

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE: :
ESTATE OF STELLA FABIAN, : No. 16-9051
Deceased :
Glen H. Ridenour, II, Esquire Counsel for Appellees
Ellen C. Schurdak, Esquire Counsel for Appellants
David M. Sebelin, Esquire Counsel for Co-executors
David Dembe, Esquire Counsel for Charitable Trusts
Senior Deputy Attorney General & Organizations Section
Office of PA Attorney General

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CASE REGISTERED
CLERK'S OFFICE

MEMORANDUM OPINION

Serfass, J.- March 29, 2021

Stella Fabian (hereafter "Decedent") departed this life on January 31, 2016. On May 27, 2016, Louise Benson, Suzanne Sullivan, Gregory Fabian, Michelle Kratzer, and Jennifer Slade (hereinafter "Appellees") initiated this action against Marie Krepicz, Charles Treskot, Carolyn Kutta, and Robert Treskot (hereinafter "Appellants") to contest the June 20, 2014, will admitted to probate by Marie Krepicz and Charles Treskot, the co-executors of Stella Fabian's estate. In their "Petition for Citation to Show Cause why Appeal from Probate Should not be Granted and Certain Writing Offered as Will Vacated," Appellees challenged the validity of the 2014 will for lack of testamentary capacity, undue influence in execution, fraud, and mistake. Appellees seek to have Decedent's will dated December 29, 1988,

admitted to probate as the true and authentic last will and testament of Decedent. On July 7, 2016, Appellants filed an Answer denying Appellees' claims.

Following evidentiary hearings held before this Court on January 18, 2017, April 20, 2017, and July 21, 2017, proposed Findings of Fact and Conclusions of Law were submitted by counsel for both parties on October 3, 2017. Upon review of counsels' submissions and careful consideration of the evidence presented at the hearings, we entered a decision and decree on June 28, 2018 denying the Appellees' action as to all counts.

The Appellees filed an appeal with the Superior Court of Pennsylvania on July 27, 2018. In their Rule 1925(b) Concise Statement of Matters Complained of on Appeal, Appellees raised three (3) issues:

1. Did the Orphans' Court err by ruling that Georgia Young, RN, was not qualified to offer an expert opinion on mental capacity despite her special training and ten years of experience making such assessments?
2. Did the Orphans' Court err as a matter of law by concluding that Decedent did not suffer from a weakened intellect where:
 - (a) the court found that she could not conduct her own affairs;
 - (b) there was evidence that Decedent was cognitively impaired with moderate Alzheimer's disease and could not make

her own decisions; and (d) the court's findings of fact mischaracterized the testimony of key witnesses?

3. Did the Orphans' Court err by not finding that Proponents had failed to rebut the presumption of undue influence, where Proponents presented no expert witnesses and testified that they were heavily involved in procuring the will and that Decedent was easily influenced?

The Superior Court of Pennsylvania found that this Court erred in failing to qualify Nurse Young as an expert witness, but that such failure did not constitute reversible error. The Superior Court further found that Decedent had suffered from a weakened intellect in the period leading up to the execution of her will. Accordingly, this Court erred in failing to find that the Appellees had established a prima facie case to support a presumption that Appellants exercised undue influence on the Decedent. Therefore, the burden of proof shifts to Appellants.

On November 7, 2019, the Superior Court reversed our decision and remanded this matter with instructions for this Court to determine whether the Appellants established, by clear and convincing evidence, the absence of undue influence.

Counsel for both parties submitted Supplemental Proposed Findings of Fact and Conclusions of Law on March 6, 2020 and March 19, 2020. By letter dated March 24, 2020, counsel for the

Charitable Trusts and Organizations Section of the Office of the Attorney General informed the Clerk of the Orphans' Court that the Commonwealth would not be submitting a supplemental filing for our consideration.

Based upon our careful consideration of this matter in light of the opinion, remand and instructions of the Superior Court of Pennsylvania, and following our review of the record and the supplemental submissions of counsel, we entered a decision and decree on December 31, 2020 finding that Decedent was subject to the undue influence of Appellants. The decedent's last will and testament of June 20, 2014 was stricken accordingly. Appellants filed a timely Notice of Appeal to the Superior Court of Pennsylvania on January 29, 2021.

FACTUAL AND PROCEDURAL HISTORY

On or about February 4, 2021, we instructed Appellants to file of record and serve upon this Court a concise statement of matters complained of on appeal no later than February 25, 2021, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b). Appellants timely complied with our Order. A "Notice of Docketing Appeal" dated February 18, 2021, was forwarded to this Court by the Prothonotary of the Superior Court of Pennsylvania and the instant opinion is filed pursuant to Pa.R.C.P. 1925(a).

All relevant facts relating to the issues raised in Appellants' concise statement were included in our decision and decree of December 31, 2020. Consequently, in terms of the factual and procedural history of this matter, this Court relies upon our decision and decree, incorporates the same herein and attaches hereto a copy of said decision and decree for the convenience of the Honorable Superior Court of Pennsylvania.

ISSUES

In their concise statement, Appellants raise the following issues on appeal:

1. This Honorable Court committed an error of law and/or committed an abuse of discretion when its December 31, 2020 Findings of Fact omitted previously adopted Findings of Fact;
2. This Honorable Court committed an error of law and/or abused its discretion when it failed to consider and give proper weight to the evidence introduced at the hearing on this matter;
3. This Honorable Court committed an error of law and/or abused its discretion when it concluded that Attorney Greek had no knowledge concerning interactions between the Decedent and [Appellants] in the weeks leading up to the execution of Stella's Will;

4. This Honorable Court committed an error of law and/or abused its discretion when it found that [Appellants] did not present any "further disinterested witnesses to testify to the mental condition of the Decedent when the issue is not whether "'further disinterested witnesses'" were presented, but whether evidence was produced as to the mental condition of the Decedent in the weeks leading up to the execution of her Will;
5. The trial court committed an abuse of discretion and/or committed an error of law when the trial court concluded that the Appellants have not presented sufficient evidence to rebut the testimony of Dr. Bosi and Nurse Young;
6. This Honorable Court committed an error of law and/or abused its discretion when it concluded that [Appellants] have failed have failed to establish by clear and convincing evidence the absence of undue influence;
7. This Honorable Court committed an error of law and/or committed an abuse of discretion when it concluded that Attorney Greek's testimony is less valuable in proving absence of undue influence because Attorney Greek had no relationship with testator before drafting the will and was first contacted by the proponent;

8. This Honorable Court committed an abuse of discretion and/or committed an error of law when it concluded that [Appellants] did not present any further disinterested witnesses to testify to the mental condition of the Decedent in the weeks leading up to the execution of her Will when [Appellants] presented evidence as to Decedent's mental condition through examination and exhibits;
9. This Honorable Court committed an error of law and/or abused its discretion when it concluded that [Appellants] had not presented sufficient evidence to rebut the testimony of Dr. Bosi and Nurse Young that the Decedent's condition was consistent with a diagnosis of moderate to severe Alzheimer's Disease and advanced Dementia when Appellants presented evidence to rebut the testimony of Dr. Bosi and Nurse Young through cross-examination and exhibits;
10. This Honorable Court committed an error of law and/or abused its discretion when it concluded that the Decedent's ability to complete some ordinary tasks independently does not negate the fact that she was suffering from weakened intellect due to disease progression; and
11. This Honorable Court committed an error of law and/or abused its discretion when it concluded that [Appellants]

presented no expert testimony to contradict Dr. Bosi and Nurse Young.

DISCUSSION

Before we address the specific issues raised by Appellants, we must address the multiple instances in Appellants' 1925(b) statement where they assert that the issue "is not limited to" the sub-issues which they include. In their concise statement, Appellants have also included lists of sub-issues which they refer to as "examples" or "non-exhaustive lists."

Pennsylvania Rule of Appellate Procedure 1925(b)(4)(ii) provides that "[t]he Statement shall concisely identify each error that the appellant intends to assert with sufficient detail to identify the issue to be raised for the judge." Therefore, Appellants non-exhaustive lists of sub-issues do not properly respond to this Court's request for a concise statement of matters complained of on appeal. We submit that any issue or sub-issue raised by Appellants subsequent to this Court's 1925(a) opinion should be considered waived under Pa.R.A.P. 1925(b)(4).

- 1. This Court did not abuse its discretion nor commit an error of law when it listed all relevant findings of fact in its decision and decree.**

Appellants assert through their 1925(b) statement that the Court omitted three previously adopted findings of fact. In our

December 31, 2020 decision and decree, we included all facts which were relevant to the issues that the Superior Court of Pennsylvania directed us to review, reconsider and adjudicate in their remand opinion of November 7, 2019. When an appellant claims abuse of discretion as to the trial court's findings of fact on appeal, the Supreme Court of Pennsylvania has held that an abuse of discretion can be found only if the trial court's findings are not supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637, 640 (Pa. 1983).

In the instant matter, the Superior Court of Pennsylvania ruled on November 7, 2019, that this Court should have considered Nurse Young an expert and that Appellees had presented a prima facie case of undue influence based on the Decedent's weakened intellect at the time that the contested will was executed, the confidential relationship between the Decedent and the will proponents, and the fact that the proponents received a substantial benefit under the will. Based upon that ruling, we were compelled to strike any findings of fact that would be contrary to the instructions of the Superior Court on remand.

Undue influence is defined as conduct including imprisonment of the body or mind, fraud, threats, misrepresentation,

circumvention, inordinate flattery, or physical or moral coercion, manifested in such a degree as to prejudice the mind of the testator, to destroy her free agency, and to operate as a present restraint upon her in making of a will. Kern v. Kern, 892 A.2d 1, 8 (Pa. Super. 2005). Specifically, the prong of the test for undue influence at issue is whether the Decedent was suffering from a weakened intellect. For purposes of establishing undue influence, a "weakened intellect" is typically accompanied by persistent confusion, forgetfulness, and disorientation. Owens v. Mazzei, 847 A.2d 700, 707 (Pa. Super. 2004). The weakened intellect necessary to establish undue influence need not amount to testamentary incapacity. In re Clark's Estate, 334 A.2d 628, 634 (Pa. 1975).

To address Appellants' specific complaints, our prior finding that Attorney Michael Greek saw no evidence of Decedent being unduly influenced was removed due to the Superior Court of Pennsylvania's conclusion that "Attorney Greek—a stranger to the Testatrix—could have had no way of knowing whether, in the weeks and months prior to his two meetings with Testatrix, her mental state could have rendered her susceptible to the undue influence of third parties." Estate of Fabian, 222 A.3d 1143, 1151 (Pa. Super. 2019). Therefore, Attorney Greek's testimony that he saw no evidence of Decedent being unduly influenced during their

limited interaction was no longer relevant to our determination as to whether she suffered from a weakened intellect. Testimony regarding a testatrix's voluntary and intelligent action by a scrivener unfamiliar with that testatrix is not dispositive of the question of the testatrix's weakened intellect. In re: Mampe, 932 A.2d 954, 961 (Pa. Super. 2007).

Additionally, the facts of Decedent being well-dressed, well-groomed and communicative as well as the testimony of Lisa Bartasavage and Michelle Nevenglosky that they saw no indication that Decedent lacked capacity to enter into the Will were also irrelevant based on the remand opinion of the Superior Court of Pennsylvania. The Superior Court found that "the 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon." Id. (citing Clark's Estate, 334 A.2d at 634). Both Ms. Bartasavage and Ms. Nevenglosky had met Decedent only once and, thus, their opinion as to whether Decedent was unduly influenced would not be relevant based on the Superior Court's conclusions. Therefore, the events that occurred on the date that the contested will was executed, while significant with regard to issues of testamentary capacity, are of little importance when determining if Decedent was unduly influenced. (The particular mental conditions of the testator on the date the will is executed is not as significant when reflecting upon undue

influence as it is when reflecting upon testamentary capacity.
Id.).

2. The Court afforded proper weight to all evidence introduced at the hearing in the instant matter.

In their second issue, Appellants contend that this Court did not give proper weight to the evidence introduced at the hearing. They state the following "examples:" (1) the [Appellants] were not blood relatives of the Decedent; (2) none of the [Appellants] had regular contact with the Decedent in the years prior to June 2014; (3) Attorney Greek met alone with the Decedent on June 13, 2014; (4) the Appellants were unaware of Attorney Greek's June 13, 2014 appointment with the Decedent; (5) the terms to be used for the drafting of Decedent's new will were directed by Decedent's daughter, Barbara Fabian to Marie Krepicz; (6) Attorney Greek's experience drafting wills for the elderly; and (7) Attorney Greek's interactions with Decedent that occurred prior to June 20, 2014.

In addressing the Appellants' second issue, the standard to reverse a trial court's decision based on a weight of the evidence argument is high. The Superior Court of Pennsylvania has repeatedly held that "we will respect a trial court's findings with regard to the credibility and weight of the evidence 'unless the appellant can show that the court's determination was manifestly erroneous, arbitrary and capricious or flagrantly

contrary to the evidence.'" Gutteridge v. J3 Energy Group, Inc., 165 A.3d 908, 914 (Pa. Super. 2017) (citing J.J. DeLuca Co. v. Toll Naval Associates, 56 A.3d 402, 410 (Pa. Super. 2012)).

This Court fully considered each of the facts to which Appellants claim we failed to afford proper weight. However, where a prima facie case of undue influence has been made, as in the instant matter, the burden shifts to Appellants to present by clear and convincing evidence that the contested will was executed by the decedent absent undue influence. In re Estate of Smaling, 80 A.3d 485, 493 (Pa. Super. 2013) (citing Clark's Estate, 334 A.2d at 632). More specifically, Appellants had the burden of proving, by clear and convincing evidence, that "one of the foregoing criteria was not established." Owens v. Mazzei, 847 A.2d. 700, 706 (Pa. Super. 2004) (citing Clark's Estate, 334 A.2d at 632).

Clear and convincing evidence is independent and unbiased evidence and, if in the form of testimony, "[t]he witness must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue..." In re Fickert's Estate, 337 A.2d 592, 594 (Pa. 1975).

In Appellants' attempts to show that Decedent was not suffering from a weakened intellect, they failed to present their own expert to rebut the testimony of Nurse Young that Decedent conducted herself like a person suffering from advanced dementia on a daily basis. Appellants also failed to present any uninterested witnesses to testify concerning Decedent's mental state in the weeks leading up to the execution of the contested will.

Though Appellants' "examples" represent evidence that was favorable to their position, we found that these "examples" were insufficient to overcome the burden of proving by clear and convincing evidence that the contested will was executed free of undue influence. Therefore, appropriate weight was afforded to all evidence presented during the proceeding before this Court.

3. The Court conducted a proper analysis of the testimony of Attorney Michael Greek and afforded it appropriate weight.

Appellants raise various claims concerning our analysis of the testimony of Attorney Michael Greek, who was the scrivener of the contested will, in the third, fourth, and seventh issues of their 1925(b) statement. In its opinion remanding the instant case to this Court, the Pennsylvania Superior Court stated the following:

...in the body of its opinion, the court continued to place almost exclusive emphasis on the testimony of

Attorney Greek, who met Testatrix twice: on June 13, 2014, and on the date of execution, June 20, 2014. The court focused on the Testatrix's ability to identify family members and express herself and her testamentary wishes. The court stated that "[i]f Attorney Greek had suspected [Testatrix] was subject to undue influence, he would have stopped the will consultation process." ... However, the court misses the point. As noted above, because undue influence is generally accomplished by a "gradual, progressive inculcation of a receptive mind," the "fruits" of the undue influence may not appear until long after the weakened intellect has been played upon. Clark, 334 A.2d at 634. Thus, Attorney Greek—a stranger to the Testatrix—could have had no way of knowing whether, in the weeks and months prior to his two meetings with Testatrix, her mental state could have rendered her susceptible to the undue influence of third parties. Once again, evidence of Testatrix's mental state at the time of execution is of substantially less probative value to an undue influence inquiry than it is to a determination of testamentary capacity. As both Dr. Bosi and Nurse Young testified, patients with Alzheimer's dementia can have "good days" and "bad days."

Estate of Fabian, 222 A.3d at 1151.

When determining if a testator was suffering from a weakened intellect during times relevant to the execution of a will, a doctor's opinion on medical incompetence is not given particular weight especially when other disinterested witnesses establish that a person with Alzheimer's disease was competent and not suffering from a weakened intellect at the relevant time. In re Estate of Angle, 777 A.2d at 123 (citing Weir by Gasper v. Estate of Ciao, 556 A.2d 819 (Pa. 1989)).

Though Attorney Greek, Lisa Bartasavage, and Michelle Nevenglosky were disinterested witnesses, an attorney-scrivener's testimony is less valuable in proving absence of undue influence where the attorney had no relationship with the testator before drafting the will, and was first contacted by the proponent. In re Mampe, 932 A.2d at 961.

Because the "fruits" of any undue influence may not appear until long after the testator's weakened intellect has been played on, Decedent's mental condition in the weeks and months leading up to the execution of the Will is highly relevant. Through the testimony of Attorney Greek, Lisa Bartasavage, and Michelle Nevenglosky, Appellants have only presented evidence of Decedent's mental condition on the day of the execution of the will and on one prior occasion where Decedent met with Attorney Greek.

The Superior Court, in deciding the issue of whether a prima facie case of undue influence had been established, found that Attorney Greek was a stranger to Decedent. Therefore, the Court was bound by the established facts that Attorney Greek had no knowledge of Decedent's mental condition in the weeks and months leading up to the execution of the will and that Attorney Greek had no relationship with Decedent prior to drafting the will. Moreover, it is undisputed that Attorney Greek was first contacted by Appellants.

Though the Court acknowledges Attorney Greek's extensive experience in working with elderly clients and that he did not see any indication that Decedent was being unduly influenced, the Court is compelled to find that the testimony of Attorney Greek and his employees, alone, is insufficient to rebut the presumption of undue influence. Though we acknowledge that Attorney Greek was diligent in assessing the Decedent's mental condition on the day of the execution of the will and in his previous meeting with Decedent, and that such assessment is highly relevant in determining testamentary capacity, the applicable law requires more extensive and compelling evidence than was presented by Appellants to overcome a prima facie case of undue influence.

4. Appellants did not present sufficient evidence to rebut the testimony of Dr. John Bosi and Nurse Georgia Young that the Decedent was suffering from a weakened intellect in the weeks and months leading up to the execution of the Will.

In Appellants' fifth, ninth, and eleventh issues, they assert that they have presented sufficient evidence to rebut the testimony of Dr. Bosi and Nurse Young through cross-examination of those witnesses and the introduction of exhibits. Through those means, Appellants elicited facts such as there being issues with the initial mental examination of Decedent by Dr. Bosi and that Decedent was able to perform certain everyday tasks independently

while a patient at MapleShade Meadows Assisted Living Community (hereinafter "MapleShade"). Further, Appellants argue that they were not required to present expert testimony to rebut the testimony of Dr. Bosi and Nurse Young.

As previously explained in our consideration of Appellants' third issue, the relevant time period for our analysis is the weeks and months prior to the execution of the will. The decedent's mental condition during that time period is relevant to determine whether she was suffering from a weakened intellect and could have been susceptible to undue influence. Dr. Bosi and Nurse Young had both worked with Decedent during that time period. Nurse Young had sometimes interacted with Decedent on a daily basis. Dr. Bosi testified that Decedent's condition deteriorated from the time that she was admitted to MapleShade.

Appellants argue that there were issues with Dr. Bosi's initial examination of Decedent, including: (1) Dr. Bosi being unfamiliar with Stella Fabian at the time that he examined her on April 16, 2014; (2) At the time of his April 16, 2014 examination of Stella Fabian, Dr. Bosi being unaware that she had arrived at MapleShade at approximately 2:00 a.m. on April 16, 2014; (3) Dr. Bosi being unaware of when Stella Fabian had last eaten a meal at the time of his April 16, 2014 examination (Dr. Bosi admitted that missing a meal may affect one's cognitive functioning); (4) Stella

Fabian had learned, on April 15, 2014, that her daughter was seriously ill; and (5) despite it usually being a procedure for diagnosis, no bloodwork or urinalysis was performed before diagnosing Stella Fabian on April 16, 2014.

Though the Court acknowledges that the reliability of the initial examination of Decedent by Dr. Bosi is limited, the Court relied upon the ongoing relationship that Dr. Bosi and Nurse Young had with Decedent in the weeks and months prior to the execution of the will. Dr. Bosi and Nurse Young interacted with Decedent on an ongoing basis and observed that her condition was deteriorating. Additionally, Nurse Young performed subsequent mental examinations on Decedent and she continued to obtain scores that are consistent with a diagnosis of Alzheimer's Disease. Nurse Young testified that Decedent conducted herself like a person suffering from advanced dementia on a daily basis.

Appellants further argue that Decedent was able to complete certain everyday tasks while she was a patient at MapleShade. In their issues raised on appeal, Appellants state that: (1) Decedent was not determined to be in constant need of supervision; (2) Decedent was determined to be able to safely use and avoid poisonous materials; (3) Decedent did not need assistance with eating, toileting, inside ambulation, and was able to communicate with other residents; (4) MapleShade accepted Decedent's signature

on its Residency Agreement Addendum on April 17, 2014; and (5) Decedent was able to pick out her own clothes and dress herself.

Though it was undisputed that Decedent was able to complete some everyday tasks independently, there was evidence presented that Decedent required assistance with personal hygiene, managing healthcare, managing finances, using the telephone, keeping appointments, caring for personal possessions, writing correspondence, shopping, doing laundry, and securing transportation. Additionally, Nurse Young testified that at least three quarters of the residents at MapleShade suffered from Alzheimer's Disease. However, Nurse Young noted that it is required that anyone residing at MapleShade be able to live with some degree of independence. Therefore, being able to perform certain tasks independently is not necessarily an indication that Decedent was not suffering from a weakened intellect due to Alzheimer's Disease during the relevant time period.

Lastly, Appellants claim that this Court abused its discretion when we concluded that they offered no expert testimony to rebut the evidence presented by Dr. Bosi and Nurse Young because they were not required to present expert testimony and that they had presented evidence to contradict Dr. Bosi and Nurse Young through cross-examination.

The Court did not find that Appellants were required to present expert testimony, nor did we find that Appellants presented no evidence to contradict the testimony of Dr. Bosi and Nurse Young. However, we found that Appellants presented no expert testimony of Decedent's condition during the relevant time period, and no lay testimony from disinterested individuals who had been in regular contact with Decedent during the relevant time period. Therefore, Appellants were unable to overcome the presumption that the decedent was suffering from a weakened intellect, as asserted by Dr. Bosi and Nurse Young, by clear and convincing evidence.

5. The evidence of Decedent's mental condition presented by Appellants was insufficient to rebut the presumption that Decedent was suffering from a weakened intellect.

In their eighth and tenth issues, Appellants allege that this Court committed an error of law or an abuse of discretion when it concluded that they did not present any further disinterested witnesses to testify concerning the mental condition of Decedent when Appellants allege that they presented such evidence through cross examination. Additionally, Appellants allege that this Court erred in concluding that Decedent's ability to complete some ordinary tasks independently does not negate the fact that she was suffering from weakening intellect due to disease progression.

Both of these issues were addressed hereinabove. To reiterate our prior conclusion, Appellants presented evidence through cross-examination and exhibits that may suggest issues with the initial evaluation of Decedent that was performed by Dr. Bosi and that Decedent was able to complete some limited ordinary tasks on her own. However, in light of the overwhelming evidence, including expert testimony, presented by Appellees, the evidence presented by Appellants was insufficient to prove by clear and convincing evidence that Decedent was not suffering from a weakened intellect in the weeks and months leading up to the execution of the contested will.

CONCLUSION

For the reasons set forth hereinabove, and in our decision and decree dated December 31, 2020, we respectfully recommend that the instant appeal be denied and that the aforesaid decree be affirmed accordingly.

BY THE COURT:



Steven R. Serfass, J.