IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

ORPHANS' COURT DIVISION

ESTATE OF LOUISE CARRIE LEE, DECEASED
O.C. NO. 2110 AP OF 2003
CONTROL NO. 065180

OPINION

This Court is required to decide between competing claims to an estate by a father, Charles Ross (hereinafter "Charles") and his son, Lynn Ross (hereinafter "Lynn"). Clear and convincing evidence compels us to find that Charles procured the January 23, 2004 Will by undue influence and therefore the prior Will dated December 3, 2003 favoring Lynn is valid and should be accepted for probate.

Louise Carrie Lee (hereinafter "Decedent"), died testate on February 12, 2005 at the age of 94. Decedent was survived by her son, Charles and her grandson, Lynn. Prior to her death, Decedent authored two Wills dated January 23, 2004 and December 3, 2003, barely six weeks apart, which are directly at issue in this proceeding. A third Will executed several years earlier favoring two nieces is in Lynn's possession.

Shortly after Decedent died, Lynn probated Decedent's December 3, 2003 Will, which designated him as her sole heir and executor. Thereafter he began to administer her estate consisting of a house at 1306 Wallace Street in Philadelphia and an annuity contract with Manulife Insurance Company having a death benefit of $192,500.00

A month later, on March 29, 2005, Charles offered the January, 2004 Will for probate which designated him as sole heir and executor. Lynn filed a caveat with the Register of Wills challenging the January 23, 2004 Will as a forgery, not properly witnessed, and obtained by fraud and/or undue influence. Almost one year later, following hearings, the Register issued a Decree on February 6, 2006 dismissing Lynn's caveat without opinion and admitting to probate the January 23, 2004 Will favoring Charles. Lynn thereafter filed an appeal to this Court which held a final hearing on the disputed facts on February 3, 2009. In the meantime on January 15, 2006, Charles died and his interest is now represented by the Executrix of his Estate, Louise Heiman, who is his sole heir and ex-wife.

The legal arguments advanced by the parties are varied and many. Lynn argues that Charles procured the January 23, 2004 Will by undue influence. Alternatively, Lynn argues that Decedent lacked capacity when she executed the January 23, 2004 Will but not when she executed the December 3, 2003 Will, within six weeks of each other. Or, alternatively, Lynn argues that Decedent lacked capacity when both these Wills were executed and therefore her Will executed many years before in favor of two nieces is the only valid Will.

Charles' surviving heir and Executrix, Louise Heiman (hereinafter "Heiman") argues that there was no undue influence and that Decedent had capacity when executing the January, 2004 Will. In the alternative, if Decedent lacked capacity, Heiman argues that both Wills are invalid and Heiman would inherit as Charles' sole testate heir. In short, Heiman argues that the much earlier Will in favor of the nieces was revoked when

Decedent directed Lynn to destroy it, an instruction Lynn admits not following. (N.T. p.45)

DISCUSSION

Initially, this controversy between the parties focused on when the Decedent became incapacitated. As a result of contested proceedings, this Court entered two orders during Decedent's lifetime: on March 22, 2004, Decedent was found partially incapacitated and on October 19, 2004 found totally incapacitated. These incapacity proceedings were initiated by Decedent's two nieces who filed the petition in late December, 2003 shortly after Decedent executed her December 3, 2003 Will. This incapacity petition averred that Decedent was 90 years of age, was confined to a wheelchair, was unable to read or write and suffered from high blood pressure and diabetes. There was no averment of mental incapacity. On March 22, 2004 a Decree was issued finding Decedent partially incapacitated. The parties, their counsel and this Court diligently searched for the transcript of these incapacity proceedings and the medical records to no avail.

The averments in the Petition for Adjudication of Incapacity are striking in portraying Decedent as a person of weakened intellect, suffering significant physical infirmities and subject to designing persons. One of the reasons for filing the petition was to curtail Decedent's proclivity for signing several powers of attorneys which resulted in "attempts to transfer her assets and change beneficiary designations to [the agents]." See Petition, paragraph 9.

At the hearing, Lynn's counsel abandoned any argument of incapacity and proceeded on the sole theory that Decedent's January 23, 2004 Will was the product of weakened intellect and undue influence (N.T p.9). This decision appears driven by several factors: the fact that there was no medical evidence of incapacity produced in spite of lengthy discovery proceedings; the circumstances surrounding the execution of the December 3, 2003 and January 23, 2004 Wills; and, the fact that none of the principal witnesses testified that Decedent was incapacitated when either of these two Wills was executed. Ironically, both trial counsel also happened to be the scriveners of these two Wills and as experienced estate practitioners would not arguably have allowed an incapacitated person to execute a Will. Trial counsel for Lynn, Charles McCuen, Esquire drafted and supervised the execution of Decedent's December 3, 2003 Will (N.T. p.47) and trial counsel for Charles and Heiman, Alan Cooper, Esquire drafted and supervised the execution of Decedent's January 23, 2004 Will (N.T. pp.17-19).

Thus, the singular focus of this controversy is whether Decedent's January 23, 2004 Will was the result of undue influence while Decedent was in a state of weakened intellect.

During the hearing, testimony on this central issue was presented by three principal witnesses: Lynn, Charles (by deposition) and Heiman.

Heiman testified that she married Charles in 1971, divorced him, married a second husband and upon his death, resumed co-habiting with Charles in 1993 until his death in 2006. She testified that Lynn was estranged from his father, Charles, but nevertheless visited Charles' home in December, 2003 to express concern that Decedent's earlier Will left her estate to her nieces (N.T p.22). Lynn showed Charles a

copy of the guardianship petition and the documents relating to Decedent's assets. While Heiman overheard part of the conversation, she claimed that she was unable to recall seeing any documents and could not recall how the visit ended.

Heiman testified that sometime in January, 2004 she and Charles drove Decedent to a meeting with trial counsel, Alan Cooper, Esquire, who met with them, conversed with Decedent, prepared a Will for her and supervised her execution of the document in his law office that same day. Decedent then returned to Charles' house for dinner.

Heiman testified that Charles had a loving and caring relationship with Decedent, lived nearby, visited her, cooked for her and accompanied her on church excursions (N.T pp.98-99). This is in sharp contrast to Charles' admission that he did not even visit the Decedent when she was hospitalized (Deposition. p.53), and conflicts, as well with Lynn's more credible testimony about Charles' poor relationship with his mother.

Heiman's testimony and credibility were seriously challenged and undermined in cross examination by differing accounts of the meeting between Charles and Lynn in December, 2003. Heiman testified that Lynn had no documents with him, showed no documents to her and that she had no knowledge of the annuity. (N.T. p.24). Her testimony was especially evasive as she tried to portray herself as having little involvement in the meeting (N.T. p.25); however, she eventually acknowledged that documents were shown and that she learned about the Will in favor of Lynn, the guardianship petition and the annuity contract. Lynn went even further in describing her role as one of taking copious notes of the documents he showed Charles, "writing everything down" and being "very much involved in the process" (N.T. pp.47-50).

Heiman also falsely testified that she and Charles executed a lease in 1993 on a form not available until 1999 (N.T. pp.33-35). For all of the above reasons, Heiman's testimony cannot be credited in these proceedings.

Lynn, in emotional testimony, said he was raised by Decedent because his father Charles "was never around" (N.T. p.40) and as a consequence "My Grandmother (Decedent) was my life" (N.T. pp.40-41).

Lynn testified that Charles rejected his mother as illiterate (N.T p.42) and seldom visited her. Lynn recalled visiting Charles in late December, 2003 to enlist his support to oppose his cousins' efforts to become the guardians of Decedent as he was "offended" by the allegation that Decedent was "mentally incompetent" (N.T p.47). Lynn showed Charles the December 3, 2003 Will and other documents relating to Decedent's annuity and assets. Heiman recorded this information. According to Lynn, Charles was offended to learn that Lynn was Decedent's heir and that his mother had disinherited him.

Lynn acknowledged that his close relationship with Decedent fell apart in January, 2004 and she refused to talk to him in the mistaken belief that he had initiated the guardianship proceedings. Within a week or two (N.T p.48) they reconciled; however, Decedent never told him about the January 23, 2004 Will favoring Charles and the revocation of her December 3, 2003 Will favoring Lynn. Moreover, Lynn asked Decedent directly whether she had executed another Will and she denied doing so. Lynn enjoyed a close and continuous relationship with Decedent for over a year following execution of the January 23, 2004 Will, but never learned about this Will until after Decedent's death in February, 2005 (N.T p.54).

In fact, Lynn asked Decedent repeatedly whether she had a new Will and she always denied it (N.T p.85).

According to Lynn he became suspicious when he monitored the annuity account on line and found that the beneficiary designation was changed from himself to Charles and that the address of the policy was changed to Charles' residence (N.T. p.62). When Lynn told Decedent about these changes, she became upset and denied making such changes (N.T p.65). Lynn then communicated this information to Howard Soloman, Esquire, the Court appointed guardian for Decedent, and he in his wisdom directed that the annuity beneficiary be changed to Decedent's estate.

Lynn testified that he filed a police report accusing Charles and Heiman of fraud and that he and the Decedent went to the police district at 55th and Pine Streets to do so and throughout this time Decedent believed she had not written a new Will as she continued denying doing so. These denials by Decedent are consistent with her state of weakened intellect as she was unable to appreciate or remember the events surrounding the execution of the January 23, 2004 Will.

Lynn concluded by testifying that Charles and Heiman wanted the annuity proceeds once Lynn disclosed the existence of the policy, that they asked him to withdraw $50,000.00 from the account which he refused to do (N.T p.69), that Charles was offended at being disinherited in the December 3, 2003 Will and that Decedent was of weakened intellect and/or intoxicated on the day the January 23, 2004 Will was executed (N.T p.70).

Lynn testified that he believes that Decedent was improperly influenced by Charles into believing that Lynn filed the guardianship petition and that this false

information alienated her affections from him at the time she executed the January 23, 2004 Will (N.T pp.75-76).

Under cross examination, Lynn conceded he had no evidence that Decedent was intoxicated at the time the January 23, 2004 Will was executed (N.T p.76).

Lynn's Testimony appeared credible in all respects and was not seriously challenged in cross examination.

The testimony of Charles at the Register of Wills hearing held on April 25, 2005 was admitted. Charles stated that Heiman referred him to Mr. Cooper, whom he had never met prior to the January, 2004 meeting. Mr. Cooper had represented Heiman previously, Charles arranged for Decedent's conference with Mr. Cooper. Importantly, he was evasive and not forthcoming when asked about this meeting. He admitted he did not tell Mr. Cooper about the December 3, 2003 Will nor about the pending guardianship proceedings.

In several respects Charles' testimony is suspect and not credible. He claimed that he was not aware of the guardianship petition prior to the execution of the January 23, 2004 Will (Deposition. pp.54-56). He also claimed that he was not aware of Decedent's assets at that time (Deposition. p.56). He testified that he did not remember contacting the annuity company, but admitted the change of address form, Exhibit C-4, was in his handwriting (Deposition. p.58). All of these statements lack credibility and are refuted by the weight of the testimony to the contrary.

The testimony of Alan Cooper, Esquire was offered without objection by either party although Mr. Cooper acted as trial counsel for Heiman. This Court does not find this practice appropriate or helpful for it places trial counsel's credibility at issue in this

case on material facts in dispute. The authorities are many and voluble criticizing this practice. Mr. Cooper testified, *inter alia*, that he did not meet with Decedent separately, had not known her prior to the day he both drafted and supervised execution of the two page Will, that he never conversed alone with her, that he was not told about the prior Will and that he was never told that guardianship proceedings were pending. He testified:

> I can assure you that had I known a guardianship petition was pending, I probably would have hesitated in preparing a Will until that matter was decided. (N.T p.89).

Lynn's counsel argues convincingly that the failure by Charles and Heiman to disclose the prior Will and pending guardianship proceedings was deliberate and is of crucial importance with regard to a finding of undue influence and weakened intellect. This Court agrees.

LEGAL ANALYSIS

The Supreme Court has on many occasions defined "undue influence":

> The word "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 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 misrepresentation, 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 a will."

Williams v. McCarroll, *supra*, 374 Pa. at 295-296, 97 A.2d at 20, quoting from *Phillips Estate*, 244 Pa. 35, 43, 90 A. 457, 460 (1914).

Undue influence "is generally accomplished by a gradual progressive inculcation of a receptive mind." *In re Estate of Clark,* 461 Pa. 52, 65, 334 A.2d 628, 634 (1975). Because it is a "subtle, intangible and illusive thing," it must often be established by circumstantial evidence. *Id.*, 461 Pa. at 67, 334 A.2d at 635; *Estate of Ziel,* 467 Pa. 531, 541, 359 A.2d 728, 734 (1976). Consequently, to establish that a will was the result of undue influence, the contestant must present clear and convincing evidence that: "(1) the testator was of weakened intellect at the time the will was executed; (2) the proponent of the will stood in a confidential relationship with the testator; and (3) the proponent received substantial benefit under the will." *Burns v. Kabboul,* 407 Pa. Super. 289, 307, 595 A.2d 1153, 1162 (1991). Once these elements have been proven by clear and confirming evidence, the burden shifts to the proponents of the will to refute the charge of undue influence. *Estate of Ziel,* 467 Pa. at 541, 359 A.2d at 733.

The Pennsylvania Supreme Court in *In re Estate of Clark,* 461 Pa. 52, 334 A.2d 628, 634 (1975) describes how this shifting burden of proof is a key element in determining the existence of undue influence:

> The resolution of a question as to the existence of undue influence is inextricably linked to the assignment of the burden of proof. Once the proponent presents evidence of the formality of probate, a presumption of lack of undue influence arises; the effect is that the risk of non-persuasion and the burden of coming forward with evidence of undue influence shift to the contestant. *Abrams Will*, 419 Pa. 92, 98, 213 A.2d 638, 641 (1965); *Kerr v. O'Donovan*, 389 Pa. 614, 134 A.2d 213, 217 (1957). Once the contestant proceeds with his proof, there are two viable rules of law in this Commonwealth which allow the contestant to shift the onus of going forward with evidence back to the proponent. The older rule is that where the evidence shows, (1) bodily infirmity and (2) greatly weakened mental capacity of the testator, (4) standing in a confidential relationship, (5) who is benefitted by a will (6) which he has been instrumental in having written, a Presumption of undue influence arises. *See, Boyd v. Boyd*, 66 Pa. 283, 293-94 (1870); *Wilson v. Mitchell*, 101 Pa. 495 (1882). *Stewart Will*, 354 Pa. 288, 296, 47 A.2d 204 (1946); *Quien Will*, 361 Pa. 133, 62

A.2d 909 (1949). The more recent rule is that where (1) a person in a confidential relationship (2) receives the bulk of the testator's property (3) from a testator of weakened intellect, the burden of proof is upon the person occupying the confidential relation to prove affirmatively the absence of undue influence. *Cuthbertson's Appeal*, 97 Pa. 163, 171 (1881); *Yorke's Estate*, 185 Pa. 61, 69, 39 A. 119 (1898); *Button Estate*, 459 Pa. 234, 328 A. 2d 480, 483 (1974), and cases cited therein at n. 6.

> The parallel development of these two rules has been unnecessary. The differentiation arose from the facts of *Boyd v. Boyd*, *supra*, which could have relied upon the tripartite test but chose to incorporate the six elements of the older rule because the additional elements were present in that case, and they naturally enhanced the strength of the presumption of undue influence. Some of the cases have cited both rules. *Hurst Will*, 406 Pa. 612, 617, 179 A.2d 436, 438 (1962); *Kerr v. O'Donovan*, 389 Pa. 614, 627-28, 134 A.2d 213, 219 (1957). And although most cases citing the older rule have insisted that all six elements must be present, the cases citing the latter rule are equally adamant that only the three elements of confidential relationship, weakened intellect and substantial benefit to proponent are the minimum requirements.
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> The first rule states that a presumption of undue influence is created; the second rule states that the burden of proof shifts to proponent to affirmatively disprove undue influence. But the procedural effect of either rule is the same; both rules act to shift the burden of going forward to the proponent. These rules define for the contestant what is his *prima facie* case. Generally, undue influence, being somewhat akin to fraud, must be proved by clear and convincing evidence. *Brantlinger Will*, 418 Pa. 236, 210 A.2d 246 (1965). The rules, whether couched in terms of presumption or burden, are substitutes for the clear and convincing evidence in that they satisfy the contestant's requirements of a *prima facie* case. Once the contestant has established the presumption or shifted the burden, the proponent must produce clear and convincing evidence which demonstrates affirmatively the absence of undue influence. *Button Estate*, *supra*, [Footnotes omitted] *Id.* at 631-2; *accord*, *In re Estate of Reichel*, 484 Pa. 610, 400 A.2d 1268, 1273-4 (1979); *In re Estate of Jones*, 1998 WL 34112763 (Phila. Cty. Cm. Pl. 1998); and *In re Estate of LeVin*, 615 A.2d 38, 44 (Pa. Super. 1992).

Significantly, the "weakened intellect" that must be shown to establish undue influence differs from testamentary capacity:

> The weakened intellect which must be shown in order to establish a prima facie case of undue influence upon the testator need not amount to testamentary incapacity. Although testamentary capacity is to be determined by the condition of the testator at the very time he executes a will, evidence of incapacity for a reasonable time before and after the making of a will is admissible as an indication of lack of capacity of the day the will is executed.
> *Burns v. Kabboul*, 407 Pa. Super. at 308, 595 A.2d at 1163.

Finally, a confidential relationship exists for the purpose of evaluating undue influence whenever "the circumstances make it certain the parties do not deal on equal terms, but, on one side, there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed [for] in both [situations] an unfair advantage is possible." *Estate of Ziel*, 467 Pa. at 542, 359 A.2d at 734 (citations omitted).

Applying these principles to the facts presented, this Court concludes that Decedent, although possessed of testamentary capacity, was of weakened intellect on January 23, 2004. She could neither read nor write and signed her Will with a mark. In her 90's, in poor health, subject to designing persons and involved in pending guardianship proceedings, Decedent was driven to and from an attorney's office, never allowed to converse with counsel alone, never saw this attorney before or after this one occasion and in a brief time signed a simple two page Will. It is no coincidence that neither Charles nor Heiman revealed the existence of the December 3, 2003 Will or the pending guardianship proceedings to counsel. Both Charles and Heiman were in a confidential relationship with Decedent and arranged the January 23, 2004 Will in order

to inherit the Decedent's estate. Their pecuniary motive is credibly established by the testimony of a prior request made to Lynn for $50,000.00 from the annuity when its existence was first revealed to them by Lynn in December, 2003. Charles' testimony that he did not remember contacting the annuity company is belied by proof that he and Heiman changed both the address of the policy to their home and changed the beneficiary designation from Lynn to Charles. Heiman even admitted that the handwriting on the designation form was hers which is at odds with Charles' testimony that the handwriting was his.

Lynn has submitted clear and convincing evidence that Decedent was of weakened intellect when the January 23, 2004 Will was executed; that Charles, the proponent of the Will, stood in a confidential relationship with Decedent; and that Charles received a substantial benefit under the Will.

Heiman failed to offer clear and convincing evidence to prove the absence of undue influence. Her testimony was at times evasive and lacked credibility. Her testimony about the December, 2003 meeting with Lynn and her claimed non-involvement with the financial and annuity documents he presented is especially unconvincing. She has failed to meet her burden of proof. Charles testimony for reasons explained above similarly lacks credibility.

Accordingly, for reasons hereinabove discussed, this Court hereby directs in a contemporaneous Order that the January 23, 2004 Will be set aside as invalid and enters a Decree that the December 3, 2003 Will be probated as the Decedent's last Will.

BY THE COURT:

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John W. Herron, J.