COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 530 AP of 2002
Control No. 020664
Estate of Fannie Stafford, a/k/a Fannie M. Stafford, Deceased

Opinion Sur Appeal From Decree of Register

Introduction

This opinion addresses claims that the decedent, Fannie Stafford, lacked testamentary capacity and/or that she suffered weakened intellect so that her will was procured by undue influence. Of particular concern and calling for critical comment is that the scrivener drafted the will in question without having had any contact whatsoever with the decedent either incident to preparation of the will or the subsequent execution of the will in the hospital.

Background

Fannie Stafford died on December 13, 2001 at the age of 95 only a few days after she was released from Hahnemann Hospital in Philadelphia, Pennsylvania.[1] Prior to November 2001, she had lived independently in Connecticut.[2] Ms. Stafford was brought to Philadelphia by her niece, respondent Vivian VanStory, on November 10, 2001 after Ms. Stafford called to tell her niece that she could no longer care for herself.[3] From November 4, 2001, Ms. VanStory considered herself "in charge" of Ms.Stafford's affairs.[4]

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[1] See Transcript from the 5/18/2004 hearing (hereinafter "N.T.") at 25, 80, 105 & 150. Although Ms. VanStory indicated that Fannie Stafford was released from the hospital on December 10, 2001 and then died on December 13th, the discharge notice suggests that she was released from the hospital on December 8, 2001. Compare N.T. at 150 with Ex.P-8C (12/8/01 Discharge Summary).
[2] N.T. at 61.
[3] N.T. at 71 & 77.
[4] N.T. at 70-71, 89.

In fact, while Ms. Stafford was hospitalized, Ms. VanStory contacted her own attorney and communicated to him the terms of a new will for Ms. Stafford[5] despite being previously told by her aunt's Connecticut attorney that the will Ms. Stafford had executed in 1991 in Connecticut would have been valid in Philadelphia.[6] When this new will was executed on December 5, 2001, the attorney was not present nor had he ever met with Ms. Stafford.[7] Instead, Ms. VanStory brought the prepared will to Ms. Stafford's bedside[8] while asking a nurse to serve as a witness and a notary to attend.[9]

After her death, Ms. Stafford's December 5, 2001 will was probated by the Philadelphia Register of Wills on February 7, 2002 and letters testamentary were granted to Ms. VanStory.[10] On April 3, 2002, Dianne Davis, Constance S. Rendell and Michael H. Grace filed a petition for a citation sur appeal from the Register of Wills February 7, 2002 decree. In their petition, they challenged the validity of the 2001 will on two grounds: 1) at the time she executed the December 5, 2001 Will, Ms. Stafford lacked testamentary capacity, and; 2) the will was procured by the undue influence of Ms.VanStory, who occupied a confidential relationship with the decedent and who was bequeathed the residue of the estate to the exclusion of other beneficiaries at a time when the decedent suffered from a weakened intellect.[11] Constance Rendell and Michael Grace subsequently withdrew as petitioners, leaving Dianne Davis as the sole petitioner.[12]

A hearing was held on this appeal on May 18, 2004. The parties then submitted proposed findings of fact and conclusions of law. After consideration of the testimony at

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[5] N.T. at 85-89.
[6] N.T. at 65 & 75.
[7] N.T. at 88-93.
[8] N.T. at 92-93.
[9] N.T. at 47-48, 94-96.
[10] See 4/3/2002 Petition for Citation and Answer, ¶ 18.
[11] See Petitioners' 4/3/02 Petition, ¶¶ 24-28.
[12] See 4/16/2004 Praecipe to Withdraw.

the hearing, the filings by the parties and the relevant precedent, this court concludes that the petitioner met her burden of proving by clear and convincing evidence that the December 5, 2001 will of Fannie Stafford was invalid because procured by the undue influence of Vivian VanStory. The Appeal from the Probate Decree dated February 7, 2002 is therefore sustained.

Legal Analysis

Undue Influence

In Will contests, the proponent of the will must first establish that the formalities of execution were followed. Estate of Reichel, 484 Pa. 610, 614, 400 A..2d 1268, 1270 (1979). At the outset of the hearing in the instant case, the parties stipulated that Fannie Stafford's will of December 5, 2001 was "duly executed, satisfying the proponent's initial burden of proof." N.T. at 5. As petitioner noted, the burden of proof then shifted to her as the contestant to prove by clear and convincing evidence that the will was invalid because of undue influence in its execution. Burns v. Kabboul, 407 Pa. Super. 289, *307, 595 A.2d 1153, **1162 (1991)**;** Estate of Reichel, 344 Pa. Super. 520, 523, 496 A.2d 1227, 1229 (Pa. Super. 1985).

Determining whether a will is invalid because of undue influence, the Pennsylvania Supreme Court has observed, "is inextricably linked to the assignment of the burden of proof." Estate of Clark, 461 Pa. 52, 59, 334 A.2d 628, 631 (1975). Once the proponent has established that the will was duly executed, there is a presumption of lack of undue influence. The contestant therefore bears the burden of presenting evidence of any alleged undue influence. Id.

Undue influence is not a precise concept. Rather it has been defined in subtle, fluid terms. As one court observed, "undue influence is generally accomplished by a gradual, progressive inculpation of a receptive mind" and "the 'fruits' of the undue influence may not appear until after the weakened intellect [of the testator] has been played upon."[13] Another court defined undue influence as "a control acquired over another which virtually destroys his free agency. . . and . . . operates as a present restraint upon him in the making of the will."[14] The Pennsylvania Supreme Court observed that the "concept of undue influence is predicated on the assumption that the influence of a strong and predatory character close to a testator who is possessed of a weakened mental state will prey insidiously on the weakened intellect in order to extract testamentary benefactions that would not otherwise be forthcoming." Estate of Ziel, 467 Pa. 531, 543, 359 A.2d 728, 734-35 (1976). Because undue influence is a "'subtle,' 'intangible' and 'illusive thing,'" it must frequently be proven by indirect evidence.[15] To satisfy the burden of proof, a contestant asserting that a will was procured by undue influence must establish the following:

> 1) that a person in a confidential relationship with a testator
> 2) receives a substantial benefit under the will and
> 3) that the testator was of weakened intellect.
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> Estate of Reichel, 484 Pa. 610, 615, 400 A.2d 1268, 1270 (quoting Button's Estate, 459 Pa. 234, 240-41, 328 A.2d 480, 484 (1974))

These elements must be established by clear and convincing evidence. Once a contestant does so, the burden shifts back to the proponent to disprove the charge of undue influence. Estate of Ziel, 467 Pa. at 541, 359 A.2d at 734.

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[13] Estate of Lakatosh, 441 Pa. Super. 133, 143-44, 656 A.2d 1378, 1384 (1995)(quoting Estate of Bankovich, 344 Pa. Super at 525, 496 A.2d at 1230).
[14] Paolini Will, 13 Fid. Rep. 2d 185, 186 (Mont.Cty. Orphans' Court 1993)(quoting Thompson Will, 387 Pa. 82, 87, 126 A.2d 740, 744)(emphasis in original).
[15] Estate of Clark, 461 Pa. at 67, 334 A.2d at 635.

To support her claim that Vivian VanStory exerted undue influence over Fannie Stafford, the petitioner presented the testimony of seven witnesses: Dr. Wilbur Oaks (by deposition), the treating physician; Dr. Stephen Mechanick, an expert witness with specialties in psychiatry and forensic psychiatry; Kathy Manigly, a nurse who was asked by Ms. VanStory to witness the execution of the will; Debra McLean, a notary who was asked by Ms. VanStory to attend the execution of the will; Vivian VanStory, the respondent; Dianne Davis, the petitioner, and; Michael Grace, a nephew of the testator. The sole witness for the proponent was Vivian VanStory. Significantly, no testimony was presented by the attorney who drafted Fannie Stafford's will and then did not preside over its execution—a serious omission in light of the great weight courts accord such testimony. See, e.g., Lynch Will, 18 Fid. Rep. 2d 65, 75 (Monty. Cty. O.C. 1997); Krauser Will, 16 Fid. Rep. 2d 324, 328 (Luzerne Cty. O.C. 1996).

The Contestant Presented Clear and Convincing Evidence of a Confidential Relationship between Fannie Mae Stafford and her Niece Vivian VanStory

Although establishing the existence of a confidential relationship between the testator and the person who receives a substantial benefit under the will is a key element in proving undue influence, there is no precise formula for determining the existence of a confidential relationship. In will contest cases, a confidential relationship exists "whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Estate of Lakatosh, 441 Pa. Super. at 142, 656 A.2d at 1383. Similarly, "a confidential relationship exists whenever circumstances make it certain that the parties did not deal on

equal terms." Burns v. Kabboul, 407 Pa. Super. 289, 308-09, 595 A.2d 1153, 1163 (1991)(quoting In re Bankovich, 344 Pa. Super. 520, 523, 496 A.2d 1227, 1229 (1985)).

Through her own testimony, the respondent, Vivian VanStory, described a relationship with her aunt—the testator—that was clearly a "confidential relationship." They had a longstanding relationship in which Ms. VanStory was ceded increasing control over Ms. Stafford's personal and business affairs as Fannie became dependent and weak due to advanced age, isolation and illness.

Ms. VanStory testified that Fannie Stafford had lived independently in Connecticut up until November 2001.[16] Fannie's husband died in 1990 and they had no children together. Beginning in approximately 1996, Ms. VanStory began writing out her aunt's checks. In fact, they maintained a jointly titled checking account, although Ms. VanStory clearly did not consider that her money.[17] Moreover, Fannie had executed a power of attorney naming Ms. VanStory around the time she executed a will in 1991.[18]

Despite her relative independence during this period,[19] Ms. Stafford suffered certain infirmities. For years she had been blind in her left eye, which ultimately had to be removed. Ms. VanStory testified that in the latter part of 2001, Fannie experienced hallucinations in her eye of "angels sitting there running around," which was caused by medication but ceased once the medication was discontinued.[20] She also had difficulty hearing normal conversations.

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[16] N.T. at 61 & 143.
[17] N.T. at 60 & 64.
[18] N.T. at 89. Ms. VanStory stated at the hearing that she had a power of attorney from the previous will, which presumably referenced the 1991 will.
[19] Ms. VanStory testified that while living in Connecticut, Fannie cared for herself and cooked her own food. N. T. at 143.
[20] N.T. at 63.

Ms. Stafford's independent life in Connecticut came to an end in November 2001. Around November 1, 2001, during a normal Thursday visit, Ms. VanStory asked Fannie whether she was ready yet to move to Philadelphia. At that point, Ms. Stafford declined. Several days later on November 4, 2001, however, Ms. VanStory returned to Connecticut after receiving a call that her aunt was unable to climb up the steps. At that point, she recalls her aunt saying that she just couldn't take care of herself anymore.[21] Ms. Stafford also spoke by phone to the petitioner, Dianne Davis, and told her that Ms. VanStory was "in charge now."[22] Ms. VanStory similarly testified that from that point she considered herself "in charge"[23]—and very significantly, one of the first things she did was to "check" on Ms. Stafford's will:

> Well, I was in charge of her getting all—everything together, yes. I never used the power of attorney. I was in charge of making all the arrangements for her to, you know, that week that we proceeded. I started—first of all, I called her attorneys that made out her first will, to ask them what to do. N.T. at 71 (emphasis added).

The attorneys specifically told Ms. VanStory that Fannie's 1991 will was "legal here and it would be legal in Philadelphia" but that she should see a lawyer in Philadelphia. N.T. at 71. On November 9, 2001, a copy of the will was taken out of Fannie's fireproof box and read out loud by a friend, Molly, in the presence of Ms. VanStory and Ms. Stafford. Neither Ms. VanStory nor Ms. Stafford said anything about the will after it was read. N.T. at 76.

In addition to contacting the attorneys who drafted Ms. Stafford's will, Vivian VanStory contacted the social security office, the bank and the physician treating Ms. Stafford "and told him that I was taking her to Philadelphia." N.T. at 72. Ms. VanStory

[21] N.T. at 69-71.
[22] N.T. at 71.
[23] N.T. at 71.

took Fannie back to Philadelphia on November 10th. N.T. at 77. Shortly thereafter, Ms. Stafford received a letter informing her that there was an environmental problem at her Connecticut home due to a leaking underground storage tank and that it might cost between $10,000 to $15,000 to resolve the problem. N.T. at 81-83.

This letter, Ms. VanStory noted, provoked a discussion about Ms. Stafford's will. This discussion was between Ms. VanStory and Ms. Stafford alone; no one else was present and no notes were taken. Ms. VanStory testified that Ms. Stafford wanted to change her will to make things easier for Ms. Stafford. N.T. at 82. Nonetheless, her testimony concerning the exact terms of the new will that were communicated to her by Ms. Stafford was evasive and unclear. As the following exchange illustrates, Ms. VanStory testified that Fannie had stated only that Dianne Davis was to get $25,000, but she made no statement concerning either any disposition to Vivian VanStory or the disposition of the remainder of the estate:[24]

> Q. And all she says is Dianne is to get 25,000 and that's all.
> A. That's Correct.
> Q. She didn't say anything else about you were to get or what was to happen to the rest of the estate during that conversation. Correct?
> A. That's correct. N.T. at 84

When Ms. VanStory was asked to describe how she later conveyed this discussion with Ms. Stafford to the attorney who drafted the will (hereinafter "scrivener"), Ms. VanStory's response was strained and evasive.[25]

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[24] See N. T. 83-84.

[25] Q. And you told [*the scrivener*] what the terms of the new will were to be; isn't that correct?
A. Yes.
Q. And you told him $25,000 to Dianne and you get the rest. Isn't that correct?

A. I told- the will was already Dianne asked—Dianne and her daughter received the gold coin and the gold chain out of the will, the car was sold to a gentleman, you could have the documents in front of you that for the car that was left was supposed to have been left to me. It was already

According to Ms. VanStory, it was sometime after this conversation about her new will that Ms. Stafford was admitted to Hahnemann hospital.[26] After considerable difficulty in getting an appointment with a physician, Ms. Stafford was seen by Dr. Oaks on November 28, 2001 and was admitted to Hahnemann Hospital that same day. N.T. at 79-80. While Ms. Stafford was hospitalized, Ms. VanStory contacted her own Philadelphia attorney, the scrivener, to prepare a new will for Fannie Stafford. [27] Ms. VanStory told him the terms of the new will.[28] This attorney never met with Fannie Stafford nor did he even speak with her about the instructions.[29] When asked whether the scrivener took all these instructions from you because you were in control of things, isn't that correct?," Ms. VanStory responded: "Well, that's if that's how you want to say it,

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> sold and the man never paid her her money that you have the receipts there to indicates of her death that it would go to me.
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> So the only thing, issue was the house, that she had an annuity here for her great-niece that, you know, I'm the executive (sic.) of making sure that they received theirs. But only thing in the will that had to be taken care of was the house The total contents of her first will she had left in my care, so the only thing, the issue, was the house.
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> Q So the only thing you needed to tell [*the scrivener*] was 25,000 to Dianne and you get the rest. Right?
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> A. I – whatever.
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> Q. And that's what you told him?
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> A. If I said that I said that, but it wasn't in an offensive way, that I get everything; it's because of the problems that we're having with the oil tank, that now I have a bad CLUE report because now it costs me a lot of money for my insurance for homeowner's insurance, because that was third—I have no—I had to use my name for remediating the oil tank out of the ground, now I'm having to pay 18,000- $1,800 per year for fire insurance for Connecticut and it makes it bad nationally (sic), so I have a national CLUE report because of that. N.T. at 87- 88.

[26] N.T. at 84-85.
[27] N.T. 86. The scrivener had been the personal attorney of Vivian VanStory for 20 years and had previously represented her in an accident case.
[28] N.T. at 87.
[29] N.T. at 88-89.

yes."[30] In addition, Ms. VanStory instructed her attorney to prepare a power of attorney for Ms. Stafford naming herself as agent.[31]

Once the will was drafted by Ms. VanStory's attorney, it was Ms. VanStory who brought it to the hospital on December 5, 2001 for Ms. Stafford to sign after reading it to her. It was Ms. VanStory who asked a nurse who was caring for Ms. Stafford to witness the signing of the will. Finally, it was Ms. Stafford who arranged for the presence of the notary.[32] Neither the nurse nor the notary actually heard Ms. VanStory read the will to her Aunt.[33]

Under the terms of the new December 5, 2001 will, Dianna Davis was to receive $25,000, while the remainder of the estate (real, personal and mixed) was to go to Vivian VanStory.[34] This contrasts with the prior 1991 will drafted in Connecticut under which the residuary estate was divided among four individuals (George Stafford, Eulyss Stafford, Vivian VanStory and Dianna Davis) after specific gifts of jewelry to Danielle Davis and Dianne Davis with the remainder of the tangible personal property devised to Vivian VanStory.[35] In explaining the rationale for the changes in the December 5, 2001 will, Ms. VanStory was insistent on Fannie's concerns about the costs for remediating the environmental problem at the Connecticut property even though Ms. VanStory eventually acknowledged that these costs had been covered largely by insurance.[36] Under questioning, Ms. VanStory acknowledged that the "environmental issue" was the sole

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[30] N.T. at 89.
[31] N.T. at 89.
[32] N.T. at 92-94, 95-96
[33] N.T. at 49-50 (Ms. Mclean, the notary); N.T. at 9-10 (Ms. Manigly, the nurse). Ms. McLean testified that she heard Ms. VanStory talking to Fannie Stafford and explaining the will. N.T. at 50.
[34] See Ex. P-1, Paragraphs Second and Third.
[35] See Ex. P-2, Paragraphs First, Second and Third. Dianna Davis was named executor for both the 1991 and the 2001 wills.
[36] N.T. at 86, 106 & 109.

reason for the changes in the December 2001 will and that Ms. Stafford's relationship with Dianne Davis had not deteriorated nor was it a factor in the decision to draft a new will.[37]

Ms. Stafford was released from the hospital to Ms. VanStory's care. She died shortly thereafter on December 13th. N.T. at 150. Dianne Davis[38] and her treating physician, in contrast, had recommended that Ms. Stafford be released to a nursing home for rehabilitation.[39]

Finally, Ms. VanStory testified that prior to Fannie's admission to the hospital, she had given Ms. VanStory a check for $36,000, which was withdrawn from a savings bank life insurance annuity. Ms. VanStory then took $25,000 of this money and placed it in a certificate of deposit in her own name, while the rest was in VanStory's personal account. After Fannie's death, Ms. VanStory withdrew the $25,000 and endorsed it over to Dianne Davis. N.T. 100-101, 103. She admitted that her reason for this was that the only asset in the estate was the house in Connecticut. N.T. at 104.

This and other testimony at the hearing established the confidential relationship that existed between Fanny Stafford and Vivian VanStory. First, Ms. Stafford had executed two powers of attorney naming Vivian VanStory as her agent, which various courts have characterized as a significant indicia of a confidential relationship especially when combined with a pattern of dependence.[40] Secondly, just prior to leaving

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[37] N.T. at 106.
[38] N.T. at 124.
[39] Ex.P-8a , Oaks depo. at 22.
[40] Hera v. McCormick, 425 Pa. Super. 432, 449, 625 A.2d 682,691 (1993)("a confidential relationship may be established by proof that the alleged donee possessed a power of attorney over a decedent's assets" which "is particularly true when the alleged donee is shown to have spent a great deal of time with decedent or assisted in decedent's care"). See also Estate of Lakatosh, 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (1995)("the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between the parties"); Estate of Bankovich, 344 Pa. Super. 520,

Connecticut for Philadelphia, Fannie Stafford had stated that Vivian VanStory was at that point in control of Fannie's affairs because she could no longer take care of herself. Ms. VanStory thereafter saw herself as "in control" of Ms. Stafford's affairs and acted accordingly by contacting Fannie's attorneys regarding her 1991 Will, contacting banks, and moving Fannie to Philadelphia. After Fannie was hospitalized, Ms. Stafford took control of the execution of Fannie's new will on December 5, 2001; VanStory employed her own personal attorney; she conveyed the terms of the will to him; and she arranged for the presence of the witness and notary at Fannie's bedside in the hospital. These actions reflected the parties' relative positions of dependence and control, as Fannie became increasingly dependent on Vivian VanStory. Based on these facts, a confidential relationship existed between Fannie Mae Stafford and Vivian VanStory. See generally Estate of Mihm, 345 Pa. Super. 1, 8, 497 A.2d 612, 615 (1985)(determination of confidential relationship may be a question of fact).

The Contestant Presented Clear and Convincing Evidence that Fannie Mae Stafford Suffered from a Weakened Intellect

Weakened intellect has been characterized as "a mind which, in all the 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." Heffner Will, 19 Fid. Rep. 542, 546-7 (Monty. Cty. 1969). As Judge Taxis further observed in Heffner Will, weakened intellect "should be viewed essentially as a relative state as the term is applied to cases of undue influence, as these

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523,496 A.2d 1227, 1229 (1985)("[n]o clearer indication of a confidential relationship [can] exist than giving another person the power of attorney over one's entire life savings"). But see Estate of Ziel, 467 Pa. at 542, 359 A.2d at 734 (grant of power of attorney was not an indicia of a confidential relationship based on the facts).

always involve the effect of one intellect upon another." Id., 19 Fid. Rep. at 547. Significantly, the "weakened intellect" that must be shown to establish undue influence "need not amount to testamentary incapacity." Burns v. Kabboul, 407 Pa. Super. 289, 308, 595 A.2d 1153, 1163 (1991). The rationale for this is that while "a testator may dispose of his property as he sees fit, the law is rigid in its insistence that one of weak mind, whether from inherent cause or by reason of illness, shall not be imposed upon by the art and craft of designing persons." Id., 407 Pa. Super. at 308, 595 A.2d at 1163.

The contestant established that Fannie Stafford suffered from a weakened intellect through the presentation of testimony from her treating physician (by deposition) as well as testimony from a psychiatrist and forensic psychiatrist who qualified as an expert witness. Dr. Wilbur Oaks first met Fannie Stafford when she came for an examination and he discovered that she was in atrial fibrillation, at which point she was sent off for admission to Hahnemann hospital.[41]

While she was in the hospital, Dr. Oaks was her attending physician.[42] He noted that in addition to the atrial fibrillation, she suffered from mandibular cancer and was missing an eye. He recalled her as being alert when admitted to the hospital, but as the stay progressed she became increasingly lethargic and noncommunicative by December 5, 2001.[43] A CAT scan that had been taken of her head revealed "moderate-to-severe generalized cerebral atrophy."[44] Dr. Oaks expressed a general view that as her hospitalization progressed, Fannie became "less communicative and less with it than she

[41] Ex. P-8a - Deposition of Wilbur Oaks (hereinafter "Ex. 8a, Oaks depo."), at 9-10.
[42] Ex. P-8a, Oaks depo. at 10.
[43] Ex. P-8a, Oaks depo. at 14-15, 17.
[44] Ex. P-8a, Oaks depo. at 19.

was when she came in."[45] In fact, he expressed the opinion that Fannie should have been released to a nursing home for rehabilitation because "I don't see how the niece could handle her."[46] In describing Fannie Stafford's condition on December 5, 2001-- the date she executed her will—Dr. Oaks testified that she "[c]ontinues to be very lethargic, moves everything, moans and hard to communicate." Ex.P-8a, Oaks depo. at 17.

When asked whether Fannie Stafford had the capacity to execute a will on December 5, 2001, Dr. Oaks stated that "I would question it," based on her history of lethargy, moaning and inability to communicate.[47] In addition, he noted that "it would be hard for me to believe that she was of sound mind" since she had attempted at various points to pull tubes out of her.[48]

Dr. Stephen Mechanick, the expert witness trained as a psychiatrist and forensic psychiatrist presented by the contestant, reviewed Fannie Stafford's hospital records for the period between November 28 through December 8.[49] Based on this review, he characterized Ms. Stafford as "a frail elderly woman, 95 years of age "with physical problems including limited vision, partial deafness and difficulty in communicating by speech. She also had problems of cognition and was "oriented only to herself" so that she "often knew only her own name, which shows a significant decrease in her ability to be oriented and to function cognitively."[50] He noted that Ms. Stafford had attempted to pull out a foley catheter as well as a dubbhoff feeding tube and these acts were "dangerous,

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[45] Ex. P-8a, Oaks depo. at 22.
[46] Ex. P-8a, Oaks depo. at 22.
[47] Ex. P-8a, Oaks depo. at 25. Dr. Oaks in his testimony presents an image of Ms. Stafford's deteriorating mental and physical condition throughout her hospital stay. Ex. P-8a, Oaks depo. at 25-26. See also n. 63 *infra.*
[48] Ex. P-8a, Oaks depo. at 25-26.
[49] N.T. at 23-24.
[50] N.T. at 26.

painful and inappropriate."[51] He observed that the medical notes by Dr. Oaks stated that "Ms. Stafford's niece reported on December 1st that Ms. Stafford was, quote, with it only on occasion, and that was the same day that he described her as being, quote, pretty much out, quote." N.T. at 33.

Dr. Mechanick thus agreed with Dr. Oaks that Ms. Stafford had weakened over the course of her hospital stay, which he attributed in part to her inability to take in adequate nutrition.[52] As he concluded: "I would say, overall, that there was a deterioration in her physical and psychological condition" as her hospital stay progressed. N.T. at 30. More specifically, he noted that the hospital records revealed that on December 5, 2001—the day she executed her will-- two attempts were made to place a Dubbhoff tube in Ms. Stafford which would have depleted her further.[53] When asked whether Dr. Mechanick had an opinion with a reasonable degree of medical certainty whether Ms. Stafford was suffering from a weakened intellect on December 5th of 2001, in the evening after 6 p.m., Dr Mechanick stated: "It is my opinion that at that time Ms. Stafford was suffering from weakened mental intellect."[54]

The contestant therefore presented clear and convincing evidence based on testimony by the testator's attending physician and by the medical expert who had reviewed medical records of Fannie's final hospital stay that on December 5, 2001 Fannie Stafford suffered from weakened intellect. Because of her confidential relationship with her niece combined with a weakened intellect, Ms. Stafford was thus susceptible to undue

[51] N.T. at 27.
[52] N.T. at 28-29.
[53] N.T. at 31-32.
[54] N.T. at 34-35.

influence in executing her new will. See DiMaio Will, 8 Fid. Rep.2d 370, 373 (Chester Cty. O.C. 1988).[55]

As the Sole Beneficiary of the Residuary Estate in the December 5, 2001 Will, Vivian VanStory Received a Substantial Benefit Under the 2001 Will

Finally, the contestant was required to show that Ms. VanStory received a substantial benefit under the December 2001 will. To do so, she "must show that more than a small portion of the decedent's estate directly benefited either the one standing in the confidential relationship to the decedent or the immediate family of the one occupying such a position." Huber Estate, 26 Fid. Rep. 180, 184 (Dauphin Cty. O.C. 1972). In determining whether a substantial benefit has been bestowed under a will, "[a]ny appreciable benefit that would ordinarily actuate a mind inclined to exercise this control will be sufficient; each case must depend on its own circumstances, as no hard and fast rule can be laid down." Miller's Estate, 265 Pa. 315, 318, 108 A. 616, 617 (1919).

Under Fannie Stafford's 2001 Will, Ms. VanStory was the sole beneficiary of the residuary estate, in contrast to the 1991 will which divided the residuary estate among four individuals including Ms. VanStory. The third prong of the test for undue influence was therefore satisfied.

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[55] Judge Wood in DiMaio Will emphasizes that "for purposes of establishing undue influence, these two factors ('confidential relationship' and 'weakened intellect') are inextricably entwined. The inquiry is whether one's intellect or will power is weak relative to the intellect or will of the person who, by virtue of a close relationship, is in a position to exert improper influence." Hence, because "weakened intellect is thus part of the overall confidential relationship, " the "evidence of these two factors should not be compartmentalized but should be weighed all together." DiMaio Will, 8 Fid. Rep. 2d at 373. See, e.g., Estate of Bankovich, 344 Pa. Super. at 525, 496 A.2d at 1230 (noting that although the weakened intellect of the testatrix did "not necessarily result in loss of testamentary capacity, it was such that she was susceptible to influence by the son upon whom she relied for her care").

The Proponent, Ms. VanStory, Failed to Rebut the Presumption of Undue Influence

Since the contestant met her burden of proof, the burden shifted to Ms. VanStory to rebut the presumption of undue influence. Newhart Estates, 22 Fid. Rep. 2d 383, 388 (Mont. Cty. O.C. 2002). The sole evidence Ms. VanStory presented to rebut the presumption of undue influence was her own testimony. She testified moreover that there were no witnesses to her discussion with Ms. Stafford concerning the terms of the new will nor were any notes taken.[56] The secrecy surrounding this critical discussion in the context of the other facts presented weighs heavily against the proponent. As the Pennsylvania Supreme court has observed, "in a will contest, the assessment of the secrecy of relationships, not unlike the evaluation of credibility of the witnesses, must be a factor which is properly within the sole discretion of the trier of fact." Estate of Clark, 461 Pa. 52, 67, 334 A.2d 628, 635 (1975).

This is especially true since as the proponent Ms. VanStory did not present testimony by the attorney who was the scrivener of the will. Courts accord great weight to testimony by an attorney who drafts a will. Lynch Will, 18 Fid. Rep. 2d, 65, 75 (Monty. Cty. 1997). Paolini Will, 13 Fid. Rep. 2d 185, 188 (1993). Moreover, Ms. VanStory conceded that the scrivener never spoke with Fannie Stafford. Instead, it was Ms. VanStory who dictated the terms of the will to the attorney.[57] Not only was there no testimony by the attorney as to how Fannie Stafford's will was drafted, but he failed to oversee its execution. This lack of any testimony by the scrivener is thus a serious omission in Ms. VanStory's effort to rebut the presumption of undue influence.

[56] N.T. at 83.
[57] N.T. at 86-89.

The serious implications of such omissions were addressed generally by Judge Drayer in lamenting the transgressions of another attorney:

> Last, and most serious, he failed to manage the execution of the documents. Instead he put the execution of the documents directly in the hands of the proponent of these documents. There was no testimony explaining the reason for this lapse. It is the Court's opinion that, with very few exceptions, the attorney should supervise the execution of testamentary documents or arrange to have a qualified independent individual do so. As evidenced by many will contests in this state, often the basis for a challenge to a testamentary document is found at the time of execution. If the scrivener is not present to assure that execution is done properly, he is failing his client's interest.
> Newhart Estates, 22 Fid. Rep. 2d 383, 390 (Monty. Cty. 2002).

In addition to these fatal flaws, Ms. VanStory failed to rebut the damaging implications of testimony by the other witnesses presented by the contestant. Ms. Manigly, the nurse who was asked to witness the will, had carefully added the following parenthetical notation after signing her own name: "saw patient sign her name."[58] In explaining this note, Ms. Manigly testified that she had reservations about signing the will because she had not been present when the will was read to the testator who "apparently couldn't see." N.T. at 9 & 18. Similarly, the testimony of the notary, Debra Anne McLean, concerning the circumstances of Ms. Stafford's signing of the will suggested Ms. VanStory's strong influence and Ms. Stafford's dependence. Ms. McLean stated, for instance, that Ms. VanStory told Fannie where to sign the various documents. N. T. at 53. She noted as well that there came a point when Fannie grew tired and wanted to stop signing the will. N. T. at 55.

[58] N.T. at 9.

Testamentary Capacity

The Contestant Presented Evidence that the Will Was Invalid Because of Fannie Stafford's Lack of Testamentary Capacity But It Was Inconclusive and Less Compelling than the Evidence of Weakened Intellect and Undue Influence

As an alternative ground, the contestant argues that the December 5, 2001 Will should be deemed invalid because Fannie Mae Stafford lacked the requisite testamentary capacity at the time of its execution. Since the parties stipulated that Fanny Stafford's December 5, 2001 will had been duly executed, the burden shifted to the petitioner to show that the testator lacked testamentary capacity at the time of the will's execution. Brantlinger Will, 418 Pa. at 242, 210 A.2d at 250.

The test for testamentary capacity "is whether a man has an intelligent knowledge regarding the natural objects of his bounty, the general composition of his estate, and what he desires done with it, even though his memory may have been impaired by age." Brantlinger Will, 418 Pa. at 247, 210 A.2d at 252 (1965). Moreover, once it is conceded that a will was duly executed, a "presumption of testamentary capacity arises which can only be overcome by 'clear, strong, and compelling evidence.'" Cohen Will, 445 Pa. 549, 551, 284 A.2d 754, 755 (1971). In determining whether a testator lacked testamentary capacity, the focus is on the "very time he executed his will." Williams v. McCarroll, 374 Pa. 281, 293, 97 A.2d 14, 20 (1953). See Brantlinger Will, 418 Pa. at 249, 210 A.2d at 253 ("We are concerned with testatrix's mental capabilities at the time she executed the will and testimony of her condition close to that time must be considered most significant").

Although the Contestant presented evidence that Fannie Stafford lacked testamentary capacity, it was not as clear cut as the evidence of Ms. Stafford's weakened

intellect. First, the issue of Ms. Stafford's knowledge as to the general composition of her estate was not developed. As to the issue of Ms. Stafford's knowledge of "the natural objects of her bounty," the petitioner did present testimony by Ms. VanStory that there had been no deterioration in Ms. Stafford's relationship with the petitioner, Dianne Davis, that might account for changes in her will.[59] Rather, the main reason proffered by VanStory for the change in the will was consistently presented as Ms. Stafford's concern about the costs of remediating the environmental problems at her Connecticut property.[60] The petitioner argues that such a concern was in itself proof of Ms. Stafford's lack of testamentary capacity since it underscored a lack of an intelligent knowledge of assets of her estate because the remediation costs were ultimately covered by insurance.[61] This argument has merit but is subject to certain reservations. First, it is not clear that Ms. Stafford would have known so shortly after being informed about the environmental problems at her Connecticut property that these costs would eventually be covered by insurance. Second, Ms. Stafford's efforts to care for her Connecticut property might be seen as a prudent concern about preserving a major asset of her estate.

Moreover, in evaluating testamentary capacity, courts typically give great weight to the testimony by attending physicians who observed the testator during the period when her will was executed. See e.g., Brantlinger Will, 418 Pa. at 248-49, 210 A.2d at 253(greater weight should be accorded to testimony by a physician who treated the testator during a period immediately preceding and following the execution of a will); Masciantonio Will, 392 Pa. 362, 141 A.2d 362, 374 (1958)(physicians "by reason of their professional training, were most competent to observe the condition (i.e. testamentary

[59] N.T. at 106.
[60] See, e.g. N.T. at 102-03.
[61] Petitioner's 7/12/2004 Memorandum of Law at 15-16.

capacity) as to which they testified"). The medical testimony presented by the contestant did focus on the relevant period of the execution of Fannie's December 5th will. The problem, however, is that it was somewhat inconclusive as to her testamentary incapacity while nonetheless evidencing Ms. Stafford's weakened intellect. See e.g., Dimaio Will, 8 Fid. Rep.2d 370,373 (Chester Cty.O.C. 1988)("Weakened intellect does not rise to the level of testamentary incapacity but rather describes the general debilitation that so weakens the intellect as to make the old and sick peculiarly subject to influence").

Although Ms. Stafford's attending physician, Dr. Oaks, offered compelling testimony of Ms. Stafford's general decline during her hospitalization with an attendant weakening intellect, his testimony as to her mental or testamentary capacity to execute a will on the precise date of December 5, 2001 was somewhat equivocal.[62] In addition, the contestant's expert, Dr. Stephen Mechanik, was not specifically asked to address the issue of her testamentary capacity, but rather was asked whether she suffered from weakened intellect to which he responded:

> Q: And are you able to render an opinion to a reasonable degree of medical certainty as to whether Ms. Stafford was suffering from a weakened intellect on December 5th of 2001 sometime in the evening after 6:00 p.m.
> A: Yes, I am.
> Q: And what is that opinion?
> A: It is my opinion that at that time Ms. Stafford was suffering from weakened mental intellect. N.T. at 35

[62] Dr. Oaks's testimony was somewhat nuanced on the issue of Ms. Stafford's capacity to execute a will on December 5, 2001 since he emphasized the deterioration in Ms. Stafford's condition during her hospital stay. Thus, when asked whether Ms. Stafford had the capacity to execute a will on December 5, 2001, Dr. Oaks stated: "I would question it. I can't say definitely she is not, but I do state here, she is very lethargic, she moans, I stated, hard to communicate, and it would be hard for me to believe that she was of sound mind and so forth to be able to think in terms—and she had pulled the tube out a couple of times, so it would be difficult on that day, but if you bring her to when I saw her in the office and when she came into the hospital, I would think that she was with it enough to make those decisions but looking at this and ask specifically that day, it would be hard to say she is." Ex. P-8a, Oaks depo. at 25-26 (emphasis added)..

While this testimony was relevant as to the issue of undue influence, it did not address the issue of testamentary incapacity. As a practical matter, however, it is not necessary to dwell on Ms. Stafford's testamentary capacity where the evidence of weakened intellect and resulting undue influence is so compelling. This is because, of course, it is well established that the test for undue influence differs from that for lack of testamentary capacity. Courts have observed that even where a testator has the requisite testamentary capacity, his will may still be invalidated on the grounds of undue influence. Estate of Ziel, 467 Pa. at 540, 359 A.2d at 733. Thus, since in the instant case the contestant established so clearly that Ms. Stafford suffered from a weakened intellect, Fannie Stafford's December 5, 2001 will is invalid because procured through the undue influence of Ms. VanStory.

Conclusion

For these reasons, the appeal from the probate decree dated February 7, 2002 is sustained.

BY THE COURT:

Date: _____

_____
John W. Herron, J.