NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ESTATE OF MICHAEL KIEFNER APPEAL OF: HOPE KIEFNER AND DIANA WIBLE	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 745 WDA 2015

Appeal from the Order April 28, 2015
In the Court of Common Pleas of Allegheny County
Orphans' Court at No(s): 02-14-00502

BEFORE: GANTMAN, P.J., BENDER, P.J.E. AND SHOGAN, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED JULY 08, 2016**

Hope Kiefner and Diana Wible (Petitioners), daughters of Michael Kiefner (Decedent), appeal from the orphans' court order that dismissed their petition concerning the Decedent's will that left Decedent's entire estate to his nephew, Charles O'Donnell (Respondent), who was also named as executor. We vacate and remand.

Following discovery and a hearing that was held on February 17 and 18, 2015, the orphans' court issued an opinion that set forth the following facts:

> The primary dispute between the parties concerns a Will executed by the Decedent, Michael Kiefner, on December 3, 2013, which was four (4) days prior to his death on December 7, 2013. The Will, which was prepared by Attorney Holly Deihl and executed by the Decedent in his residence, disinherits his daughters and leaves his entire estate to his nephew, Charles O'Donnell, who is also the Executor of the Will.
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> The Petition and Amended Petition allege that Mr. O'Donnell used undue influence and his confidential relationship with the Decedent to convince him to execute the Will. It further claims that the Decedent lacked testamentary capacity and that

he was suffering from a weakened mental intellect when he executed the Will.

Findings of Fact

Through testimony at the hearing on February 17 and 18, 2015, the Court makes the following findings of fact:

1. The Will was prepared by Holly Deihl, Esquire[,] and executed by the Decedent, in the presence of Attorney Deihl, another witness, and a Notary Public on December 3, 2013. Exhibit A (N.T. 2/17-18/15, pp. 8, 259-264, 276-280).

2. Although ill and suffering from mesothelioma, the Decedent knew that he was executing his Will and he did so voluntarily.

3. Contrary to the testimony of Wendy Carlson, an expert in handwriting analysis, the Decedent's signature on the Will is not a forgery.

4. Although it appears that the Decedent loved his daughters, he did not have a close, father-daughter relationship with them and he had not seen either of them in the few years prior to this death.

5. The Decedent did not attempt to contact his former wife or his daughters to let them know that he was ill.

6. Although he had the ability to contact the Decedent's ex-wife for the purpose of notifying the Decedent's daughters of his illness and his death, Charles O'Donnell chose not to do so.

7. Charles O'Donnell was the Decedent's primary caregiver during the last few weeks of his life and he lived with the Decedent in the Decedent's residence during this time.

8. Charles O'Donnell has significant tax liens filed against him by either the Internal Revenue Service or the State of Ohio Department of Revenue or both.

9. The Decedent died on December 7, 2013.

> 10. Neither party presented medical evidence with regard to the Decedent's mental intellect.

Orphans' Court Opinion (OCO), 4/28/15, at 1-2 (unnumbered).[1] Based upon these facts the orphans' court dismissed Petitioners' petition that challenged Decedent's will, allowing probate of the will to go forward.

Petitioners filed a notice of appeal and raise the following issues for our review:

> 1. Whether the Orphan[s'] Court decision was improper as the Orphan[s'] Court denied Respondent's demand for Non-Suit at the close of Petitioner[s'] case, yet ruled in favor of the Respondent stating Petitioner[s] did not prove weakened mental intellect under the three **Clark** [2]prongs for Undue Influence.
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> 2. Whether the [Orphans'] Court abused its discretion and the Court capriciously disbelieved the evidence presented by the Petitioners of their expert, document examiner Wendy Carlson, who testified the will's signature by the Decedent was not genuine.
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> 3. Whether the [Orphans'] Court abused its discretion and capriciously disbelieved the evidence of Petitioner[s'] unbiased witness Michael Albrecht.
>
> 4. Whether the [Orphans'] Court committed an error of law in stating that Petitioners needed to have a medical expert prove weakened intellect under Undue Influence.

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[1] In response to Petitioners' appeal to this Court, the Orphans' Court issued an order directing that its opinion, dated April 28, 2015, should be considered its opinion pursuant to Pa.R.A.P. 1925(a). ***See*** Order, 5/12/15. No Pa.R.A.P. 1925(b) statement of errors complained of on appeal was requested by the Orphans' Court, nor was one filed.

[2] ***In re Estate of Clark***, 334 A.2d 628, 632 (Pa. 1975).

> 5. Whether the [Orphans'] Court committed error of law in refusing to admit medical records of the [D]ecedent from his time in Forbes Hospice from one month prior to his death to his death, ruling they were hearsay.

Petitioners' brief at 1.

Our scope and standard of review applied to an appeal from a decree of the orphans' court adjudicating an appeal from probate is as follows:

> In a will contest, the hearing judge determines the credibility of the witnesses. The record is to be reviewed in the light most favorable to the appellee, and review is to be limited to determining whether the trial court's findings of fact were based upon legally competent and sufficient evidence and whether there is an error of law or abuse of discretion.

In re Estate of Tyler, 80 A.3d 797 (Pa. Super. 2013) (*en banc*) (citing ***Estate of Reichel***, 400 A.2d 1268, 1269-1270 (Pa. 1979)). An appellate court will set aside the orphans' court's factual conclusions only if they are not supported by adequate evidence. ***In re Bosley***, 26 A.3d 1104, 1107 (Pa. Super. 2011). This Court exercises plenary review over the orphans' court's legal conclusions drawn from the facts. ***In re Mampe***, 932 A.2d 954, 959 (Pa. Super. 2007).

The applicable burden of proof in a case in which the contestant of a will asserts the existence of undue influence is as follows:

> "The resolution of a question as to the existence of undue influence is inextricably linked to the assignment of the burden of proof." ***In re Estate of Clark***, 334 A.2d 628, 632 (Pa. 1975). Once the proponent of the will in question establishes the proper execution of the will, a presumption of lack of undue influence arises; thereafter, the risk of non-persuasion and the burden of coming forward with evidence of undue influence shift to the contestant. ***Id.*** **The contestant must then establish, by clear and convincing evidence, a prima facie showing**

> **of undue influence by demonstrating that: (1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the will; and (3) the proponent receives a substantial benefit from the will in question.** ***Id***. Once the contestant has established each prong of this tripartite test, the burden shifts again to the proponent to produce clear and convincing evidence which affirmatively demonstrates the absence of undue influence. ***Id.***

In re Estate of Smaling, 80 A.3d 485, 493 (Pa. Super. 2013) (*en banc*) (footnote omitted) (emphasis added). "As our Supreme Court has held, a testator may be of sufficient testamentary capacity to make a will but still may be subjected to the undue influence of another in the making of that will." ***Mampe***, 932 A.2d at 959 (citing ***In re Estate of Fritts***, 906 A.2d 601, 606-607 (Pa. Super. 2006) (other citations omitted)).

This Court in ***Fritts*** set forth the definition of undue influence as follows:

> [U]ndue influence is a subtle, intangible and illusive thing, generally accomplished by a gradual, progressive inculcation of a receptive mind. Consequently, its manifestation may not appear until long after the weakened intellect has been played upon.
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> ***Owens*** [***v. Mazzei***, 847 A.2d 700,] 706 [(Pa. Super. 2004)] (quoting ***In re Estate of Clark***, 461 Pa. 52, 334 A.2d 628, 634 (Pa. 1975)) (internal quotations and citation omitted). Our Court has stated:
>
> > Conduct constituting influence **must** consist of "imprisonment of the body or mind, or fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to

> destroy his free agency and to operate as a present restraint upon him in the making of a will."
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> [***In re Estate of***] ***Luongo***, [823 A.2d 942,] 964 [(Pa. Super. 2003)] (quoting [***In re Estate of***] ***Angle***, [777 A.2d 114,] 123 [(Pa. Super. 2001)] (emphasis in original).

Fritts, 906 A.2d at 607.

"Although our cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation." ***Smaling***, 80 A.3d at 498 (quoting ***Fritts***, 906 A.2d at 607).

> Finally, a confidential relationship exists when the circumstances make it certain that the parties did not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed. A confidential relationship is created between two persons when it is established that one occupies a superior position over the other — intellectually, physically, governmentally, or morally — with the opportunity to use that superiority to the other's disadvantage. [S]uch a relationship is not confined to a particular association of parties, but exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest.

Id. at 498 (omitting quotation marks and citations).

The essence of Petitioners' argument centers on their allegation that the orphans' court did not believe the uncontradicted testimony of two of their witnesses that, if believed, would have proven that Decedent's will was

obtained by undue influence. The orphans' court explained the reasoning underlying its decision, as follows:

> Applying the applicable case law to the facts elicited at the hearing in this case, this Court finds that the Petitioners have failed to meet their burden of proving that the Decedent lacked testamentary capacity. The testimony of Attorney Deihl indicated that she, the other witness, and the Notary Public personally witnessed the Decedent execute the Will. Attorney Deihl stated that the Decedent knew what he was doing when he executed the Will, understood that he was not leaving any of this estate to his daughters, and he executed the Will voluntarily. (N.T. 2/17-18/15, pp. 8-15, 35-38)[.]
>
> While the Court respects the opinion of Wendy Carlson, the handwriting expert, who testified that, in her opinion, the signature on the Will was not the signature of the Decedent, the Court discounts this testimony for the following reasons: First, Ms. Carlson admitted that the Decedent's health could affect his handwriting. As the Decedent was undergoing treatment for mesothelioma, it is probable that his handwriting, along with most of his other motor skills, was [*sic*] affected. Second, the purported signatures supplied to Ms. Carlson that she used to compare to the Decedent's signature on the Will were from 1981 and 1984. It is self-evident that one's signature changes over the years, especially over 30 years, as one ages and one's health is failing. Third, it is highly unlikely that Attorney Deihl would conspire with two persons in her firm, along with Mr. O'Donnell, to forge the Decedent's signature on the Will and that she, the other witness, and the Notary Public, would then testify under oath in open court that they witnessed the Decedent execute the Will.
>
> The Court also finds that the Petitioners have failed to produce clear and convincing evidence of undue influence. While it is clear that there was a confidential relationship between the Decedent and Mr. O'Donnell and that Mr. O'Donnell benefits by the terms of the Will, the Petitioners have failed to demonstrate via expert medical testimony that the Decedent had a weakened intellect. Moreover, there was no testimony whatsoever to show that the Decedent was threatened or coerced in any manner by Mr. O'Donnell to execute the Will. There is no dispute that Mr. O'Donnell assisted the Decedent during his cancer treatment and

> the last weeks of his life; however, that does not rise to the level of coercion; rather, it demonstrates concern for an elderly relative who was ill and dying.

OCO at 4-6 (unnumbered).

With regard to Petitioners' first issue, they contend that despite Respondent's motion requesting a non-suit at the end of Petitioners' case in chief, which the court denied, the court then determined that they had failed to prove the weakened intellect prong of the ***Clark*** test.[3] Essentially, Petitioners appear to suggest that the court's refusal to enter a non-suit is contradictory to its final determination, since it was based upon their failure to carry their burden of proving a weakened intellect. Citing ***Estate of Koltowich***, 457 A.2d 1302 (Pa. Super. 1983), Petitioners suggest that by denying Respondent's request for non-suit, the court found that they had proven that undue influence existed and that the burden then shifted to Respondent to demonstrate that there was a lack of undue influence.

To counter this argument, Respondent relies on ***In re Dunlap's Estate***, 370 A.2d 314 (Pa. 1977), which provides:

> In actions at law, a nonsuit may be granted at the close of plaintiff's case only when it is clear that plaintiff has presented insufficient evidence to maintain the action. **See *Exposito v. Dairymen's League Cooperative Assoc'n, Inc.***, 236 Pa. Super. 401, 344 A.2d 505 (1975). In ruling on a nonsuit, the

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[3] Petitioners note that the court found that they had satisfied the other two ***Clark*** prongs, *i.e.*, that a confidential relationship existed between Mr. O'Donnell and Decedent and that Mr. O'Donnell received a substantial benefit under the will.

> trial court views the evidence in the light most favorable to plaintiff and gives plaintiff the benefit of all favorable evidence and all reasonable inferences therefrom. ***E.g., Tolbert v. Gillette***, 438 Pa. 63, 260 A.2d 463 (1970); ***Flagiello v. Crilly***, 409 Pa. 389, 187 A.2d 289 (1963).

Id. at 315. Thus, Respondent asserts that the standard to support a non-suit is "manifestly different" than what must be proven to show undue influence. ***See*** Respondent's brief at 4-5. We agree and conclude that although the orphans' court did not provide a reason for denying the non-suit, its denial did not foreclose its ability to determine that Petitioners had failed to carry their burden of proving that Decedent suffered from a weakened intellect and that, therefore, undue influence was not established.

We next turn to Petitioners' second, third and fourth issues, but we address them in the order presented in the Argument Section of Petitioners' brief rather than as stated in their Statement of Questions Involved. In the first of their arguments, Petitioners contend that the court's *sole* reason for determining that they failed to prove undue influence was because they presented no medical expert testimony. They cite ***Mampe*** for the proposition that "[e]pert testimony is explicitly not needed to prove undue influence." Petitioners' brief at 15. Rather, Petitioners contend that in a weakened intellect situation they need only show that "testator exhibit[ed] behaviors of confusion, disorientation and forgetfulness[.]" ***Id.*** (citing ***In re Estate of Nalaschi***, 90 A.3d 8 (Pa. Super. 2014)). The ***Mampe*** decision explains that "a lay witness may testify regarding matters of health, so long

as his testimony is confined to facts within his knowledge, but the witness may not testify to matters involving the existence or nonexistence of a disease, which is discoverable only through the training and expertise of a medical expert." ***Mampe***, 932 A.2d at 960.

Petitioners' recitation of the law is correct; however, they have mischaracterized the orphans' court's statement about the lack of an expert's testimony. First, the court did not *solely* rely on the fact that no expert medical opinion was submitted into evidence. It also relied on the fact that "no testimony whatsoever [was submitted] to show that the Decedent was threatened or coerced in any manner by Mr. O'Donnell to execute the will." OCO at 5. Moreover, the court also relied on the testimony of Attorney Deihl, who was handling Decedent's asbestos related lawsuit; another witness, who worked at Attorney Deihl's law firm; and a notary public from the same law office. Furthermore, we note that the question as to Decedent's suffering from mesothelioma is not at issue in this case. Accordingly, we conclude that this argument is without merit.

Petitioners' next two arguments relate to the testimony of their witnesses, Michael Albrecht, Decedent's neighbor and caregiver, and Wendy Carlson, the handwriting expert. Petitioners acknowledge that Ms. Carlson's testimony was discussed by the court in its opinion, but note that the court did not mention Mr. Albrecht's testimony about Decedent's confusion and particularly about the threats made by Respondent that caused Mr. Albrecht

to remove himself from his caregiving duties of Decedent. Although a reference by the court to Mr. Albrecht's testimony would have been more than helpful, it is evident that the court placed more emphasis on Attorney Deihl's testimony and apparently did not find Mr. Albrecht's testimony sufficiently credible or carried enough weight to overcome the attorney's testimony. ***See Mampe***, 932 A.2d at 961 (stating "the scrivener of a will, especially if a lawyer, is always an important and usually the most important witness in a contested will case, and, where the lawyer knew the testator prior to the execution of her will, his testimony showing voluntary and intelligent action by the testator makes out a *prima facie* case that requires very strong evidence to offset it"). As noted previously, the credibility of witnesses, and the weight to be assigned to their testimony, is to be determined by the court so long as the court's findings are support by the evidence. ***See Tyler, supra.*** Therefore, we must conclude that these issues raised by Petitioners are also without merit.

Petitioners' last issue relates to the court's refusal to admit into evidence the medical records, dated November 23, 2013, from Forbes Hospice that they contend show Decedent's state of mind ten days before the will was signed. Specifically, Petitioners sought to enter two documents, designated Exhibit 12 and Exhibit 13, which reveal comments gleaned from Decedent as to his contact person. The documents reference Mr. Albrecht, Decedent's neighbor, as his contact person, but the notes also state that

Decedent wanted no contact with Charles O'Donnell, his nephew. The documents also indicate that Decedent was on strong pain medication and was forgetful and confused at times. Petitioners contend that the court erred by refusing to allow the introduction of this evidence on the basis that it was hearsay, and did not meet an exception to the hearsay rules, namely, as to Decedent's state of mind and as a business record. ***See*** N.T. Hearing, 2/17-18/15, at 215-217. Specifically, Petitioners reference the exceptions to the hearsay rule found at Pa.R.E. 803(3) (Then-Existing Mental, Emotional, or Physical Condition), and at Pa.R.E. 803(6) (Records of a Regularly Conducted Activity). They also rely on ***Turner v. Valley Housing Dev. Corp.***, 972 A.2d 531 (Pa. Super. 2009), which states:

> "Medical records are admissible under the hearsay rules as evidence of facts contained therein but not as evidence of medical opinion or diagnosis." ***Folger v. Dugan***, 876 A.2d 1049, 1055 (Pa. Super. 2005). "[A] party may introduce medical records as evidence of facts contained therein without producing the person who made the notation in the record or the records custodian." ***Id.*** at 1056.

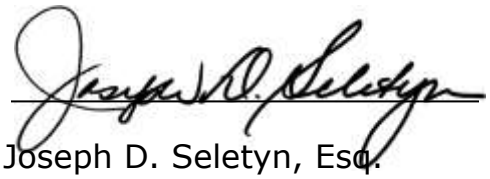
Id. at 537. Petitioners further rely on ***Schmalz v. Manufacturers & Traders Trust***, 67 A.3d 800 (Pa. Super. 2013), which discusses the state of mind hearsay exception set forth at Pa.R.E. 803(3). The ***Schmalz*** opinion explains that "where a statement is being introduced for the truth of the matter asserted, then it may be admissible if it is a declaration concerning 'the declarant's then existing state of mind … such as intent, plan, motive,

design, mental feeling, pain and bodily health.'" ***Schmalz***, 67 A.3d at 804 (quoting Pa.R.E. 803(3)).

Based upon the rules of evidence and the case law cited by Petitioners, we conclude that the orphans' court was incorrect in refusing to allow the hospital records into evidence based upon its bald assertion that the evidence was hearsay. That error coupled with its failure to mention Mr. Albrecht's testimony and its credibility determination relating to that testimony compel this Court to vacate the decision and remand for further proceedings.

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/8/2016