

**COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION**

**No. 590 AP of 2002**

**E-Filing Number 0700919  
Control Number 070495**

**Estate of EDNAMAY CLARK, Deceased**

**OPINION SUR APPEAL FROM DECREE OF REGISTER**

The matter before this Court is an Appeal by William N. Clark, Sr., J. Kenneth Clark and Edward Clark, from that portion of the Decree of the Register of Wills dated October 18, 2006 which admits to probate a certain writing dated November 13, 2000 as a Codicil to the Last Will and Testament of their mother, Ednamay Clark.

Ednamay Clark was 89 years of age and a widow when she died in Samaritan Hospice in Mount Holly, New Jersey, on February 7, 2006.

By Item SIXTH of her Will dated June 28, 1995, Ednamay Clark gave the sum of \$2,000.00 to each of her nine named grandchildren. By Item SEVENTH of her Will, she gave the sum of \$2,000.00 to each of her great-grandchildren who might be alive at the time of her death. By Item EIGHTH of her Will, she gave the residue of her estate to her sons, Frederick G. Clark, Jr., Edward Clark, William N. Clark, Sr. and J. Kenneth Clark. Items FOURTH and FIFTH make gifts of a family portrait and of Norman Rockwell place sets. Item FIRST directs payment of funeral expenses, expenses of last illness and just debts. Item SECOND directs

payment for perpetual care and maintenance of a burial plot. Item THIRD is a so-called pay tax clause. Item SEVENTH appoints Frederick G. Clark, Jr. and William Clark to serve as co-executors.

The writing in question, dated November 13, 2000, is a codicil which revokes Items FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH and ELEVENTH of the Will dated November 13, 2000; gives the residue of the estate of Ednamay Clark entirely to her eldest son, Frederick G. Clark, Jr.; gives the residue to Catherine Korndaffer if Frederick G. Clark, Jr., should die before his mother, appoints Frederick G. Clark, Jr., to serve as sole executor; and appoints Warren L. Soffian, Esquire, to serve as sole executor if Frederick G. Clark, Jr., is unwilling or unable to serve.

Frederick G. Clark, Jr. died on February 14, 2004.

On September 13, 2006, Warren L. Soffian, Esquire, offered the Will dated June 28, 1995, and, the questioned writing, dated November 13, 2000, to the Register of Wills for probate.

On October 18, 2006, the Register entered a Decree whereby he admitted the Will and the questioned writing to probate as the Last Will and Testament and Codicil of Ednamay Clark. By the same Decree, the Register granted Letters Testamentary to Warren L. Soffian, Esquire, as the executor named in the questioned writing.

As the contestants, William, Kenneth and Edward contend that their mother lacked testamentary capacity at the time of the execution of the writing dated November 13, 2000. They also contend that said writing was procured by undue

influence which was exerted upon their mother by their deceased brother, Frederick.

By offering the Register's record of probate into evidence as her Exhibit "P-1", Catherine Korndaffer raised a presumption that the writing in question is a valid Codicil and cast upon William, Kenneth and Edward the burden of proving lack of testamentary capacity or undue influence by clear and convincing evidence. (See *Estate of Clark*, 461 Pa. 52 (1975); *Szmahl Estate*, 335 Pa. 89 (1939); *Geho's Estate*, 340 Pa. 412 (1941), *Ash Will*, 351 Pa. 317 (1945); *Burns v. Kabboul*, 407 Pa.SuperiorCt. 289 (1991) and *Brantlinger Will*, 418 pa. 236 (1965)).

In *Brantlinger*, supra, at 247, our Supreme Court made the following statement concerning testamentary capacity,

“ 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 or disease.”

In *Estate of Reichel*, 484 Pa 610, 614 (1979), our Supreme Court made the following statement concerning undue influence,

“ When the proponent of a will proves that the formalities of execution have been followed, a contestant who claims that there has been undue influence has the burden of proof. The burden may be shifted so as to require the proponent to disprove undue influence. To do so, the contestant must prove by clear and convincing evidence that there was a confidential relationship, that the person enjoying such relationship received the bulk of the estate and that the decedent's intellect was weakened.” (citations omitted)

The term “confidential relationship” is defined in the following discussion in *Leedom v. Palmer*, 274 Pa. 22, 24 (1922),

“Confidential relation is not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust justifiably reposed; in both an unfair advantage is possible.”

The term “weakened intellect” is defined in the following discussion in *Heffner Will*, 19 Fiduc.Rep. 542, 546-547 (O.C. Montg. 1969),

“The closest that we can come, therefore, to a definition of weakened intellect is that it is 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 characteristic of a fully competent mentality. It should be view 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 of the testator 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.”

Failing to present clear and convincing evidence of each of the three elements discussed in *Reichel* above, a contestant may yet prove undue influence by presenting direct, clear and convincing evidence of the elements discussed in *Phillip’s Estate*, 244 Pa. 35 at 43 (1914),

“...the word ‘influence’ doest not refer to any and every line of conduct capable of disposing in one’s favor a fully and self directing mind, but to a control acquired over another which virtually destroys his free agency... In order to constitute undue influence sufficient to void

a will, there must be imprisonment of the body or mind...fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of the will.” (citations omitted)

The meaning of the term “clear and convincing evidence” is discussed in *LaRocca Trust*, 411 Pa. 633, 640 (1963),

“In *Broida v. Travelers Ins. Co.*, 316 Pa. 444, 175 A. 492 (1934), at 448, in describing the meaning of the phrase ‘clear, precise and convincing,’ we stated, ‘the witnesses 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 jury to come to a clear conviction, which hesitancy, of the truth of the precise facts in issue ... It is not necessary that the evidence be uncontradicted (citing cases) provided ‘it carries conviction to the mind’ (*Burt v. Burt*, supra) or ‘carries a clear conviction of its truth’...”

To satisfy their abovementioned burdens as contestants, William, Kenneth and Edward presented the testimony of four (4) witnesses, including Warren L. Soffian, Esq., J. Kenneth Clark, William N. Clark, Sr. and Catherine Korndaffer. The contestants entered twenty six (26) exhibits marked “C-1” through “C-26”.

As proponent of the writing in question, Catherine Korndaffer presented the testimony of three (3) witnesses, including Michelle Van Doren, William N. Clark, Jr. and Dr. David Tabby. The proponent entered six (6) exhibits marked “P-1” through “P-6”.

The record from the Register of Wills, admitting the questioned writing as a codicil, was entered at the commencement of the hearing by J. Earl Epstein, Esq.,

counsel for the proponent. Thus, the burden was on Contestants to prove a lack of testamentary capacity or undue influence in the execution of the writing by clear and convincing evidence.

In an effort to prove the necessary elements of lack of testamentary capacity including a lack of intelligent knowledge regarding objects of bounty, composition of estate and what should be done with it, contestants introduced testimony from Ednamay's family members including her children and grandchildren. Her family members could see that she was declining in the last few years of her life as she did not remember them or their names and struggled to remember normal activities of her life. William N. Clark, Jr., her grandson, testified that he noticed on Christmas Eve in 1999 she could not remember the names of her family members and by Christmas of the following year she had trouble remembering family traditions. J. Kenneth Clark, her son, testified that as of 1997 his mother had memory problems, she could not remember her grandchildren, she had trouble with locations, and in 1999 he stopped to visit and she did not know who he was telling him she didn't have any sons. Mr. Clark explained to the Court that "from 95-96 on if you had more than a three minute conversation with Ednamay it would be extremely obvious to anyone that she did not have her total mental capacities." NT 83.

Contestants also introduced testimony from Ednamay's physicians. Not only could her family see a change in Ednamay, her doctors noticed this too. Dr. David Tabby, a neurologist at Community Neurological Services where Ednamay was a patient, reviewed her medical records and testified as to her mental and

physical health in connection with an incapacity proceeding. In his brief, proponent's counsel challenges the admission of the testimony by Dr. Tabby as to Ednamay's medical records. The records in question were written during exams by Dr. Tabby's colleague Dr. Arenas and Ednamay's primary physician Dr. Ball. Counsel claims that the records are not an exception to the hearsay rule under Pennsylvania Rule of Evidence 803(6) as business records because the documents are untrustworthy. Counsel argues that Dr. Tabby was unaware as to the specific circumstances surrounding the medical evaluations discussed. I find that the medical records are admissible as an exception to the rule. Dr. Tabby testified that the records were a regularly conducted business activity, they were made by a person with knowledge and they were kept in the course of a regularly conducted business activity. The contestants satisfied the necessary elements of the exception under Pennsylvania Rule of Evidence 803(6), thus the testimony was admissible.

Dr. Tabby testified that Dr. Robert Ball, her primary physician, performed two examinations, one in 1997 and one in 1999. As of 1997, Ednamay had been diagnosed with Alzheimer's disease. By 1999, there was further deterioration of her memory as she was continuing to decline despite taking Alzheimer's medication. At the time of the examinations, she was given a Folstein Mini Mental Status Exam (hereinafter "MMSE") to determine a broad understanding of her mental function. Dr. Ball noted that Ednamay had a score of 15 out of 30. Dr. Tabby explained that "at a 15 in general telephone use is probably not possible, difficulties with dressing and bathing would start to begin, loss of interest in self

appearance is typical with 15, difficulty with spatial relationships.” NT 23. Dr. Tabby further testified that Dr. Arenas examined Ednamay in October 2000, just weeks before the questioned writing was executed. Dr. Arenas noted that her MSSE score had fallen to a 6 out of 30. Dr. Tabby explained that:

“A person with a score of 6 should be withdrawn and have very little interaction with other people, probably wouldn’t be able to speak much at all with a 6 and would need help with all her activities of daily living including dressing, bathing, eating, cleaning around the house, everything.” NT 25-26.

Dr. Tabby testified that at this point in Ednamay’s life nothing could have been done to improve her condition, her Alzheimer’s disease was severe.

I hold that the contestants have proven, by clear and convincing evidence, that Ednamay Clark lacked testamentary capacity when she signed the writing in question on November 13, 2000.

In addition to the problems with Ednamay’s mental state, the details surrounding the creation and the execution of the questioned writing are particularly upsetting to the Court. According to Warren L. Soffian, Esq. who drafted the document, Ednamay never discussed the codicil with him, it was all Fred’s doing. There was no evidence introduced to Ednamay’s desire for a codicil or her understanding of one. As contestants’ counsel argued in his brief, the execution of the codicil is troubling considering that the scrivener, Mr. Soffian, was not present nor was the notary who signed the document. We cannot be sure what the exact circumstances were surrounding the execution as all parties are deceased but Joseph Lange, a man too ill to testify in Court who

struggled to remember the exact details surrounding Ednamay's state at the time of signing. As Mr. Soffian testified, he didn't send a copy of the codicil to Ednamay, rather he sent it to Ms. Korndaffer. In fact, Mr. Soffian wasn't aware that Ednamay was being treated for Alzheimer's at the time of execution.

In addition to testimony regarding a lack of testamentary capacity, contestants also introduced evidence as to the existence of undue influence in the execution of the writing in question. Fred lived with his mother, cared for her and held a financial power of attorney over her affairs. He wrote checks on her accounts and took her to the doctor. William N. Clark, Sr. son testified that they were not aware that their Mother was being treated for Alzheimer's, in fact, when questioned about his mother's mental state, Fred responded that everything was fine. Fred made a point to inform his family that he did not need their help in caring for their mother. It wasn't until 2002, when Fred became ill, that William N. Clark, Sr. brought his mother into William's home. He noticed her mental trouble and arranged for an incapacity proceeding. William N. Clark, Jr. further testified that she was adjudicated an incapacitated person in 2002 and, "by the time the guardianship hearing she did not even know she had sons." NT 29. As counsel argued in his brief, Fred was in control of every aspect of his mother's life – financial, medical and physical. He used this control to induce her to upset an estate distribution plan that she and her husband had put into effect several years prior. This plan was intended to benefit both their children and grandchildren not cut out her grandchildren, favor one child over all the others and leave the residue to a stranger.

Catherine Korndaffer claims that she was a close friend of both Fred and Ednamay, she spent most of her time caring for and helping Ednamay. As Ms. Korndaffer testified in reference to the year 2000, “I was able to see Mrs. Clark through the summer prior to the fall...into the fall almost everyday, but at least every other day.” NT 55. In fact, as Fred became ill, Ms. Korndaffer testified that she would receive Ednamay’s bank statements and important documents in an effort to manage her finances. Ms. Korndaffer was both Ednamay’s close friend and personal caretaker. Despite this closeness however, Ms. Korndaffer claims that she was unaware of the questioned writing. However, the Court notes Mr. Soffian’s testimony that it was Ms. Korndaffer alone that he sent the copy of the codicil to. Ms. Korndaffer continuously contradicted her own testimony throughout the hearing. She claimed that she was working to manage Ednamay’s finances for Ednamay alone. However, the Court heard testimony that Ms. Korndaffer constantly cashed large checks on Ednamay’s accounts, she used Ednamay’s money to pay off her own credit bills and while unemployed accumulated over \$180,000.00 in her bank account. The Court finds that Ms. Korndaffer was not a credible witness in that her testimony was neither distinctly remembered nor convincing.

I hold that the contestants have proven, by clear and convincing evidence, that there was a confidential relationship between Fred and his mother; that there was a confidential relationship between Ms. Korndaffer and Ednamay Clark; that Ms. Korndaffer received the bulk of the estate; and that the intellect of Ednamay

was weakened. Ms. Korndaffer thus has the burden of disproving undue influence.

Ms. Korndaffer claims that Ednamay could still play cards, read, do crossword puzzles and cook her own meals in the Fall of 2000. Counsel for Ms. Korndaffer even argues in his brief that Ednamay was a competent woman who thought her doctor visits were bothersome; the questions were ridiculous and she 'played with him.' The Court recalls no evidence of these claims introduced at the hearing. In fact, we heard testimony that was quite the opposite as Dr. Tabby explained that given Ednamay's mental state in October 2000, she wouldn't have been able to use the telephone or dress herself. Ms. Korndaffer did little to disprove the claim of confidential relationship, rather she furthered the claim by testifying as to the close and controlling relationships of Fred and Ms. Korndaffer with Ednamay.

On the record made by the parties in this matter, I hold that, when she signed the questioned writing dated November 13, 2000, Ednamay Clark did not have testamentary capacity, and, that said writing was procured by undue influence which was exerted upon Ednamay by her son, Fred, and, by Catherine Korndaffer.

Appropriate Decrees will be entered in accordance with the foregoing discussion, findings and holdings.

Dated: \_\_\_\_\_

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O'KEEFE, ADM. J.