

**Estate of John Joel Myers***Standing – Undue Influence – Clear and Convincing Evidence – Weakened Intellect – Confidential Relationship – Testamentary Capacity*

When the proponent of a will presents evidence of a formally probated will, a presumption of lack of undue influence arises and the burden of producing evidence to support an allegation of undue influence shifts to the contestant of the will.

To support a claim of undue influence, the contestant of a will must show by clear and convincing evidence 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. If the contestant satisfies that burden, the burden then shifts to the proponent to produce evidence to show the lack of undue influence.

Weakened intellect is defined as a mind which, in all circumstances of a particular situation, is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality.

A confidential relationship exists when the circumstances make it certain that the parties do not deal on equal terms, whereby one side exercises an extensive influence over the other side. Under these circumstances, the term "influence" means "control 'acquired over another that virtually destroys that person's free agency.

Evidence of a close friendship, in and of itself, is not enough to establish a confidential relationship.

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it. Simply because a person's memory is impaired by age or disease does not mean a person lacks testamentary capacity.

The burden of proving testamentary capacity is initially with the proponent, but upon proof of execution by two subscribing witnesses, a presumption of testamentary capacity arises, and burden of proof thereafter shifts to the contestant to overcome the presumption by clear, strong and compelling evidence.

Old age, illness, frailty, or debility of body neither prove nor raise a presumption of incapacity. Further, inability to transact business, physical weakness, or peculiar beliefs and opinions do not prove nor raise a presumption of incapacity. However, transaction of business is indicative of testamentary capacity,

Expert testimony as to a decedent's capacity may be rejected completely when the expert did not meet or examine the decedent and the testimony is inconsistent with that of witnesses who knew the decedent.

The Court held:

The Court's ruling that the Decedent had testamentary capacity when he executed his will and that the Petitioner's claim of undue influence was meritless was proper.

The Court found that the Decedent had many close friends and family members who had regular, constant and appropriate access to the Decedent. These friends and family members spent significant time around the Decedent during the final years and months of his life. Any functions that these friends and family members undertook, such as writing out checks to pay bills, were completed at the direction of the Decedent. Further, the Decedent knew how to manage his business and financial affairs. Based on these factors, it was clear that the Decedent had testamentary capacity when the will was created and that he was not susceptible to undue influence.

No. 012-2014

*Jennifer Popelack, Esquire for the Petitioner*

*Jacquie Jones, Esquire and Tinu Osinupebi, Esquire for the Respondent*

Opinion by the Honorable Chad F. Kenney filed: March 10, 2015

**OPINION**

This matter came before the Court on a Petition for Citation to Rescind the Grant of Letters and Probate of Will in the Estate of John Joel Myers (hereinafter referred to as Decedent) filed by LaTonya Frazier (hereinafter referred to as Petitioner) on January 7, 2014. The Petition alleged that the Decedent did not possess testamentary capacity when he executed the probated Will and that the Executor and sole beneficiary, Michael Jackson (hereinafter referred to as Respondent), procured the Will by undue influence. The Respondent filed a Response to said Petition on February 7, 2014 which denied the allegations of undue influence and lack of testamentary capacity. The Respondent also challenged the Petitioner's standing to bring the Petition by alleging that the Petitioner was not the natural child of the Decedent. On May 21, 2014, a hearing was held to determine whether the Decedent was the father of the Petitioner. At that hearing, it became clear that the Petitioner is the daughter of the Decedent<sup>1</sup> and a scheduling order was drafted which set discovery deadlines and a trial date.

A trial on the issues of undue influence and testamentary capacity began on December 11, 2014 and, because of unforeseen circumstances, was continued to January 21, 2015 and January 22, 2015. After the Petitioner presented her entire case, the Respondent moved for a directed verdict in his favor. For the reasons explained below, this Court granted the Respondent's motion for directed verdict, in part, by denying the Petitioner's claim of undue influence but required the Respondent to proceed on the issue of testamentary capacity.

Based on the evidence and testimony presented and for the reasons set forth below, this Court finds that the Decedent had testamentary capacity when he executed the probated Last Will and Testament dated December 5, 2012.

**FACTS**

The Decedent died on December 22, 2012. On January 15, 2013, the Decedent's Last Will and Testament dated December 5, 2012 was admitted to probate by the Register of Wills of Delaware County and Letters Testamentary were issued to the Respondent who was named executor in the Will.

The Decedent suffered from poor health beginning in 2008 and worsened until his death on December 22, 2012. From January 2012 until his death, the Decedent received in-home hospice care. During this time, the Decedent received care from aides and from friends and family. In particular, Mary Roddy-Duncan, the Decedent's foster sister, Ruth Ann Thompson, a long-time friend, the Petitioner, the Decedent's daughter, and the Respondent provided the most care to the Decedent other than the in-home hospice aides. Mary Roddy-Duncan lived in the house with the Decedent for the last three (3) years of his life and Ruth Ann Thompson visited the Decedent daily in the last months of his life. The Petitioner and the Respondent visited as often as they could and were around when needed.

On December 5, 2012, the Respondent arrived at the Decedent's home accompanied by Ruth Ann Thompson and Fletcher Chism, a long-time friend and fraternity brother of the Decedent who was also a licensed notary. Both the Decedent

<sup>1</sup> The Respondent, the one who was challenging the paternity of the Decedent, testified that he had no reason to believe that the Petitioner was not the daughter of the Decedent.

and Mary Roddy-Duncan were present when they arrived because they resided in the house. At that time, the Decedent was presented with a document which had been provided by Fletcher Chism. The document was a form will which had blank spaces on it as to who would receive the residue of the estate and who would be designated the executor of the estate. Mr. Chism filled in both those blanks with the Respondent's name. The form will also had check boxes as to whether the Decedent had children or not. Mr. Chism checked the box next to no children. Mr. Chism filled in the blanks and checked the box only after explaining the document and reading its terms to the Decedent. The Decedent signed the Will and Mary Roddy-Duncan and Ruth Ann Thompson signed the Will as witnesses. The Decedent also executed a General Durable Power of Attorney on December 5, 2012 which named the Respondent his agent and was signed by Mary Roddy-Duncan and Ruth Ann Thompson as witnesses.

Part of this process was videotaped by the Respondent at the suggestion of Mr. Chism. The video shows Mary Roddy-Duncan and Ruth Ann Thompson present with the Decedent. The voice of the Respondent can also be heard on the video as the Respondent was the one who was videotaping the process and asked the Decedent several questions. In the video, the Decedent agrees to the Respondent being designated his agent under the General Durable Power of Attorney and states that he is of sound mind.

At some point in December of 2012, Delaware County Office of Services for the Aging (hereinafter referred to as COSA) received a report of concern that the Respondent had exploited the Decedent. As a result, Katrina Robinson, a protective services investigator for COSA, opened an investigation. Ms. Robinson met with the Decedent and the Respondent and spoke with the Decedent's sister, Mary Roddy-Duncan. According to Ms. Robinson, the Decedent asked and answered questions clearly and appropriately and told Ms. Robinson to contact his sister to get the Respondent's contact information because the Respondent was the Decedent's agent and would handle everything. As a result of her investigation, Ms. Robinson found that the report was unsubstantiated which Ms. Robinson explained to mean that she found nothing to support the allegations in the report.

The Decedent died on December 22, 2012, shortly after COSA closed its investigation, and, on January 15, 2013, the Decedent's Will dated December 5, 2012 was admitted to probate.

**I. THE PETITIONER DID NOT PRODUCE CLEAR AND CONVINCING EVIDENCE OF UNDUE INFLUENCE SUFFICIENT TO SHIFT THE BURDEN OF PROVING LACK OF UNDUE INFLUENCE TO THE RESPONDENT**

Once the proponent of a will presents evidence of a formally probated will, a presumption of lack of undue influence arises and the burden of producing evidence to support an allegation of undue influence shifts to the contestant of the will. *Estate of Clark*, 461 Pa. 52 (1975). In order to support an allegation of undue influence, the contestant of a will must show by clear and convincing evidence 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.* If the contestant satisfies that burden, the burden then shifts to the proponent to produce evidence to show the lack of undue influence. *Id.*

Pennsylvania courts have defined weakened intellect as: [A] mind which, in all circumstances of a particular situation, is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality. It should be viewed essentially as a relative state as the term is applied to cases of undue influence, as these always involve the effect of one intellect upon another; if the intellect is substantially impaired in comparison to that of the proponent or beneficiary it must be regarded as weakened since there could be no equal dealings between the two parties.

Paolini Will, 13 Fiduc. Rep. 2d 185, 187-88 (O.C. Montg. 1993) (quoting Heffner Will, 19 Fiduc. Rep. 542, 546-47).

“Substantial benefit’ has not been specifically defined by Pennsylvania courts, and whether one receives a substantial benefit is determined on a case-by-case basis.” In re Estate of Fritts, 906 A.2d 601, 609 (Pa. Super. 2006). The most typical substantial benefit is direct financial gain by the proponent but a substantial benefit can also be collateral. In re Button’s Estate, 328 A.2d 480 (Pa. 1974); In re Estate of LeVin, 615 A.2d 38 at 42 (Pa. Super. 1992).

“[A] confidential relationship exists when the circumstances make it certain that the parties do not deal on equal terms, with one side exercising an overmastering influence over the other.” In re King’s Estate, 87 A.2d 469, 472 (1952). The term “influence” has been interpreted to mean “control ‘acquired over another that virtually destroys that person’s free agency.’” Kostenbader, 23 Fiduc. Rep. 392, 397 (O.C. Div. Monroe 2002). Evidence of a close friendship, in and of itself, is not enough to establish a confidential relationship. See, e.g. Jenness Estate, 15 Fiduc. Rep. 2d 149 (O.C. Div. Erie 1995). However, the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between parties. Estate of Lakatos, 656 A.2d 1378 (Pa. Super. 1995). In King’s Estate, the Pa. Supreme Court rejected allegations of a confidential relationship where a friend was living with the testatrix, taking care of the testatrix in her old age, possessed power of attorney that was in a safe deposit box unused, contacted the attorney handling the testatrix’s estate, and writing her checks because it was clear that the decedent still had a clear mind and saw to it that her estate was distributed as she intended. Id.

In the present matter, the Will dated December 5, 2012 was formally probated on January 15, 2013. As such, there is a presumption of lack of undue influence and the burden is on the Petitioner to produce clear and convincing evidence of each element of the three-part burden shifting test.

The record before this Court does not overcome the presumption of lack of undue influence sufficient to shift the burden to the Respondent because it does not provide clear and convincing evidence that the Respondent was in a confidential relationship with the Decedent. A confidential relationship requires an overmastering influence which deprives one of free agency. Such a relationship was not present in this matter. The Respondent and the Decedent were close friends but that, in and of itself, is not enough to establish a confidential relationship as the court in Jenness Estate informs us. The Decedent did name the Respondent his agent under a General Durable Power of Attorney which is usually an indication of a confidential relationship but, in this case, the General Durable Power of Attorney

was executed at the same time as the contested will. Therefore, the Respondent was not acting pursuant to the General Durable Power of Attorney when the Will was executed. With respect to the General Durable Power Attorney, this matter is similar to King's Estate. In King's Estate, the individual alleged to have unduly influenced the testator was named agent in a power of attorney but that power of attorney was in a safety deposit box and never used. Just like the individual in King's Estate, who was found to have not exercised undue influence, the Respondent never exercised his authority pursuant to the power of attorney either before or at the time the will was executed. In addition, the Respondent was in the room with Mary Roddy-Duncan and Ruth Ann Thompson when the Decedent stated that he wanted the Respondent to be his agent under General Durable Power of Attorney which offsets any indication of an over-mastering influence by the Respondent over the Decedent.

Furthermore, while the Decedent was restricted to his home because of his failing health, the Decedent was not isolated. The Decedent's sister, Mary Roddy-Duncan, lived with the Decedent for the last three (3) years of his life and provided regular care for the Decedent in his last months. Ruth Ann Thompson visited the Decedent daily in the last few months of his life and in-home hospice care aides were providing regular care to the Decedent. Bishop Lorraine Ware, the Decedent's cousin and close friend, testified that she, the Petitioner, the Respondent, Ruth Ann Thompson, and Mary Roddy-Duncan spent the most time with the Decedent towards the end of his life and provided the most care. In addition, the Petitioner testified that the Decedent's church friends visited regularly during the last few months of the Decedent's life and the Petitioner herself was there frequently. With so many sources of care, assistance, and friendship, it is difficult to imagine that the Respondent was able to influence the Decedent to such an extent that the Respondent over-mastered the Decedent and destroyed his free agency as is required to establish a confidential relationship. Instead, the record reveals that the Respondent was one of several people who were close to the Decedent and who spent a significant amount of time around him near his death to ensure that the Decedent was well taken care of.

In order to shift the burden to the proponent of the will, the Petitioner had to produce clear and convincing evidence of each of the three (3) elements of the three-part burden shifting test. As explained above, the Petitioner failed to produce clear and convincing evidence of one (1) of the three (3) elements—confidential relationship—necessary to shift the burden and, as such, this Court found that there is no evidence of undue influence in this matter. Therefore, this Court granted the Respondent's motion for a directed verdict with respect to undue influence.

## **II. THE PETITIONER DID NOT PRODUCE CLEAR AND CONVINCING EVIDENCE THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY**

"Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs." Estate of Reichel, 484 Pa. 610, 614 (1979). The burden of proving testamentary capacity is initially with the proponent, but upon proof of execution by two subscribing witnesses, a presumption of testamentary capacity arises, and burden of proof

thereafter shifts to the contestant to overcome the presumption by clear, strong and compelling evidence. Kuzma's Estate, 487 Pa. 91 (1979). "[O]ld age, sickness, or debility of body neither prove nor raise a presumption of incapacity nor will inability to transact business, physical weakness, or peculiar beliefs and opinions." Conway Will, 366 Pa. 641 at 644-645 (Pa. 1951). However, transaction of business is indicative of testamentary capacity, Kline Will, 382 Pa. 395 (Pa. 1995). In addition, expert testimony as to a decedent's capacity may be rejected completely when the expert never met or examined the decedent and the testimony is inconsistent with that of witnesses who knew the decedent. Conway Will, 366 Pa. 641.

As noted above, the December 5, 2012 Will was formally probated on January 15, 2013. As such, there is a presumption that the Decedent possessed testamentary capacity and the burden was on the Petitioner to produce clear, strong and compelling evidence that the Decedent lacked testamentary capacity.

In the present matter, the Petitioner did not produce evidence sufficient to overcome the presumption that the Decedent had testamentary capacity. This Court is cognizant of the fact that the Petitioner obtained an expert, Dr. Dale Panzer, who reviewed all records relevant to the Decedent's medical condition, reviewed the video of the Decedent related to the estate planning documents and prepared a report. Dr. Panzer testified that, in his opinion, the Decedent did not have testamentary capacity when he executed the December 5, 2012 Will. Dr. Panzer testified that he never met or evaluated the Decedent in person and did not interview anyone who knew the Decedent personally. This Court, on the other hand, had the advantage of hearing the testimony of the friends and family of the Decedent. With that advantage and foundation, which Dr. Panzer did not have, this Court respectfully disagrees with Dr. Panzer's opinion as to the Decedent's testamentary capacity.

Old age, sickness and debility of body do not raise a presumption of lack of testamentary capacity. Inability to transact business also does not raise a presumption of lack of testamentary capacity but ability to transact business is indicative of testamentary capacity. While the record reveals that the Decedent suffered from serious physical ailments such as congestive heart failure and occasionally displayed confusion and short term memory loss, the record is replete with examples of the Decedent holding normal conversations and directing his affairs. Mary Roddy-Duncan, who lived with the Decedent for the last three (3) years of his life, testified that the Decedent was not as sharp closer to his death but still had moments of clarity and, in fact, would direct Mary to handle his business affairs. Ruth Ann Thompson testified that the Decedent could hold a conversation up until his death and would direct his business affairs despite being restricted to his house. Mary Roddy-Duncan, Ruth Ann Thompson, and the Petitioner testified that they completed tasks for the Decedent, at his direction, such as going to the bank and filling out checks which the Decedent was too feeble to do because of his physical condition. In fact, the Petitioner testified that the Decedent knew how much money he had, where it was, what properties he owned, the due dates of his bills, and that the Decedent dealt with the rental companies that managed his properties. These facts demonstrate that the Decedent not only knew the composition of his estate and what he wanted done with it but also had the ability to transact business, albeit through the direction of others, which is the hallmark of testamentary capacity.

The Decedent's testamentary capacity is further supported by COSA's investigation. Pursuant to a report of concern, Katrina Robinson, a COSA representative, investigated an allegation of financial exploitation of the Decedent by

the Respondent. In the course of her investigation, Ms. Robinson met with the Decedent who asked and answered questions clearly and appropriately and told Ms. Robinson to contact Mary Roddy-Duncan to obtain the Respondent's contact information because the Respondent was the Decedent's agent and would handle everything. Ultimately, Ms. Robinson found the report of concern to be unsubstantiated which Ms. Robinson explained to mean that she found nothing to support the allegations in the report. Because the Decedent not only had coherent, logical conversations with Ms. Robinson regarding the allegations, which involved his estate, but also directed Ms. Robinson to his foster sister, Mary Roddy-Duncan, to obtain the Respondent's contact information, the investigation demonstrates that the Decedent knew the composition of his estate and what he wanted done with it. The Decedent wanted the Respondent to handle all his affairs and made that clear to all around him. There were several others who cared for and completed tasks for the Decedent in his final months but the Decedent chose the Respondent to handle everything. In fact, there is video of the Decedent in a room with Ruth Ann Thompson, Mary Roddy-Duncan and the Respondent during which the Decedent is asked if he wants the Respondent as his agent under a General Durable Power of Attorney and responds affirmatively. Ruth Ann Thompson and Mary Roddy-Duncan did not object to that decision, they did not question it in any way, and they did not even seem concerned. Rather, Ruth Ann Thompson and Mary Roddy-Duncan seemed comfortable and supportive of that decision and the Decedent appeared comfortable making it.

The record before the Court does not contain clear, strong and compelling evidence that the Decedent lacked testamentary capacity. Despite suffering from serious physical ailments, the Decedent still possessed the clarity of mind to comprehend his estate and to direct what was to be done with it. In fact, the Decedent continued to direct his business affairs, albeit through the direction of others, until his death. Thus, the record reveals and this Court finds that the Decedent possessed testamentary capacity to execute the December 5, 2012 Will.

### III. CONCLUSION

The record in this matter, taken as a whole, reveals that the Decedent had several close family members and friends who all had unfettered access to the Decedent. Those family and friends spent significant amounts of time around the Decedent during the last few month, days, and hours of his life providing him care and assisting him with various tasks. Among the tasks completed on behalf of the Decedent were business affairs. The Decedent's family and friends would write out checks for him to pay bills and go to the bank on his behalf. However, all those tasks were completed at the direction of the Decedent. The Decedent knew what had to be done, how to do it and who should do it on his behalf. Both the access to the Decedent and also the Decedent's direction of his business affairs, demonstrate an individual who was not prone to undue influence and who had testamentary capacity.

Accordingly, this Court properly granted the Respondent's motion for a directed verdict with respect to the allegation of undue influence at trial and finds that the Decedent possessed testamentary capacity when he executed his Last Will and Testament on December 5, 2012.

**BY THE COURT:**

/s/ C. F. Kenney

**CHAD F. KENNEY, P.J.**