stephan C. Hansbury over a two-day period on April 27 and 28, 2015. Plaintiffs claimed three grounds for invalidating decedent's 2007 Will: (1) lack of testamentary capacity; (2) undue influence by his son Frank; and (3) improper execution. Plaintiffs sought to invalidate the 2007 Will and reinstate a Will decedent executed in 2001 that contained, inter alia, specific bequests to Chad, Kelsey and Nicholas, and

[1] In the interest of clarity, we will refer to the individuals whose last name is "Finocchiaro" by their first name. We intend no disrespect.

directed the residuary estate to be equally divided between his two sons, Frank and Alfred, Jr., per stirpes in fee simple absolute. Plaintiff also sought punitive damages and an award of counsel fees.

In support of their claims, plaintiffs presented the testimony of Dr. Robert Bock, a family practice physician who briefly treated decedent in 2005. Judge Hansbury also granted plaintiffs' application to admit Dr. Bock as an expert witness in the field of "general family medicine, competency determination and geriatric care." Plaintiff also called Detective James A. Mandeville, who was one of the Pequannock Police Officers who responded to decedent's residence on December 29, 2006, the day Alfred, Jr. committed suicide. Detective Mandeville testified about the circumstances surrounding Alfred, Jr.'s suicide. The balance of plaintiffs' case consisted of testimony from O'Dowd and from the children she had with Alfred Jr.

Defendant's case consisted of Frank's testimony and that of John A. Snowdon, Sr., the attorney who prepared the March 1, 2007 Will. Frank described his father's emotional state and cognitive abilities during the time he cared for him after Alfred, Jr.'s death. Snowdon testified about his interactions with Frank and decedent and the procedures he followed to ensure that decedent had the testamentary capacity to execute the 2007 Will.

After considering the evidence presented by the parties, Judge Hansbury found plaintiffs did not prove, by clear and convincing evidence, that Frank unduly influenced decedent to disinherit Alfred Jr.'s children or that decedent lacked the testamentary capacity to dispose of his estate at the time he executed the March 1, 2007 Will. Judge Hansbury also found that Snowdon's testimony describing the manner the Will was executed satisfied the requirements of N.J.S.A. 3B:3-23.[2]

Against this record, plaintiffs now appeal arguing that they were "manifestly denied justice" because Judge Hansbury's factual findings and application of the relevant legal standards were clearly erroneous. We disagree and affirm substantially for the reasons expressed by Judge Hansbury in his oral opinion delivered from the bench on April 29, 2015. We gather the following facts from the evidence presented by the parties before the Chancery Division.

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[2] N.J.S.A. 3B:3-23 provides:

> If an issue as to the execution of a will arises in a contested probate action, the testimony of at least one of the attesting witnesses, if within the State, competent and able to testify, is required. Other evidence is admissible as to the due execution of a will.

I

At the time of his death on August 18, 2011, Alfred, Sr. resided with his son Frank and his wife Jacqueline in Boonville, North Carolina. Decedent's wife Florence and his older son Alfred Jr., both predeceased him. As reflected in the certificate issued by the Morris County Surrogate, decedent was survived by his son Frank and four grandchildren, Chad, Kelsey, Nicholas and William Ray Smith, Jr. On May 22, 2001, decedent executed a last Will and Testament that designated Frank as executor and Alfred Jr. as the substitute executor. This Will contained the following specific bequests and provisions:

> 1) To my grandson, WILLIAM RAY SMITH, JR., I leave the sum of $30,000.00
>
> 2) To my granddaughter, DARLEEN MCCLELLAN, I leave the sum of $5,000.00.
>
> 3) To my grandson, NICHOLAS FINOCCHIARO, I leave the sum of $5,000.00.
>
> 4) To my grandson, CHAD FINOCCHIARO, I leave the sum of $5,000.00.
>
> 5) To my granddaughter, KELSEY FINOCCHIARO, I leave the sum of $5,000.00.
>
> 6) To my great-granddaughter, HAILEY MARIE SMITH, I leave the sum of $5,000.00 and
>
> 7) To my great-grand[son], WILLIAM RAY SMITH, I leave the sum of $5,000.00.
>
> 8) To any unborn or afterborn grandchildren or great-grandchildren not specifically

> name[d] above, I leave the sum of $5,000.00 for each.
>
> 9) To my two sons FRANK T. FINOCCHIARO and ALFRED F. FINOCCHIARO, I leave the property located on Highway 71, Scohata, Louisiana, along with all the rights, leases, contracts and appurtenances thereto.

The 2001 Will also divided the residuary estate equally between Frank and Alfred, Jr., per stirpes in fee simple absolute.

On March 1, 2007, decedent executed a second Will that expressly revoked "all prior Wills and Codicils made by me." The 2007 Will designated Frank as executor and William Ray Smith, Jr., as the substitute executor. The 2007 Will contained the following specific bequests and provisions:

> 1) To my grandson, WILLIAM RAY SMITH, JR., I leave the sum of THIRTY THOUSAND DOLLARS ($30,000.00).
>
> 2) To my granddaughter, DARLEEN MCCLELLAN, I leave the sum of FIVE THOUSAND DOLLARS ($5,000.00).
>
> 3) To my grandson, NICHOLAS FINOCCHIARO, I leave the sum of FIVE THOUSAND DOLLARS ($5,000.00).
>
> 4) To my grandson, CHAD FINOCCHIARO, I leave the sum of FIVE THOUSAND DOLLARS ($5,000.00).
>
> 5) To my granddaughter, KELSEY FINOCCHIARO, I leave the sum of FIVE THOUSAND DOLLARS ($5,000.00).
>
> 6) To my son FRANK T. FINOCCHIARO, I leave the property located on Highway 71, Scohata,

> Louisiana, along with all rights, leases, contracts and appurtenances thereto.

The 2007 Will bequeathed the residuary estate to Frank. In the event Frank did not survive him, decedent left the residuary of his estate to his daughter-in-law Jacqueline Finocchiaro, Frank's wife. Thus, the 2007 Will removed two significant provisions that were part of the 2001 Will: (1) the specific bequests to Hailey Marie Smith and to decedent's unborn or after-born grandchildren or great-grandchildren; and (2) the per stirpes provision in the distribution of the residuary estate between Frank and Alfred, Jr., thus denying Alfred, Jr.'s children the right to equal shares of their late father's share of the residuary estate.

Dr. Bock was the first witness to testify at the trial. He began seeing decedent as a patient when he took over the practice of decedent's former physician. Dr. Bock testified his first contact with decedent was in September 2005. Although he did not remember the visit, Dr. Bock was able to describe decedent's physical and emotional status based on the medical notes he took to document the encounter. Dr. Bock wrote that decedent was "overall feeling well" and said "he could still rage hell." He did not have "any chest pain" or "trouble breathing," or any signs of "acute illness." Dr. Bock testified that decedent told him he

was "eating okay" and "his moods were good."

Dr. Bock next saw decedent approximately one month later. According to his notes, decedent was more "agitated" and "confused" that day. Although "he didn't actually complain of anything," Dr. Bock asked his son Alfred Jr., to try to get him decedent's medical records because he had been "diagnosed with bladder cancer [six] years before." Dr. Bock wrote that decedent's "blood pressure was real high, which . . . goes along to him being agitated[.]" On that day, Dr. Bock found him "only alert and oriented X1." This meant "he knew his name but didn't know where he was."

On that day, Dr. Bock "made a note of his dementia" on decedent's file. Dr. Bock testified that he left a message with his son Alfred Jr., and ordered "a CAT scan of the abdomen and an ultrasound of the neck." He saw decedent again on November 1, 2005. On this day, Dr. Bock testified that decedent "wasn't delusional." Dr. Bock spoke to "his daughter-in-law"[3] about scheduling the "scans." Dr. Bock also noted that decedent had not started to take his blood pressure medication and his "[b]lood pressure was high, still."

Dr. Bock next saw decedent on December 29, 2005. He noted

[3] We presume this reference to "daughter-in-law" applies to Peggy O'Dowd.

decedent's condition "was better." Although he was still smoking, his blood pressure was better. Dr. Bock continued to see decedent on this semi-monthly basis in 2006. His main medical concern was decedent's elevated blood pressure aggravated by his continued smoking. According to Dr. Bock, he visited decedent at his home on a regular basis in 2006 and noted that his physical appearance was deteriorating throughout the months. The last time he saw him that year was in December 2006. Dr. Bock wrote decedent was: "Walking about at home. Smoking. Pleasant. Conversive. Appropriate. Greeted me at the door. No complaints. Mild cough. Wants to stay home. Refusing nursing home placement." Despite these indicia of normalcy and cognitive awareness, Dr. Bock testified that decedent "was unaware of my name or what I did, even though I was there for the last year."

Dr. Bock's relationship with decedent ended on January 26, 2007, when he encountered decedent's son Frank. Dr. Bock wrote that Frank was "[v]ery agitated" and did not want him to continue to treat his father. Ultimately, Dr. Bock opined that decedent suffered from a chronic, progressive course of dementia from October 27, 2005 until the last time he examined him in December 2006. In his opinion, decedent was not competent during this entire time period. In response to plaintiffs' counsel's questions, Dr. Bock provided the following opinion testimony with

respect to the ultimate issue before the court.

> Q. So, therefore, Doctor, in your opinion do you believe that he could understand the terms of a will?
>
> A. That's something that we never discussed, but I wouldn't expect so, no.
>
> Q. Given his medical condition?
>
> A. No.
>
> Q. And do you believe that he would be able to understand or to express a proposed distribution plan route under a will? Or what he'd like done after he died?
>
> A. I don't think he'd even understand a distribution plan, or necessarily what that meant. What he would want to happen like if he got - - if he wanted to be buried or cremated? He might have an opinion on that. But in terms of long—term estate planning and things, you know, part of the - - I don't think he would have the competency for that.

Pequannock Police Detective Mandeville testified that he and other police officers responded to a report of a suicide at decedent's home on December 29, 2006. Upon arrival, they found that Alfred, Jr. had hanged himself in the garage. Mandeville remembered speaking with Alfred Jr.'s wife Peggy O'Dowd, who did not reside at the house. Relying on police records to refresh his recollection, Mandeville testified that he believed Alfred, Jr. and his father Alfred, Sr. were the only residents.

Peggy O'Dowd testified that from October 2005 to December 2006, her husband Alfred, Jr. lived with his father. She and her husband were separated and estranged from each other. During this same period of time, she would go to the house where her husband lived "on occasion." According to O'Dowd, she had "a very good relationship" with her father-in-law "during the period of my marriage." She and her estranged husband took care of whatever her in-laws needed.

On cross-examination, O'Dowd confirmed that she had a pending divorce action at the time Alfred, Jr. took his own life. When asked if she had a tumultuous marriage, O'Dowd responded: "We had . . . a marriage at sometimes made in hell, yes." She sought and obtained a domestic violence restraining order against her husband. O'Dowd testified that she was forced to get several restraining orders against her husband over the years, mostly due to his alcoholism. O'Dowd and Alfred, Jr. also had significant financial problems and filed for bankruptcy protection.

O'Dowd described her father-in-law as a reclusive man who was accustomed to a daily routine of going to work and returning home without socializing. Even before his illness, decedent never answered the telephone. He depended on his wife to take care of the house work and the family's finances. O'Dowd also stated that decedent did not "believe[] in doctors." She did not seek out

decedent or have any communications with him at the time her husband committed suicide. In fact, she did not see decedent until Alfred, Jr.'s wake.

Alfred, Jr.'s daughter Kelsey was fifteen years old at the time of her father's death in December 2006. She described her relationship with decedent as "very close." Kelsey stated, "I lived right down the street my whole life[;] so I saw him all the time[;] we were very close." She testified that she spent "[a]lmost every weekend" at her grandfather's house in 2006. This also allowed her to visit her father who was residing there at the time. When asked to describe her relationship with her uncle Frank in 2006, Kelsey responded: "I've never had a relationship with my uncle." She did not see decedent again or have any form of contact with him after her father's wake.

Chad testified that he enlisted in the Navy a week after his father Alfred, Jr.'s death in 2006. According to Chad, decedent seemed confused during this time period in 2006. He too did not see decedent again and did not have any contact with him after his father's death. Nicholas was twenty-four years old at the time his father Alfred, Jr. committed suicide. Unlike his two siblings, Nicholas testified that he did not see or have any kind of regular contact with his grandfather in 2006 "because I was kind of strained [sic] with my father." He learned of his grandfather's

passing from his mother, Peggy O'Dowd. Plaintiffs rested after Nicholas's testimony.

Defendant called William Ray Smith as his first witness. Smith is the son of decedent's daughter. She survived her father's passing but died before this trial began in April 2015. Smith is decedent's oldest grandchild. Unlike his cousins, Smith was unaffected by decedent's repudiation of the 2001 Will. His bequest remained the same in the 2007 Will. Smith testified that when he was a child he lived with his maternal grandparents for approximately twenty years, including his high school years. He said his grandparents treated him like a son. In response to defense counsel's question, Smith testified that from 2000 until decedent relocated to North Carolina with Frank in 2006, he saw his grandfather on a regular schedule "every other week." His visits usually lasted "a couple of hours" and at times included having dinner with him. When asked to describe his grandfather's demeanor and cognitive abilities during this time, Smith stated that "[h]e had his good days . . . and his bad days."

The Pequannock Police Department contacted Smith after Alfred, Jr.'s suicide and requested that he come to decedent's residence. After Alfred, Jr.'s death, Smith stayed at decedent's residence until his uncle Frank arrived approximately four days later. Smith testified that decedent was "very depressed" and

inconsolable during this time. Smith made clear, however, that decedent understood the gravity of the situation; but he was in disbelief over his son's death. Smith testified that even at Alfred, Jr.'s wake decedent was able to communicate and tell him what was on his mind.

Frank and his wife Jacqueline were the last two witnesses to testify. Frank testified that he and Jacqueline went to decedent's house after Alfred, Jr.'s death to assess the situation and assist with the burial arrangements. According to Frank, his father only required assistance "with meals and paying bills[.]" He emphasized that his father needing assistance with these two particular tasks was not necessarily indicative of any age-related degeneration or limitation. His mother (decedent's wife) had cooked all of the family's meals and paid the household expenses during the entire time his parents lived together as husband and wife. His father "never cooked in his life."

Frank testified that his father stopped driving after his brother's suicide. Decedent relied on him for transportation. Jacqueline testified that decedent knew who she was and was happy to see her. He was also understandably distraught and upset over his son's death. Jacqueline claimed she was able to maintain productive conversations with her father-in-law during the time she was with him in this State. She testified that he confided

in her his fear of being left alone. According to Jacqueline, decedent was receptive to the idea of moving to North Carolina to be near his son Frank and her.

Jacqueline returned to North Carolina on January 9, 2007. Frank remained behind to care for his father. On March 1, 2007, decedent executed a new Will in New Jersey. Frank and his father flew to North Carolina shortly thereafter. Upon decedent's arrival in North Carolina, Jacqueline and Frank rented an apartment for him to live, located across the street from their home.

Jacqueline testified that she became very close to decedent during the time he lived across the street from her home. In fact, she voluntarily assumed most of the responsibility for his care. They worked together on house chores or mini-projects, including the construction of a fence. Jacqueline testified that decedent was able to engage in conversations "most of the time." However, there were times when he became confused. This confusion could last for hours or for days. Conversely, there were times when he was lucid for days.

In May 2007, Jacqueline took decedent to see a doctor because she was concerned about his weight and frailness. After engaging in conversation with him, the doctor told Jacqueline that he believed decedent was suffering from Alzheimer's disease. The doctor suggested that he submit to certain cognitive tests to

confirm the diagnosis. Decedent chose not to take the tests; Jacqueline testified that she did not attempt to persuade him otherwise. The doctor suggested that decedent take Aricept, a medication designed to slowdown the progression of the symptoms of Alzheimer's.[4] Jacqueline agreed.

Jacqueline testified that decedent began to decline physically and mentally in 2009. Frank corroborated his wife's testimony. He testified that his father was in "real good shape" for approximately two years after his move to North Carolina. Alfred, Sr. died on August 18, 2011. Frank testified that he did not contact O'Dowd or any of Alfred, Jr.'s children to inform them of his passing. Frank provided the Morris County Probate Clerk with an address where he believed they may be residing. According to Frank, the Probate Court told him that he was not legally obligated to notify these individuals directly. He was only obligated to place a formal notification in the newspaper. Frank complied accordingly.

[4] Dr. Bock testified that Aricept is a medication for dementia and is typically prescribed to dementia patients as part of an aggressive treatment plan. Dr. Bock explained that he did not prescribe Aricept for decedent because it only slows the on-set of dementia. He opined it would have been futile given decedent's deteriorating state.

II

When a judge sits as the trier of fact in a bench trial, the judge must make factual findings based on the evidence presented by the parties. In this case, the evidence consisted primarily of the testimony of the witnesses. Here, Judge Hansbury found "no problem with credibility of anyone. I really think everybody pretty much told me the truth." Our standard of review of Judge Hansbury's factual findings is well-settled. "Factual findings premised upon evidence admitted in a bench trial 'are binding on appeal when supported by adequate, substantial, credible evidence.'" Potomac Ins. Co. of Ill. ex rel. OneBeacon Ins. Co. v. Pa. Mfrs.' Ass'n Ins. Co., 215 N.J. 409, 421 (2013) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). See also Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). This deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." Sipko v. Koger, Inc., 214 N.J. 364, 376 (2013), (quoting Cesare, supra, 154 N.J. at 412).

Guided by these standards, we discern no legal basis to disturb Judge Hansbury's factual findings. However, we review de novo and afford no deference to the trial court's rulings which constitute a determination of law. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010).

As the parties contesting decedent's 2007 Will, plaintiffs bear the burden of proving undue influence. In re Estate of Stockdale, 196 N.J. 275, 303 (2008). Furthermore, undue influence is a form of fraud that must be proven by clear and convincing evidence. In re Niles Trust, 176 N.J. 282, 300 (2003). Our Supreme Court has held that

> undue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will or inter vivos transfer[.]
>
> [In re Estate of Folcher, 224 N.J. 496, 512 (2016) (quoting Stockdale, supra, 196 N.J. at 302-03).]

Here, Judge Hansbury reviewed the evidence presented at trial and did not find any evidence to support the claim of undue influence by Frank. Judge Hansbury found decedent's decision to repudiate the 2001 Will was based primarily on Alfred, Jr.'s suicide and the reasons he believed precipitated it.

> I find the defendant [Frank] credible and I do find the decedent was extremely upset at the loss of his son and it's not hard to imagine that. I have never suffered through a suicide; but, to lose a child I've been told is the worst thing in the world. It's worse than losing anybody else and to lose a child at his own hands has got to be the most traumatic experience one can have.

> So, Senior now had one son and the testimony through the defendant here was that he blamed Peggy and the kids for Junior's suicide. That's not out of the blue, because, given the nature of the marriage, . . . I can conclude that that's a legitimate thought of the decedent. The TRO's, the divorce, the separation between them, the lack of contact between plaintiff and defendants and the decedent for all those years, meaning from the date of the wake forward, it fits with that conclusion. I find it a credible statement.

As the trier of fact, Judge Hansbury chose to rely on this evidence to support his legal conclusion. We review a trial judge's legal conclusions de novo. The evidence amply supports Judge Hansbury's conclusion. It is undisputed that O'Dowd and her children severed all contacts with decedent immediately after Alfred, Jr.'s suicide. When decedent relocated to North Carolina, Frank and Jacqueline were his only family. Finally, decedent's decision to include in the 2007 Will the same $30,000 bequest to his grandson Smith that he included in the 2001 Will is further evidence that he was acting under his own volition.

We next address plaintiffs' argument claiming Judge Hansbury erred when he found decedent had the testamentary capacity to execute the 2007 Will. We begin our analysis of this issue by noting that "[t]he findings of the trial court on the issues of testamentary capacity and undue influence, though not controlling, are entitled to great weight since the trial court had the

opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony." Matter of Will of Liebl, 260 N.J. Super. 519, 523 (App. Div. 1992) (quoting Gellert v. Livingston, 5 N.J. 65, 78 (1950)), certif. denied, 133 N.J. 432 (1993). Plaintiffs must rebut the presumption that "the testator was of sound mind and competent when he executed the will." Id. at 524 (quoting Gellert, supra, 5 N.J. at 71). Plaintiffs must satisfy this burden of proof by clear and convincing evidence. Ibid.

Plaintiffs rely on the testimony of Dr. Bock in support of their contention that decedent lacked testamentary capacity when he executed the 2007 Will. In rejecting this argument, Judge Hansbury accepted as credible the testimony of John A. Snowdon, Sr., the attorney who drafted the March 1, 2007 Will and was present when decedent executed it. Judge Hansbury noted that Snowdon met with decedent approximately two weeks after Alfred, Jr. died, and personally discussed with decedent what plans he had concerning the disposition of his estate.

Following this meeting, Snowdon sent decedent drafts of the Will for his review and approval. Judge Hansbury specifically found that this process took approximately six weeks, which "was plenty of time [for decedent] to reflect . . . plenty of time to calm down, to overcome the initial shock of losing his son[.]"

Stated differently, decedent was not pressured to reach this decision. Judge Hansbury also did not find strange or suspicious that Snowdon did not retain any notes in his file of his meetings with decedent. The judge concluded:

> I do find that the [decedent] had sufficient testamentary capacity to execute the documents. He went in and out. That I find, not a problem. He suffered from dementia, that I find; but, there's [no] evidence that he was incapable of understanding what his desires were and as I said, even the doctor said he could decide what to do with his body.
>
> . . . .
>
> So, I do find that he had sufficient capacity to execute the Will, understanding that he suffered from dementia, had bad days and had good days.

The evidence presented at trial, including Dr. Bock's testimony, supports this finding. There is no question that decedent suffered from dementia that was progressing commensurate with his age and was likely exacerbated by the emotional trauma associated with Alfred, Jr.'s death. The testimony of his grandson Smith corroborated Dr. Bock's testimony in one key respect. Both of these witnesses testified that decedent had days in which he was able to have "normal" conversations.

This court has held that a person who may at times lack testamentary capacity may be deemed capable of executing an enforceable will if they have "lucid intervals." See Wallhauser

v. Rummel, 25 N.J. Super. 358, 366 (App. Div. 1953); see also In re Politowicz, 124 N.J. Super. 9, 12 (App. Div. 1973). We discern no legal basis to disturb Judge Hansbury's well-reasoned legal conclusion upholding the validity of the March 1, 2007 Will.

We affirm the judgment of the Chancery Division substantially for the reasons expressed by Judge Hansbury in his oral opinion delivered from the bench on April 29, 2015.

Affirmed.