NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF WALTER WILLIAM ZAWICKI	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: JANET DEMUTH	:	No. 596 MDA 2012

Appeal from the Decree Entered October 5, 2011,
In the Court of Common Pleas of Lackawanna County,
Orphans' Court Division, at No. 35-2007-01252.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: March 18, 2013

Appellant, Janet Demuth, appeals from the *decree nisi* entered on October 5, 2011, directing distribution of the estate of Walter Zawicki ("Decedent").[1] We Affirm.

The background of this matter was set forth by the orphans' court as follows:

> This is a will contest in which [Appellant] seeks to have the February 19, 2007 Will of [Decedent] declared void on the grounds of undue influence. Unlike the Wills executed by [Decedent] prior to 2007, which made substantial bequests to [Appellant] and named her as Executrix, this document excluded her entirely, as a beneficiary and as Estate fiduciary. Peter Zawicki, who was granted Letters Testamentary in accordance

*Retired Senior Judge assigned to the Superior Court.

[1] On March 19, 2012, the orphans' court entered an order denying the exceptions Appellant filed to the October 5, 2011 decree. The instant appeal was filed within 30 days from the March 19, 2012 order denying Appellant's exceptions and, thus, this appeal from the October 5, 2011 decree is timely. ***In re Wilton***, 921 A.2d 509, 512 n.1 (Pa. Super. 2007) (citing Pa.R.A.P. 342 and Pa.O.C.R. 7.1(a)).

> with the February 19, 2007 Will, stands in opposition to [Appellant].
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> The facts indicate that the Decedent's February 19, 2007 Will was drawn up by an attorney, witnessed by two non-interested adults, and notarized. [Decedent's] previous Wills, from 2004 and 2006, were prepared by a different attorney. The 2007 Will was done approximately one month after [Decedent] had been diagnosed with colon cancer. [Decedent] was hospitalized on January 24, 2007, and he was discharged with a diagnosis of end stage adenocarcinoma of the colon. He died on December 8, 2007. Within weeks of his death, [Appellant] filed a Petition for Certification from the Register of Wills requesting that this matter be certified to the Court of Common Pleas.
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> [Appellant] asserts that this is a classic case of undue influence, having been visited on [Decedent] by his nephew, Peter Zawicki.

Orphans' Court Decision and Decree, 10/5/11, at 1-2.

The orphans' court subsequently granted Peter Zawicki's motion to deny Appellant's petition for certification and permitted Decedent's estate to be distributed pursuant to the February 19, 2007 will. Appellant filed exceptions that were denied on March 19, 2012, and she timely appealed.

On appeal, Appellant raises the following questions for this Court's consideration:

> 1. Did the Orphans' Court err and/or abuse its discretion by incorrectly applying the standard set forth in Estate of Clark, 334 A.2d 628 (Pa. 1975)?
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> > a. Did the Orphans' Court err and/or abuse its discretion when it failed to conclude that a confidential relationship existed between [Peter Zawicki] and the Decedent by dismissing the relevance of [Peter Zawicki] receiving a power of attorney from the Decedent and ignoring facts and

> cases which recognize that granting a power of attorney establishes a confidential relationship?
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> b. Did the Orphans' Court err and/or abuse its discretion when it incorrectly applied a higher standard to the requirement of weakened intellect and, rather, required a showing of testamentary incapacity which is not required by the *Clark* decision and in failing to give greater weight to the testimony of the Decedent's treating physician and erroneously concluding that the treating physician did not know of the Decedent's mental competency at the time of the execution of the Will?
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> c. Did the Orphans' Court err and/or abuse its discretion in failing to shift the burden of proof to the Proponent.

Appellant's Brief at 5. We will address Appellant's issue and sub-issues concurrently as the queries and concepts overlap.

Our Supreme Court has stated that the standard of review from an orphans' court order in a will contest 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 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 Bosley, 26 A.3d 1104, 1107 (Pa. Super. 2011) (quoting ***Estate of Reichel***, 484 Pa. 610, 614, 400 A.2d 1268, 1269–1270 (1979)). With these principles in mind, we will proceed with our discussion.

The overarching argument Appellant makes is that the orphans' court erred or abused its discretion by incorrectly applying the standard set forth

in ***Estate of Clark***, 461 Pa. 52, 334 A.2d 628 (1975). In ***Estate of Clark***, the Pennsylvania Supreme Court explained: "where (1) a person in a confidential relationship (2) receives the bulk of the testator's property (3) from a testator of weakened intellect, the burden of proof is upon the person occupying the confidential relation to prove affirmatively the absence of undue influence." ***Id***. at 59-60, 334 A.2d at 632 (citations omitted).

Here, the orphans' court applied the test from ***Estate of Clark*** as follows:

> No testimony was offered that showed or even suggested that Peter Zawicki had an overmastering influence over the Decedent, or that [Decedent] was weak of mind and dependent on his nephew. **Burns v. Kabboul, 595 A.2d 1153 (Pa. Super. 1991).** While [Appellant] maintains that because the Decedent had executed a Power of Attorney in favor of Peter Zawicki, this circumstance establishes a confidential relationship. The law does not support her contention. The existence of a Power of Attorney will not raise the suggestion of a confidential relationship where a decedent sought assistance with his business affairs, unless the Power of Attorney laid the basis for unequal dealings between the two parties. **Paolini Will, 13 Fiduc. Rep. 2d 185 (O.C. Montg. 1993).** In fact, [Appellant] had a Power of Attorney for [Decedent] at the time he made his Last Will, so using her own assertion, [Appellant], not Peter Zawicki, was in a position to take advantage of her own confidential relationship with the Decedent when he executed the Will in question.
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> The evidence offered by relatives of the Decedent, as well as the Decedent's physician, showed that [Decedent] suffered from several illnesses in his later years, some of which could lead to confusion on the part of this patient. However, Dr. Kuber, the physician at issue, had no opinion as to whether the Decedent was mentally competent at the time he signed the Will. His testimony was that he was not present with the Decedent at the time the Will was executed, so he could not comment on what

> the Decedent's mental status or capacity was at that time. Further, Dr. Kuber had no recollection of [Decedent's] mental state when he saw this patient approximately one month after the Will was signed. None of this physician's records reference any capacity or intellect issues. His thought that the Decedent may have been "suggestible" late in life does not mean that Peter Zawicki made any suggestions to him, or that [Decedent] was so intellectually weakened that he would have accepted any suggestions that were made. Conjecture is what [Appellant] is offering, and it falls far short of the legal standard for a valid Will challenge.

Orphans' Court Decision and Decree, 10/5/11, at 2-3.

We agree. While Peter Zawicki stood to inherit the bulk of Decedent's estate under the February 19, 2007 will (N.T., 5/10/11, at 105), there was no power of attorney in favor of Peter Zawicki at the time the will was executed; rather Appellant had power of attorney at that time.[2] Additionally, aside from accusations by Appellant, there is no evidence that Peter Zawicki had an overmastering influence on Decedent, and this allegation is pure speculation on the part of Appellant, which the orphans' court chose not to accept. Moreover, with respect to weakened intellect, the orphans' court found this element lacking and concluded there was no evidence that Decedent was of a weakened intellect at the time he executed the will. Orphans' Court Decision and Decree, 10/5/11, at 3.

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[2] Additionally, even if Peter Zawicki had power of attorney at the time the will was executed, it would not establish a confidential relationship. ***See In re Estate of Angle***, 777 A.2d 114, 124 (Pa. Super. 2001) (stating that "[t]he law is that the existence of a power of attorney will not raise the inference of a confidential relationship where the decedent sought that aid with his business affairs.").

Next, we conclude that Appellant's accusation that the orphans' court's conflated testamentary capacity and weakened intellect is baseless. While we agree that the Supreme Court in ***Estate of Clark*** differentiated between these two concepts, (***id***. at 65, 334 A.2d at 634), there was no abuse of discretion or error of law committed in the instant case. Here, the orphans' court did not base its decision on a conclusion that Appellant failed to illustrate a lack of testamentary capacity, nor is there evidence that the court confused the standards. Appellant points to an excerpt from the orphans' court decision as evidence of the orphans' court's improper application of the proper standard:

> However, Dr. Kuber, the physician at issue, had no opinion as to whether the Decedent was mentally competent at the time he signed the Will. His testimony was that he was not present with the Decedent at the time the Will was executed, so he could not comment on what the Decedent's mental status or capacity was at that time. Further, Dr. Kuber had no recollection of [Decedent's] mental state when he saw this patient approximately one month after the Will was signed. None of this physician's records reference any capacity or intellect issues. His thought that the Decedent may have been "suggestible" late in life does not mean that Peter Zawicki made any suggestions to him, or that [Decedent] was so intellectually weakened that he would have accepted any suggestions that were made.

Appellant's Brief at 25 (quoting the Orphans' Court Decision and Decree, 10/5/11, at 3).

Upon review, we cannot agree that this excerpt shows an improper application of the lack of testamentary capacity standard. Rather, the orphans' court properly focused on the test from ***Estate of Clark***, which was

set forth above, and it concluded that Decedent did not have a weakened intellect at the time he executed his will. Orphans' Court Decision and Decree, 10/5/11, at 3.

Finally, Appellant claims that the trial court erred in not shifting the burden to Peter Zawicki to rebut the existence of undue influence. Appellant's Brief at 31. We discern no error because, as discussed earlier, Appellant never established undue influence. Therefore, no burden shifting was required.[3] Appellant's argument to the contrary lacks merit.

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Accordingly, the order of the orphans' court is affirmed.

Decree affirmed.

OTT, J., Concurs in the Result.

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[3] ***See Estate of Clark,*** 461 Pa. at 59-60, 334 A.2d at 631-632 (Once the contestant proceeds with his proof, there are two viable rules of law in this Commonwealth which allow the contestant to shift the onus of going forward with evidence back to the proponent. The older rule is that where the evidence shows (1) bodily infirmity and (2) greatly weakened mental capacity of the testator, and (3) a stranger to the blood of testator, (4) standing in a confidential relation, (5) who is benefited by a will (6) which he has been instrumental in having written, a Presumption of undue influence arises. The more recent rule is that where (1) a person in a confidential relationship (2) receives the bulk of the testator's property (3) from a testator of weakened intellect, the burden of proof is upon the person occupying the confidential relation to prove affirmatively the absence of undue influence.) (internal citations omitted).