COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

O. C. NO. 394 of 1997

Estate of SELENA R. JONES, Deceased

OPINION and DECREE
SUR APPEAL FROM DECREE OF REGISTER

The matter before this Court is an appeal by Kenneth and Shirley Lawrence from a Decree of the Register of Wills admitting to probate a writing dated July 31, 1992 as the Last Will and Testament of Kenneth's aunt, Selena R. Jones. The decedent was 88 years of age, unmarried and without issue, when she died in the Germantown Home on December 30, 1995. Kenneth's mother, Hazel Lawrence, is the decedent's sole heir-at-law and next of kin under the intestate laws.

The writing in question, dated July 31, 1992, gives $2,000.00 to the decedent's "god daughter", Lorraine King, and, gives the residue of her estate, in equal shares, to the decedent's sister, Hazel Lawrence, and two of Hazel's sons, Harold Lawrence and Charles Lawrence.

Kenneth and Shirley Lawrence, the contestants, are beneficiaries under a writing dated March 3, 1983. Said writing gives the decedent's entire estate to her husband, Philip Jones, and, makes alternative gifts in the event that Philip should die in the lifetime of the decedent. Said alternative gifts include: a silver service to Kenneth Lawrence, Jr., son of the contestants; $5,000.00 to Lottie Flood; $1,000.00

to Donald Isaac; and, the residue to the contestants, Kenneth and Shirley Lawrence.

The contestants contend that the decedent lacked testamentary capacity at the time of the execution of the writing of July 31, 1992. The contestants also contend that said writing was procured by undue influence which was exerted upon the decedent by the residuary beneficiaries, Hazel, Harold and Charles Lawrence.

The proponent in a will contest carries the initial burden of establishing the formalities of execution, or, probate: Estate of Clark, 461 Pa. 52, 59 (1975). Where the initial burden is met, a presumption of validity arises and the burden shifts to the contestant: Burns v. Kabboul, 407 Pa Superior Ct 289 (1991). In order to satisfy his burden and overcome the presumption of validity, the contestant must prove the elements of lack of testamentary capacity or undue influence by clear and convincing evidence: Brantlinger Will, 418 Pa. 236, 242(1965) and Burns, Supra. The definition of the term "clear and convincing evidence" is found in the following discussion in LaRocca Trust, 411 Pa. 633, 640 (1963), to wit,

> **"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, without 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'...'"**

In the instant case, the record of probate has been received into evidence, thus raising the presumption of validity and shifting to contestants the burden of proving lack of testamentary capacity or undue influence by clear and convincing evidence.

The test for determining testamentary capacity is whether a person has intelligent knowledge regarding the natural objects of her bounty, the general composition of her estate and what she desires to be done with it, even though her memory may have been impaired by age or disease: Brantlinger Will, Supra. at 247. As long as sufficient mental capacity exists, physical weakness will not create incapacity: Krauser Will, 16 Fiduc. Rep. 2d 324-325 (1996).

The principles governing any determination of undue influence are set forth in the following words of our Supreme Court in Estate of Reichel, 484 Pa. 610, 614 (1979):

> **" 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)**

If the contestant fails to present clear and convincing evidence of each of the three requirements set forth in Reichel, supra, contestant still may prove undue influence by presenting clear and convincing evidence that there was imprisonment of 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 decedent's mind, destroy her free agency and act as a present restraint upon her in the making of the will. Hollinger Will, 351 Pa. 364, 367-68 (1945). See also Estate of Ziel, 467 Pa, 531, 541 (1976).

Testifying on her own behalf, as a contestant, Shirley Lawrence stated that she and the decedent were like mother and daughter. They saw each other, and, talked on the telephone, on a daily basis. They went shopping together; had lunch together; and, went on picnics together.

Shirley Lawrence testified that, as of April 27, 1991, the decedent and her husband, Philip, needed help. The decedent couldn't go up steps by herself. She couldn't take care of her bedridden husband. Nevertheless, according to Shirley, the decedent stated that she did not want to leave her home, and, that she did not want to go into a nursing home.

Shirley Lawrence testified that, at some point in time, the decedent left her home to enter St. Agnes Hospital and, thereafter, a nursing home. After insisting that these events occurred in 1991, Shirley

admitted that they could have occurred in 1994, and, that she had no idea of when the decedent entered the nursing home. According to Shirley, the decedent was put into the nursing home by her sister, Shirley's mother-in-law, Hazel Lawrence, and, Shirley could not find the decedent for a period of a year. During this year, the decedent's friends and doctor, who was on the staff of St. Agnes Hospital, did not know where to find the decedent. Shirley stated that she never asked her mother-in-law, Hazel Lawrence, where she could find the decedent. Shirley did not go to court to protest Hazel's actions in taking control of the decedent. Shirley does not know if her husband, Kenneth, went to Court over the matter. However, Kenneth did ask his mother where the decedent could be found.

Shirley Lawrence testified that she visited the decedent in the nursing home. On her first visit, Shirley observed: that the decedent was in a wheelchair because she couldn't walk; that the decedent couldn't make phone calls because there was something wrong with her hands; and, that the decedent did a lot of crying. Shirley recalled that the decedent said that she didn't have any money; that she did not want to be in a nursing home; that "They" would not let her go home; and, that "They" would not let her friends know where she was. The decedent did not identify the persons whom she described as "They". The decedent asked Shirley to help her to make phone calls to let her friends know where she was. Shirley recounted another visit to the nursing home when she told the decedent that her

home was being occupied by Hazel's son, Charles, and his wife. Shirley told the decedent to ask Charles when she could come home.

Shirley Lawrence testified that she had to take a power of attorney from the decedent in 1991. According to Shirley, the decedent could not take care of her bedridden husband and herself, and, they needed help. The husband, Philip Jones, had to enter a nursing home. At this point, someone suggested to Shirley that she should take the decedent's assets in an effort to get the husband into the nursing home and save the assets. Shirley stated that she responded to this advice by closing the decedent's bank account and re-depositing the proceeds into another account in the names of the decedent and herself. Shirley's husband, Lawrence, responded to said advice by having the decedent execute a deed of her house to Lawrence, which deed was dated December 19, `1991 and recorded in the Philadelphia Department of Records on December 26, 1991. It appears that the decedent executed said deed twice, that is, individually and as attorney in fact for her husband, Philip Jones. According to Shirley, she never took any of the decedent's money out of their joint account. Nevertheless, Shirley's mother-in-law, Hazel Lawrence, made the following false statements to the decedent, to wit: that Shirley was taking the decedent's money; and, that Lawrence would put the decedent out on the street. Shirley testified that the decedent responded to these lies by taking her money out of the joint account, and, by having

Lawrence convey her house back to her by deed dated June 1, 1992 and recorded September 17, 1992. This second deed has been received as Exhibit "P-1". It bears a certification that the address of the grantee, Selena R. Jones, is the subject premises, to wit, 1608 Annin Street, Philadelphia.

Testifying on his own behalf, as a contestant, Kenneth Lawrence stated that the decedent was his aunt, but, that she was like a mother to him. He accompanied her to special functions; came for her on holidays; and, sent meals to her when she couldn't come to holiday affairs.

Kenneth Lawrence testified that his aunt was drained by the illness of her husband, Philip Jones; by Philip's entry into a nursing home; and, by Philip's death. Kenneth stated that he is not good at dates. Accordingly, Kenneth could not recall when Philip Jones died. However, Kenneth did recall that Philip Jones gave his will, dated March 3, 1983, to Kenneth. By his said will, a copy of which has been received as Exhibit "C-6", Philip makes the same gifts and bequests as appear in the will of his wife, our decedent, Selena R. Jones. If Selena should die in the lifetime of Philip, the residue of Philip's estate is given to Kenneth and Shirley Lawrence.

When asked about the transfers of his aunt's bank account and house, Kenneth Lawrence testified that they were intended to hide and protect his aunt's assets while her husband entered a nursing home. According to Kenneth, the transfers had nothing to do with taking things away from his aunt, and, everything to do with Medicare and Medicaid

regulations. Kenneth stated that he transferred the house back to his aunt, by Exhibit "P-1": because he never had any intention of taking it away from her, and, because he respected her. According to Kenneth, his mother, Hazel Lawrence, had no relationship with her sister, the decedent, until after the death of the decedent's husband, Philip.

Kenneth Lawrence testified that he lost contact with his aunt, for a period of one year, after she went into St. Agnes Hospital. No one told Kenneth that his aunt had entered the hospital. She went directly from the hospital to a nursing home. According to Kenneth, his mother and brothers, Harold and Charles Lawrence, would not divulge the whereabouts of his aunt. This led Kenneth to believe that his mother and brothers were attempting to coerce his aunt, that is, attempting to steal her estate.

Kenneth Lawrence testified that it took him one year to find his aunt in a nursing home on Germantown Avenue. He then visited his aunt and found that she had deteriorated both physically and mentally. In response to questioning by his counsel, on direct examination, Kenneth gave the following responses,

> **"Q. Did she know where she was?**
>
> **A. In a nursing home. She couldn't get out, she said. 'They won't let me out. They won't let me make any phone calls.' I said, 'You can go home, if you want to.' 'They said I couldn't go home.' I said, 'Who is 'they'?' And she said, 'My sister and her sons.'**
>
> **Q. Do you know whether or not Selena Jones had the right to leave that nursing home and go back to her own home? Do you know it?**

A. Yes, I reminded her that she could, but all she did was cry.

Q. We have talked about this case before. Have I left anything out that you want to tell the Judge?

A. No."

On direct examination, Kenneth Lawrence insisted that he lost contact with his aunt, at some point in 1991, when she left her house to enter St. Agnes Hospital and never returned to the house. On cross-examination, Kenneth insisted that he did not know when his aunt went into the nursing home. On re-direct examination, Kenneth insisted that the will in question, dated July 31, 1992, was executed at a time when his aunt was in the nursing home and Kenneth did not know where she was.

Called by the contestants, Dr. Naciancento Largoza testified that he has been licensed to practice medicine in the Commonwealth since 1966, and, that he is board certified in the field of Family Practice. Dr. Largoza stated that he treated the decedent and her husband. He treated the decedent from 1985 until some point in the early 1990s. Initially, the decedent came to his office, but, by 1990, he was seeing her in her home on Annin Street. While he believes that he last saw the decedent in 1993, the Doctor could not say exactly when he last saw her: because he did not bring his records to Court, and, because he has seen so many patients over so many years. In response to questioning by this Court, Dr.Largoza gave the following testimony, to wit,

“ THE COURT: Okay. Now, during the entire period of time that you treated her, did she have any mental difficulties?

THE WITNESS: No, not that I’m aware of. I’m not aware that she had any mental deficiencies. She was so alert, awake and oriented.

THE COURT: Now, you said you would go to her house when she called you.

THE WITNESS: Yes.

THE COURT: How often would you go to her house? Once a month? Once every --

THE WITNESS: Generally, once a month, but there are times I may have to go twice, and maybe even three times, depending on the condition. She may have loose bowel movements, or she may have a temperature. I may have to go there.

THE COURT: But you only went if she called you?

THE WITNESS: Yes, You Honor.

THE COURT: You did not go just by yourself?

THE WITNESS: Yes, she usually notified me.

THE COURT: She would call you, and you would go to the house?

THE WITNESS: Yes, sir.” NT 81 to 83

Dr. Largoza agreed with the statement that the decedent was fully oriented right up to the last time he saw her.

Dr. Largoza recalled that the decedent told him that she did not want to leave her home because she had spent so many years there, and, because it was free of debt. He further recalled her promise that she would call him if she ever did leave her home. Accordingly, he was surprised when she stopped calling his office. He wondered what had happened to her. He did not know how to get in touch with her. The Doctor stated that no one requested her records of him. On cross-examination, the Doctor stated that he assumed that she no longer had access to a phone,

> **"..... --- because she was so viable. She was oriented in her mental faculties. She promised she would get in touch with me one way or the other. I was surprised. I believe she has no access." NT 79**

On direct examination, the Doctor gave his opinion that the decedent would suffer a deterioration of her mental faculties, anxiety, depression and confusion by reason of losing contact with her home and her Doctor of many years.

The proponent offered no evidence other than the probate record and Exhibit "P-1". Exhibit "P-1" is the deed of June 1, 1992 which was recorded on September 17, 1992.

Upon a review of the record in this matter, this Court cannot make a finding of fact as to when the decedent entered a nursing home. The testimony of contestants and Dr. Largoza is simply unreliable on this point. Similarly, this Court cannot make a finding of fact as to when the

decedent was last seen by Dr.Largoza. The doctor's testimony on this point is, again, unreliable.

At some point in 1991, the decedent made Shirley Lawrence her attorney-in-fact. On December 19, 1991, the decedent conveyed her house to Kenneth Lawrence by a deed which she executed in two capacities: once on her own behalf; and, once as attorney-in-fact for her husband, Philip Jones. Said deed was recorded on December 26, 1991. Because the contestants did not give evidence of his date of death, this Court must assume that decedent's husband, Philip Jones, died after December 19, 1991. On June 1, 1992, Kenneth Lawrence conveyed the decedent's house back to her by a deed which indicates that her address was the subject premises, to wit, 1608 Annin Street. The writing in question was executed by the decedent on July 31, 1992. The deed of June 1, 1992, was recorded on September 17, 1992. This chronology of events suggests that the decedent was not being held incommunicado, in a nursing home, when she executed the writing in question.

Because we cannot say when the decedent entered a nursing home, or, when she was last seen by Dr. Largoza, this Court holds that the contestants have not offered clear and convincing evidence that the decedent lacked testamentary capacity on July 31, 1992. Nor have they offered clear and convincing evidence that the decedent suffered from a weakened intellect on July 31, 1992. She had sufficient mental capacity to

reclaim her money and house from the contestants. She was fully oriented when she last saw the Doctor. Under these circumstances, this Court is not convinced that the decedent lacked testamentary capacity, or, suffered from a weakened intellect when she executed the writing in question.

Because we cannot say when the decedent entered a nursing home, this Court holds that the contestants have not offered clear and convincing evidence that any of the proponents enjoyed a confidential relationship with the decedent when she executed the writing in question.

Hazel Lawrence is the decedent's sole heir-at-law, but, receives one-third of the residue of the decedent's estate under the writing in question. Under these circumstances, this Court holds that Hazel does not receive the bulk of the decedent's estate under the writing in question. Nor does she receive a substantial benefit thereunder. See Estate of Simpson, 407 Pa.SuperiorCt. 1 (1991), and, Ciaffoni Will, 18 Fiduc.Rep.2d 177 (O.C., Washington, 1997). Harold and Charles Lawrence are two of the decedent's three, surviving nephews, and, each receives one-third of the residue of her estate under the writing in question. Under these circumstances, this Court holds that neither Harold nor Charles receives the bulk of the decedent's estate under the writing in question. Nor does either of them receive a substantial benefit thereunder.

In accordance with the foregoing discussion, this Court finds no merit in the appeal of Kenneth and Shirley Lawrence from the Decree of the Register of Wills admitting to probate a writing dated July 31, 1992 as

the Last Will and Testament of Selena R. Jones. An appropriate Decree will be entered.

J.

Bruce W. Jennings, Esquire
for contestant

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