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 Petitioners
Ellen C. Schurdak, Esquire	Counsel for Respondents
Michael S. Greek, Esquire	Counsel for Co-executors
David Dembe, Esquire	Senior Deputy Attorney General

MEMORANDUM OPINION

Serfass, J. – October 2, 2018

Louise Benson, Suzanne Sullivan, Gregory Fabian, Michelle Kratzer, and Jennifer Slade (hereinafter "Petitioners") have taken this appeal from our decision and decree of June 28, 2018, finding that Petitioners failed to meet the evidentiary burden necessary to reform or vacate the Last Will and Testament executed by Stella Fabian (hereinafter "Decedent") on June 20, 2014, and denying Petitioners' appeal and petition in their entirety. We file the following memorandum opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that the aforesaid decision and decree be affirmed for the reason set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

On May 27, 2016, Petitioners initiated this action against Marie Krepicz, Charles Treskot, Carolyn Kutta, and Robert Treskot

(hereinafter "Respondents") to contest the June 20, 2014, will naming Marie Krepicz and Charles Treskot as the co-executors of Decedent 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," Petitioners challenged the validity of the 2014 will for lack of testamentary capacity, undue influence in execution, fraud, and mistake. Petitioners sought to have a will executed by Decedent on December 29, 1988, admitted to probate as her true and authentic last will and testament. On July 7, 2016, Respondents filed an Answer denying Petitioners' 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, this Court entered a decision and decree on June 28, 2018, summarizing the pertinent facts in this case. We have attached a copy of our decision and decree for the convenience of the Honorable Superior Court.

Based upon these findings of fact, this Court held that Petitioners failed to meet the evidentiary burden necessary to reform or vacate the Last Will and Testament executed by Decedent,

Stella Fabian, on June 20, 2014. Accordingly, this Court denied Petitioners' appeal and petition in their entirety.

On July 27, 2018, Petitioners filed a notice of appeal to the Superior Court. On that same date, this Court entered an order directing Plaintiff to file of record, within twenty-one (21) days, a concise statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On August 13, 2018, we received Petitioners' concise statement in which they raise seven (7) issues for appellate review.

DISCUSSION

The issues raised by Petitioners on appeal can be simplified into two (2) distinct questions: 1) Whether this Court erred by finding that Petitioners did not establish that Decedent's will was the product of undue influence by Respondents; and 2) Whether this Court erred by ruling that Georgia Young, R.N., was not qualified to offer expert testimony as to the mental competence and treatment of Decedent and by subsequently limiting her testimony on that basis. We will address each in turn.

I. While this Court may have misstated the standard for determining mental capacity in a claim of undue influence, this Court did consider the totality of the evidence in determining whether Decedent suffered from a weakened intellect

Petitioners argue that this Court erred as a matter of law by misapplying the applicable legal standard for determining whether the will executed on June 20, 2014, was the product of undue influence. We acknowledge that this Court did not note that more credence may be given to remote mental history when determining whether Decedent suffered from a weakened intellect in claims of undue influence. *See* In re Estate of Smaling, 80 A.3d 485, 498 (Pa.Super. 2013). The Superior Court has held that undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind such that the "fruits" of the undue influence may not appear until long after the weakened intellect has been played upon. *Id.* Accordingly, the particular mental condition of the testator on the date that she executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity. *Id.* However, when viewing all of the available evidence, as this Court did, Petitioners have failed to demonstrate by clear and convincing evidence that Decedent was suffering from a sufficiently weakened intellect to rebut the presumption of a lack of undue influence.

Undue influence does not refer to any and every line of conduct capable of disposing in one's favor a fully and self-directing mind, but to control acquired over another that virtually destroys her free agency. In re Ziel's Estate, 359 A.2d 728, 733 (Pa. 1976). When the proponent of the will in question establishes

the proper execution of the will before two (2) uninterested witnesses, as is the case here, a presumption of lack of undue influence arises. In re Estate of Smaling, 80 A.3d at 493. Thereafter, the burden of evidence of undue influence shifts to the contestant of the will. *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 would receive a substantial benefit from the will in question. *Id.* Once the contestant has established all three (3) prongs of this test, the burden shifts again to the proponent of the will to produce clear and convincing evidence which affirmatively demonstrates the absence of undue influence. *Id.*

For purposes of establishing undue influence, "weakened intellect" is typically accompanied by persistent confusion, forgetfulness, and disorientation. Owens v. Mazzei, 847 A.2d 700, 707 (Pa.Super. 2004). The existence of Alzheimer's disease, in itself, does not establish incompetency to execute a will. In re Estate of Angle, 777 A.2d 114, 125 (Pa.Super. 2001). Further, 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)).

Attorney Michael S. Greek's testimony was of particular significance on the issue of undue influence given his experience with estate planning and his highly credible testimony. Attorney Greek has been licensed in Pennsylvania and practicing as an attorney-at-law since 1993. Attorney Greek has a general practice of law, which includes serving as a part-time assistant district attorney and practicing in the areas of bankruptcy, wills and estates, domestic relations, divorce, custody, criminal law, and municipal solicitorships. Attorney Greek has a contract with the County of Carbon to provide simple wills, living wills, and powers of attorney to individuals referred by the Carbon County Area Agency on Aging. In providing the services to clients referred to him by the Area Agency on Aging, Attorney Greek is bound by the Rules of Professional Conduct and the rules regarding attorney/client privilege.

Attorney Greek met with Decedent on or about June 13, 2014, to discuss the preparation of a last will and testament and the provisions she wanted included in her will. Decedent told Attorney Greek that Respondents were the relatives that come to see her and that she wanted to leave her assets to them after her daughter. During her meeting with Attorney Greek on June 13, 2014, Decedent was able to recall events and family members, maintain fluent

conversation, and express herself without any difficulty. Attorney Greek has experience with elderly clients who lack the capacity and sound mind necessary to craft a will, and he did not believe that Decedent lacked testamentary capacity based upon his conversations and interactions with her. During his meeting with Decedent on June 13, 2014, Attorney Greek was able to determine that she wanted to have a will drafted. During this meeting, Attorney Greek discussed with Decedent whether she wanted a will and how she wanted to distribute her assets. During the June 13, 2014 meeting, Decedent was able to answer all of Attorney Greek's questions. On June 13, 2014, Attorney Greek believed that Decedent understood the nature and extent of her assets and how she wanted to distribute those assets upon her death. He did not make any inquiry as to Decedent's medical condition since there was nothing in his discussions with her which would have prompted him to make such an inquiry.

If Attorney Greek had suspected that Decedent was subject to undue influence, he would have stopped the will consultation process. In this case, Attorney Greek saw no evidence of Decedent being unduly influenced. She was able to recall events, she knew her birth date, who the president was, and was able to converse without any issues or problems. Additionally, Lisa Bartasavage and Michelle Nevenglosky regularly serve as witnesses for will executions with Attorney Greek, and they have observed situations

where the prospective testators did not have the mental capacity necessary to execute a will. In those situations, Attorney Greek did not have the individual execute the will. Lisa Bartasavage and Michelle Nevenglosky observed no reason to believe that Decedent lacked the capacity to enter into the will based upon their previous experience witnessing will executions. At the will execution on June 20, 2014, Decedent was well dressed, well groomed, friendly, and responsive to questions regarding the will including who had been named as the beneficiaries.

Attorney Greek did not discuss with Respondents the drafting of Decedent's will or what Decedent wanted to do with her assets prior to her execution of the will on June 20, 2014. When Attorney Greek was leaving Decedent on June 20, 2014, he witnessed her encountering Marie Krepicz, Carolyn Kutta and Robert Treskot. During this encounter, Attorney Greek observed that Stella Fabian recognized Ms. Krepicz, Ms. Kutta and Mr. Treskot. She called each of the relatives by their name, and showed no signs of being fearful or intimidated. Rather, Stella Fabian appeared to be happy to see Ms. Krepicz, Ms. Kutta and Mr. Treskot.

Regarding the medical testimony presented during the hearings, Dr. John Bosi testified that Decedent performed poorly on the mini-mental status exam on the morning of April 16, 2014, and could not recall the date, time, and place, resulting in his diagnosis of moderate to severe Alzheimer's disease. However,

Decedent had been up all night prior to the exam when she had gone to the hospital with Respondents because her daughter, Barbara Fabian, was seriously ill. It is unclear whether Decedent had eaten anything since leaving her home to go to the hospital the previous night. Dr. Bosi testified that the lack of proper nutrition would cause the cognitive function of a person of Decedent's age to decline rapidly. Dr. Bosi also testified that lack of sleep and stress from hearing that a loved one is seriously ill could affect an elderly person's cognitive functioning. Additionally, multiple medical reports showed Decedent was orientated as to date, time, place, medical history, and her birth date both before and after Dr. Bosi's examination.

When viewing the evidence of Decedent's mental capacity in its totality throughout the time prior to and including the execution of the will on June 20, 2014, we find that Petitioners have not met their burden to show that Decedent suffered from a weakened intellect by clear and convincing evidence.[1]

[1] It should be noted that, while this Court stated in our decision and decree of June 28, 2018, that "Petitioners have failed to demonstrate by clear and convincing evidence that, when the will was executed, Decedent was of weakened intellect[,]" the language "when the will was executed" was a direct reference to the standard for a claim of testamentary incapacity. *See* In re Estate of Hastings, 387 A.2d 865, 867 (Pa. 1978); *but see* In re Estate of Smaling, 80 A.3d at 498 (holding that the particular mental condition of the testator on the date she executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity and that more credence may be given to remote mental history in a claim of undue influence). However, when viewing the evidence to make the determination of whether Decedent was of a weakened intellect for the purposes of the undue influence claim, this Court viewed all available evidence, not only that which related to the events of June 20, 2014. Thus, the language "when the will was executed" was used to

Because Petitioners failed to prove that Decedent was of weakened intellect, we ended our analysis of the undue influence claim. There was no need to shift the burden of proof onto Respondents to affirmatively demonstrate the absence of undue influence nor was there a need to determine whether Respondents had met that burden.

Petitioners also argue that this Court abused its discretion by failing to properly weigh the evidence regarding whether Decedent suffered from a weakened intellect.

> [A]ppellate review of a weight claim is a review of the [trial court's] exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence.

In re Estate of Smaling, 80 A.3d at 490 (quoting Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa.2013)).

> 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. Only where it appears from a review of the record that there is no evidence to support the court's findings or that there

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emphasize the testamentary incapacity legal standard, not to foreclose this Court from considering evidence prior to the date of execution in determining whether Decedent suffered from a weakened intellect.

> is a capricious disbelief of evidence may the court's findings be set aside.

In re Bosley, 26 A.3d 1104, 1107 (Pa.Super. 2011) (internal citation omitted). This Court's findings of fact are amply supported by the evidence in this case, and this Court did not abuse its discretion in finding that Petitioners did not meet their burden of proving by clear and convincing evidence that Decedent suffered from a weakened intellect. Therefore, our finding that Petitioners have failed to demonstrate a *prima facie* showing of undue influence should be affirmed.

II. This Court did not err in ruling that Georgia Young, R.N., was not qualified to offer testimony as an expert in the fields of dementia, Alzheimer's, and capacity

Finally, Petitioners argue that this Court erred by only recognizing Georgia Young, R.N., as an expert registered nurse and not as an expert in the fields of dementia, Alzheimer's, and mental capacity.

> [T]he question whether a witness is qualified to testify as an 'expert' is within the sound discretion of the trial court and will not be overturned except in clear cases of abuse. In Pennsylvania, a liberal standard for the qualification of an expert prevails. Generally, if a witness has any reasonable pretension to specialized knowledge on the subject matter under investigation [s]he may testify and the weight to be given to h[er] evidence is for the [fact finder]. It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required.

Commonwealth v. Ramos, 920 A.2d 1253, 1255 (Pa.Super. 2007) (quoting Commonwealth v. Marinelli, 810 A.2d 1257, 1267 (Pa. 2002)).

Nurse Young works at the Maple Shade Meadows personal care home in Nesquehoning, Pennsylvania, as a registered nurse and director of nursing. She oversees the care of all the residents. Nurse Young's ten (10) year certification as a psychiatric mental health nurse had lapsed prior to her court appearance and testimony. Approximately three-quarters of the sixty-two (62) residents she oversees have Alzheimer's disease. Nurse Young prepares care plans for the residents for staff to follow, which include day-to-day guidelines. She also reviews the patients' medications to advise the doctors on whether they are working as expected.

Nurse Young testified that she is a graduate nurse from a diploma program, but that she does not have a bachelor's degree. She does not have any specialized certifications related to the care of patients with Alzheimer's or dementia. Additionally, Nurse Young has never before been qualified as an expert witness by any court and has not published any papers regarding patients with Alzheimer's or dementia. She did not prepare an expert report related to her testimony in the instant matter.

In considering Nurse Young's qualifications, this Court found that she was qualified to testify as an expert in the field of

nursing, but not in the specific fields of "Dementia, Alzheimer's and capacity" as requested by counsel for Petitioners. There is no abuse of discretion relative to our determination on qualifications and that determination should not be overturned.

CONCLUSION

For the reasons set forth hereinabove, we respectfully recommend that the instant appeal be denied and that our decision and decree of June 28, 2018, be affirmed accordingly.

BY THE COURT:

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Steven R. Serfass, J.