

**COURT OF COMMON PLEAS OF PHILADLEPHIA COUNTY
ORPHANS' COURT DIVISION**

O. C. NO. 591 AP of 2002

Estate of PAUL WEITZENKORN, Deceased

OPINION SUR APPEAL FROM DECREE OF REGISTER

The matter before this Court is an Appeal by Metropolitan Aids Neighborhood Nutrition Alliance (hereinafter "MANNA") from a Decree of the Register of Wills, dated September 13, 2002, which Decree admits to probate a writing dated April 15, 2002 as the Last Will and Testament of Paul Weitzenkorn.

Paul Weitzenkorn was born in Germany on May 20, 1929 and died of Bladder Cancer, in his Apartment in Kennedy House, on April 19, 2002. Paul was unmarried at the time of his death, and, left no issue surviving him.

The writing in question, dated April 15, 2002, gives Paul's entire estate to his friend, John Cerquitella, and, appoints John to serve as executor.

In his "Petition For Probate And Grant Of Letters Testamentary", filed on July 3, 2002, John Cerquitella declared that Paul Weitzenkorn owned the following property at Paul's death, to wit: personal property, including Paul's Apartment in Kennedy House, having a total estimated value of \$300,000.00; and, real estate, being Paul's property in New Hope, Pennsylvania, having an estimated value of \$125,000.00.

The contestant, known as "MANNA", is named as a beneficiary in a Will and First Codicil which were executed by Paul Weitzenkorn on December 13, 1995

and April 9, 2002.

In the Will of December 13, 1995, Paul Weitzenkorn gives his tangible personal property (which term does not include cash or securities), and, his real property located in New Hope, Pennsylvania, to his friend, John Cerquitella. Also in said Will, Paul gives the residue of his estate in two, equal shares: one to be held in trust for the benefit of Paul's godson, Steven Schiff, and Steven's family; and, one to be held in trust for the benefit of Paul's friend, John Cerquitella. Steven is given the net income of the trust for his benefit, and, the absolute right to withdraw the principal of said trust upon his reaching the age of fifty (50). If Steven should die before reaching the age of fifty (50), the then remaining principal of his trust is to be paid to his wife, Nancy Schiff. If Nancy fails to survive Steven, the then remaining principal of Steven's trust is to be paid to "MANNA". John is given the net income of the trust for his benefit, for his life, and, upon John's death, the then remaining principal of his trust is to be paid to MANNA. Provident National Bank, as Trustee, is given discretion to make payments, from the principal of each trust, for the health, maintenance and support of the income beneficiary thereof. Paragraph FOURTH of the Will dated December 13, 1995 ends with the following language, to wit,

" The principal object of my bounty are STEVEN SCHIFF and his family and JOHN CIRQUITELLA. Neither the contingent charitable remaindermen nor the Attorney General as parens patriae shall have standing to challenge the principal expenditures for the benefit of these beneficiaries....."

In the First Codicil of April 9, 2002, headed "FIRST CODICIL TO WILL DATED DECEMBER 13, 1995", Paul Weitzenkorn gives his Apartment in Kennedy

House to his friend, John Cerquitella. Also in said First Codicil, Paul deletes Paragraph FOURTH of the Will dated December 13, 1995, and, replaces it with a new Paragraph FOURTH which gives the entire residue of Paul's estate in trust for the sole benefit of John. Under the First Codicil, John is to receive the net income of the trust, and, as much of the principal as Provident National Bank, the Trustee, deems desirable for his health, maintenance and support. Also under the First Codicil, upon John's death, the then remaining principal of the trust is to be paid to MANNA. This new Paragraph FOURTH ends with the following language, to wit,

“ I declare that the principal object of my bounty is JOHN CIRQUITELLA. Neither the charitable remaindermen nor the Attorney General as parens patriae shall have standing to challenge the principal expenditures for the benefit of JOHN.....”

On May 6, 2002, the Register of Wills issued a Decree admitting the aforementioned Will and First Codicil, dated December 13, 1995 and April 9, 2002, to probate as the Last Will and Testament of Paul Weitzenkorn. Said Decree also granted Letters Testamentary to Provident National Bank and Leigh W. Bauer as Co-Executors named in the Will. The Register subsequently Revoked his Decree of May 6, 2002 by reason of his probate of the writing in question, that is, the writing dated April 15, 2002.

As the contestant, MANNA contends that the writing dated April 15, 2002 was procured by undue influence which was exerted upon Paul Weitzenkorn by John Cerquitella. MANNA has withdrawn its claims that Paul lacked testamentary capacity at the time of the execution of said writing, and, that Paul's signature was forged.

In passing upon allegations of undue influence, this Court is mindful of the discussion in Phillips' Estate, 244 Pa. 35 at 43 (1914), to wit,

“.... 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 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 mindfraud, 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).

John Cerquitella offered the Register’s record of probate into evidence as his Exhibit “P-1”. Having done so, John raised a presumption that the writing in question is a valid Will, and, cast upon MANNA the burden of proving 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 Estate of Reichel, 484 Pa. 610, 614 (1979), our Supreme Court made the following statement concerning proof of undue influence, to wit,

" 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), to wit,

“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), to wit,

The closest that we can come, therefore, to a definition of weakened intellect is that it is 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. It should be viewed 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.”

The meaning of the term “clear and convincing evidence” is discussed 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'...”

To meet its aforementioned burden as contestant, MANNA presented the testimony of six (6) witnesses, including:

- a) Leigh Bauer, Esquire, who served as Paul Weitzenkorn's Attorney from 1988 onward;
- b) Valerie Harris, who served as Mr. Bauer's secretary and assistant from 1986 onward;
- c) Shirley Spector, who lived across the hall from Paul Weitzenkorn for twenty-five (25) years;
- d) John Cerquitella, the proponent of the writing in question, who was called "as of cross-examination";
- e) Charlene Agnew, a Registered Nurse called upon by John Cerquitella to care for Paul Weitzenkorn in Paul's final days, and, a subscribing witness to the execution of the writing in question on April 15, 2002; and,
- f) Alan Bredt, Esquire, who drafted the writing in question and presented it to Paul Weitzenkorn for execution on April 15, 2002.

MANNA also offered ten (10) Exhibits, marked "C-1" through "C-10", in support of its case.

At the conclusion of MANNA's case, John Cerquitella, as proponent of the writing in question, presented the testimony of three (3) witnesses, including:

- a) Jacquelyn Bredt, spouse, legal assistant and secretary to Alan Bredt, Esquire, who was present at the execution of the writing in question on April 15, 2002, and, who affixed her Notarial Seal to the acknowledgment and affidavit of Paul and the subscribing witnesses;
- b) Lawrence O'Connor, who knew Paul Weitzenkorn for twenty-five (25) years, and, who is a subscribing witness to the execution of the writing in question on April 15, 2002; and,

c) Dolores Mescher, who knew Paul Weitzenkorn for more than ten (10) years.

Having considered the testimony and Exhibits offered and received into evidence, this Court makes the following Findings of Fact, to wit:

- 1. Paul Weitzenkorn was a self-employed Hairdresser, and, several years older than his friend, John Cerquitella;**
- 2. John worked in Retail Management for the first seventeen (17) years after his graduation from High School;**
- 3. John met Paul when John tried working in the cosmetology field;**
- 4. In the course of their relationship, Paul and John frequently traveled together, and, Paul invested some money in a Travel Agency so that John might be employed as a Travel Agent; would be eligible for discounts on travel expenses; and, would be available to travel with Paul;**
- 5. The Travel Agency venture did not work out, and, as a result: Paul lost the value of his investment; and, John went through Personal Bankruptcy;**
- 6. John resumed working in the Retail Management field, but, was fired, in part, because he took too many trips with Paul;**
- 7. John maintained his own residence until March of 2002 when Paul suggested that John move into Paul's Apartment in Kennedy House;**
- 8. John lived with Paul throughout Paul's final days;**
- 9. Alan Bredt, Esquire, served as John's Attorney in John's Personal Bankruptcy proceeding, several years before the year 2002;**
- 10. Mr.Bredt knew John as a business person in the area of Third and Bainbridge Streets;**
- 11. Mr.Bredt met Paul through John, that is, Paul accompanied John on five or six visits to Mr.Bredt's office,**

in the course of Mr. Bredt's representation of John in the Personal Bankruptcy proceeding;

12. Leigh Bauer, Esquire, served as Paul Weitzenkorn's Attorney from 1988 onward, and, John knew Mr. Bauer to be Paul's "regular" Attorney;

13. The relationship between Paul and John was like one between best friends or relatives, that is, one in which they both argued and laughed together;

14. The relationship between Paul and John was such that John did not control Paul because:

- a) Paul had an iron will;**
- b) John did whatever Paul told John to do; and,**
- c) John never succeeded in changing Paul's mind;**

15. In the course of their relationship, Paul never revealed the exact state of his financial affairs to John, in that: at times, Paul would say that he was going on welfare; and, at other times, Paul would say that he had enough money to last three (3) lifetimes;

16. In the course of their relationship, John never knew exactly where he stood in Paul's testamentary plans, in that:

- a) at one point, Paul said that he would leave everything to John;**
- b) at another point, Paul said that he would leave his Apartment in Kennedy House to John; but,**
- c) John never saw any Will or Codicil of Paul's until after Paul had died;**

17. Paul Weitzenkorn inherited a substantial amount of money on the death of his Mother in 1988;

18. On June 7, 1988, Paul executed a Will which had been drafted by Mr. Bauer. This Will has been marked and received into evidence as Exhibit "C-1";

19. In the Will of June 7, 1988, Paul gives his tangible personal property to Aaron Twer of New Hope, Pennsylvania;

20. In Paragraph THIRD of the Will of June 7, 1988, Paul gives the sum of \$200,000.00 in a trust for the benefit of his godson, Steven Schiff, and Steven's family. Steven is given the net income of the trust, and, the absolute right to withdraw the principal upon his reaching the age of fifty (50). If Steven should die before reaching the age of fifty (50), the then remaining principal of the trust is to be paid to his wife, Nancy Schiff. If Nancy fails to survive Steven, the then remaining principal of the trust is to be paid to the John Locke Fund of a charitable organization known as "Community Health Alternatives". Provident National Bank, as Trustee, is given discretion to make payments from the principal of the trust for the health, maintenance and support of Steven Schiff and his family;

21. Paragraph THIRD of the Will dated June 7, 1988 ends with the following language, to wit,

“ The principal object of my bounty is STEVEN SCHIFF and his family. The contingent charitable remainderman shall have no standing to challenge the principal expenditures for the benefit of STEVEN SCHIFF and his family.....”;

22. In the Will of June 7, 1988, Paul gives the residue of his estate to a charitable organization known as "Community Health Alternatives", to be used by the John Locke Fund;

23. On October 19, 1992, Paul executed a Will which had been drafted by Mr. Bauer. This Will has been marked and received into evidence as Exhibit "C-2";

24. In the Will of October 19, 1992, Paul gives his tangible personal property (which term does not include cash or securities), and, his real property located in New Hope, Pennsylvania, to his friend, John Cerquitella;

25. In Paragraph FOURTH of the Will of October 19, 1992, Paul gives the residue of his estate in two, equal shares: one to be held in trust for the benefit of Paul's godson, Steven Schiff, and Steven's family; and, one to be held in trust for the benefit of Paul's friend, John Cerquitella. Steven is given the net income of the trust for his benefit, and, the absolute right to withdraw the principal of said trust upon his reaching the age of fifty (50). If Steven should die before reaching the age of fifty (50), the then remaining principal of his trust is to be paid to his wife, Nancy Schiff. If Nancy fails to survive Steven, the then remaining principal of Steven's trust is to be paid to an AIDS related charitable organization known as "PHILADELPHIA FIGHT". John is given the net income of the trust for his benefit, for his life, and, upon John's death, the then remaining principal of his trust is to be paid to "PHILADELPHIA FIGHT". Provident National Bank, as Trustee, is given discretion to make payments, from the principal of each trust, for the health, maintenance and support of the income beneficiary thereof;

26. Paragraph FOURTH of the Will dated October 19, 1992 ends with the following language, to wit,

“ The principal object of my bounty are STEVEN SCHIFF and his family and JOHN CIRQUITELLA. Neither the contingent charitable remaindermen nor the Attorney General as parens patriae shall have standing to challenge the principal expenditures for the benefit of these beneficiaries.....”

27. On December 13, 1995, Paul executed a Will which had been drafted by Mr. Bauer. This Will has been marked and received into evidence as Exhibit "C-3";

28. The dispositive provisions of the Will of December 13, 1995 are virtually identical with those of the Will of October 19, 1992, including: the same pre-residuary gifts to John Cerquitella; the same two residuary trusts for the benefit of Steven Schiff and John Cerquitella; and, the same statement as to the principal objects of bounty;

29. In the Will of December 13, 1995, "MANNA" replaces "PHILADELPHIA FIGHT" as "the contingent charitable

remaindermen”;

30. On April 22, 1997, Paul executed another document which had been drafted by Mr. Bauer. This document is headed “LIVING WILL (ADVANCE DIRECTIVE FOR HEALTH CARE) OF PAUL E. WEITZENKORN”, and, has been marked and received into evidence as Exhibit “C-7”;

31. In the Living Will of April 22, 1997, Paul designates John Cerquitella to serve as Paul’s agent in making medical treatment decisions should Paul become unable to communicate his wishes;

32. Also in the Living Will of April 22, 1997, Paul designates Mr. Bauer to serve as Paul’s agent if John is unwilling or unable to do so;

33. The Living Will of April 22, 1997 does not contain any indication as to whether or not John was aware of its existence;

34. Paul Weizenkorn was in Pennsylvania Hospital, suffering from Bladder Cancer, when he called Valerie Harris, in Mr. Bauer’s office, on Tuesday, April 2, 2002;

35. In their telephone conversation on April 2, 2002, Paul told Valerie that Paul wanted her to bring him a document naming John Cerquitella to act as Paul’s Power of Attorney;

36. Pursuant to Paul’s instructions, Valerie drafted a Power of Attorney and took it to Paul’s hospital room;

37. Valerie had known Paul, as a client of Mr. Bauer, since 1988, but, she met John for the very first time, in Paul’s hospital room, on April 2, 2002, when Paul executed the Power of Attorney which has been marked and received into evidence as Exhibit “C-6”;

38. After Paul executed the Power of Attorney of April 2, 2002, Valerie affixed her Notarial Seal to Paul’s Acknowledgment thereof, and, John signed an Acknowledgement at the end thereof, which latter Acknowledgment indicates that John read the document;

39. The Power of Attorney of April 2, 2002 does not contain any indication as to whether or not John received a copy of said document on April 2, 2002;

40. On Wednesday, April 3, 2002, Valerie Harris took a document headed "FIRST UNION NATIONAL BANK (PA) DURABLE POWER OF ATTORNEY" to Paul's hospital room. This document appoints John to serve as Paul's agent in regard to a certain First Union Account. This document has been marked and received into evidence as Exhibit "C-8";

41. After Paul executed the First Union Power on April 3, 2002, Valerie affixed her Notarial Seal thereto, and, John signed the document to provide a specimen of John's signature;

42. The First Union Power of April 3, 2002 does not contain any indication as to whether or not John received a copy of said document;

43. Also on Wednesday, April 3, 2002, Valerie accompanied John to First Union National Bank in an effort to facilitate the acceptance of Exhibit "C-8" by the Bank;

44. On or before Monday, April 8, 2002, Valerie and Paul spoke, on the telephone, again;

45. In their telephone conversation, on or before April 8, 2002, Paul told Valerie that he wanted to make certain changes to his Will;

46. On Monday, April 8, 2002, pursuant to Paul's instructions, Valerie typed the document headed "FIRST CODICIL TO WILL DATED DECEMBER 13, 1995", which document has been marked and received into evidence as Exhibit "C-4";

47. In the First Codicil typed on April 8, 2002, Paul gives his Apartment in Kennedy House to John, and, gives the entire residue in trust for the sole benefit of John;

48. Under the First Codicil typed on April 8, 2002, John is to receive the net income of the residuary trust, and, as much of the principal as Provident National Bank, the

Trustee, deems desirable for his health, maintenance and support;

49. Also under the First Codicil typed on April 8, 2002, upon John's death, the then remaining principal of the residuary trust is to be paid to MANNA;

50. The First Codicil contains a new Paragraph FOURTH which ends with the following language, to wit,

“ I declare that the principal object of my bounty is JOHN CIRQUITELLA. Neither the charitable remaindermen nor the Attorney General as parens patriae shall have standing to challenge the principal expenditures for the benefit of JOHN

51. On Tuesday, April 9, 2002, Mr.Bauer and Valerie took the First Codicil, which had been typed on April 8, 2002, to Paul's room in Pennsylvania Hospital;

52. John was not present when Mr.Bauer and Valerie met with Paul on April 9, 2002;

53. During the meeting with Mr.Bauer and Valerie, on April 9, 2002, Paul seemed to be fine;

54. During the meeting with Mr.Bauer and Valerie, on April 9, 2002, Mr.Bauer quizzed Paul in an effort to make sure that John was not pushing Paul into making the First Codicil;

55. In response to Mr.Bauer's questioning, on April 9, 2002, Paul made the following statements, to wit:

a) that Paul wanted to eliminate his godson as a beneficiary of the residuary trust because Paul's assets had diminished and Paul was not as close to the godson as he had been in the past;

b) that John was nervous and upset;

c) that John had a propensity to "blow" money;

d) that Paul wanted to protect John against John's propensity to "blow" money;

e) that Paul wanted to ensure that John had sufficient income and, if necessary, principal; and,

f) that Paul still wanted the remaining principal, if any, to go to a charitable organization;

56. Paul executed the Codicil, in the presence of Mr. Bauer, Valerie, and, a third person acting as a Witness, on April 9, 2002;

57. Paul met his friend and neighbor of twenty-five years, Shirley Spector, when Paul returned to his Apartment in Kennedy House, from Pennsylvania Hospital, in the evening hours of Tuesday, April 9, 2002;

58. Shirley visited Paul at 10 a.m. on Wednesday, April 10, 2002, and, at 10 a.m. on each and every day thereafter, including the day on which Paul died, that is, Friday, April 19, 2002;

59. On each of her visits to Paul's Apartment, in his last nine days, Shirley spent about five (5) or ten (10) minutes in Paul's presence, and, there was not much conversation between them;

60. Shirley felt that Paul seemed fine during her visits on Wednesday, Thursday and Friday, that is, on April 10, 11 and 12, 2002;

61. After his Chemotherapy Treatment on Friday, April 12, 2002, Paul struck Shirley as being in decline; very sad; and, depressed;

62. Mr. Bauer placed a telephone call to Paul shortly after Paul arrived home from the Hospital;

63. During this Call, Mr. Bauer felt that Paul sounded depressed, that is, like Paul had given up;

64. At some point on Wednesday, Thursday or Friday, that is, on April 10, 11 or 12, 2002, Paul instructed John to place a phone call to Alan Bredt, Esquire;

65. After placing the call to Mr.Bredt, John got off the phone and left Paul alone to speak to Mr.Bredt privately;

66. During his telephone conversation with Mr.Bredt, on Wednesday, Thursday or Friday, that is, on April 10, 11 or 12, 2002, Paul told Mr.Bredt:

a) that Paul was dying;

b) that Paul wanted Mr.Bredt to draft a new Will for Paul; and,

c) that this new Will should leave all of Paul's estate to John;

67. On Friday, April 12, 2002, John and John's Sister accompanied Paul to a Doctor's Office where Paul was to receive his first Chemotherapy Treatment;

68. At the Doctor's Office on April 12, 2002, Paul received an explanation of the risks, benefits and possible side effects of Chemotherapy;

69. At the Doctor's Office on April 12, 2002, Paul asked for John's advice as to whether or not Paul should undergo Chemotherapy, and, John responded that Paul would have to make that decision on his own;

70. At the Doctor's Office on April 12, 2002, Paul signed a "Consent for Chemotherapy Administration" Form, which Form has been marked and received into evidence as Exhibit "C-10";

71. In the evening hours, on Saturday, April 13, 2002, Paul fell in the bathroom of his Apartment in Kennedy House;

72. Paul's fall led John to make arrangements for a Registered Nurse to care for Paul, in the Apartment, on a 24 hour a day basis;

73. Charlene Agnew is a Registered Nurse with twenty (20) years experience, and, a friend of John's ex-Wife;

74. John contacted Charlene through John's ex-Wife, and, arranged for Charlene to live in Paul's Apartment, 24

hours a day, for a period which was to end at 8:00 p.m. on Friday, April 19, 2002;

75. Charlene arrived in Paul's Apartment shortly after midnight, that is, in the early morning hours on Sunday, April 14, 2002;

76. Charlene made her bed at the foot of Paul's bed, and, never left Paul's Apartment until Friday, April 19, 2002;

77. Charlene received \$50.00, per hour, for her services, before she left Paul's Apartment;

78. Charlene spent every day, from Monday, April 15 until Friday, April 19, 2002, in Paul's company;

79. Paul never did or said anything, in Charlene's presence, which gave Charlene the impression that Paul did not know where he was, or, that Paul did not know what was going on around him;

80. There were many, many visitors, and, many, many phones calls, to Paul's Apartment, while Charlene was present;

81. In his final days, Paul ruled the roost in his Apartment in that:

a) Paul often told John to make sure that John did things that Paul wanted done;

b) Paul often told John not to forget to do things that Paul wanted done; and,

c) John did everything that Paul told John to do;

82. Charlene never saw John control Paul;

83. Charlene never saw John bar any person from coming to see Paul;

84. Paul died, in his Apartment in Kennedy House, at 11:35 p.m., on Friday, April 19, 2002;

85. Friday, April 19, 2002, was the first day on which Charlene observed what she regarded as signs of physical weakness in Paul;

86. Up until Friday, April 19, 2002, Charlene observed Paul: getting out of bed each day; going to the kitchen and eating his meals there; and, sitting in the den and watching TV and home movies of his trips;

87. Up until Friday, April 19, 2002, Charlene and Paul engaged in discussions in which Paul spoke about his trips with John, and, about famous people who had come to Paul to have their hair done;

88. Paul asked Charlene whether he was scheduled to receive a Chemotherapy Treatment on a certain day, and, she told him what John had told her, to wit: that John had told the Doctor that Paul was exhausted; and, that the Doctor had decided that Paul should not receive further Chemotherapy Treatments until Paul was stronger;

89. Friday, April 19, 2002, was the first day on which Paul complained to Charlene that he was experiencing any pain;

90. On Friday, April 19, 2002, Paul told Charlene that he wanted to go to the Hospital, and, Charlene raised to Paul the possibility that Hospital Staff might initiate artificial means of life support if Paul should experience cardiac arrest or a failure of his kidneys;

91. Without mentioning the fact that he had a Living Will, Paul told Charlene, on Friday, April 19, 2002, that he did not want anyone to use artificial means of life support on him;

92. After discussing life support with Charlene, on Friday, April 19, 2002, Paul decided not to go to the Hospital;

93. Friday, April 19, 2002, was the first day on which Charlene administered any medications to Paul;

94. On Friday, April 19, 2002, Charlene found Morphine among medications which had been left for Paul at the front desk of Kennedy House, and, she administered a

dose of Morphine to Paul;

95. After receiving the dose of Morphine, on Friday, April 19, 2002, Paul was sedated but capable of being aroused;

96. After receiving the dose of Morphine, on Friday, April 19, 2002, Paul was surrounded by Charlene, by John, and, by a visiting friend, all of whom told Paul that it was OK to let go;

97. Thursday, April 18, 2002, was the last day on which Paul was seen by Dolores Mescher, a retired Medical Social Worker whom Paul had known for over ten (10) years;

98. In the course of their ten (10) year friendship, Paul made many statements to Dolores regarding his feelings about MANNA, to wit:

a) that he did not approve of MANNA's actions in hiring and paying staff;

b) that he did not want to be involved with MANNA anymore despite his having done volunteer work for the organization in the past; and,

c) that he did not want to give money to MANNA;

99. Dolores arrived at Paul's Apartment at 11 a.m. on Thursday, April 18, 2002, and, stayed about an hour, leaving after Paul had eaten his lunch;

100. On April 18, 2002, Paul was physically weaker and thinner than when Dolores had last seen him in March of 2002, but, mentally, Paul was his usual, normal self, that is, totally lucid and in full possession of his mental faculties;

101. On April 18, 2002, Dolores and Paul joked and spoke about her recent vacation;

102. On April 18, 2002, Dolores drew upon her experience in working with cancer patients and dying

people, and, spoke to Paul about his Mother, and, about his letting go;

103. At some time on Monday, April 15, 2002, John called the Office of Mr.Bauer, and, told Valerie that Paul wanted John to serve as sole Executor of Paul's Will;

104. Not content to rely upon John's recitation of Paul's wishes regarding who should serve as Executor, Valerie insisted that she speak to Paul, on the phone, on April 15, 2002;

105. Paul got on the phone and spoke to Valerie, on April 15, 2002, and, told Valerie:

a) that Paul wanted John to serve as sole Executor of Paul's Will, with Mr.Bauer as a backup;

b) that Paul did not feel able to keep up with all of the things which were going on; and,

c) that Paul wanted Valerie to get his Power of Attorney recorded, and, to give certified copies to John, so that John could take care of things;

106. On the telephone, on April 15, 2002, Valerie felt that Paul sounded very tired and a little depressed;

107. On the telephone, on April 15, 2002, Paul said nothing to Valerie regarding Paul's dealings with Mr.Bredt;

108. After speaking to Paul, on April 15, 2002, Valerie drafted a document headed "SECOND CODICIL TO WILL DATED DECEMBER 13, 1995", which document has been marked and received into evidence as Exhibit "C-5";

109. Exhibit "C-5" appoints John to serve as sole Executor of Paul's Will, and, appoints Mr.Bauer to so serve if John should be unable or unwilling to do so;

110. Exhibit "C-5" includes a Note which Valerie typed and left for Mr.Bauer on April 15, 2002;

111. Said Note, dated April 15, 2002, summarizes Valerie's conversations with John and Paul, and, gives Paul's phone number to Mr.Bauer so that Mr.Bauer might call Paul if he wished to confirm Paul's instructions;

112. At some time on Monday, April 15, 2002, Paul met with four (4) people in the den of his Apartment in Kennedy House;

113. Those four people were Alan Bredt, Esquire; Mr.Bredt's Wife and legal secretary, Jacquelyn Bredt; Paul's Nurse, Charlene Agnew; and, Paul's very good friend of twenty-five (25) years, Lawrence O'Connor;

114. John was out of the Apartment when the group gathered in Paul's den, on April 15, 2002, and, John was not present, in the den, during the meeting;

115. Paul specifically directed Mr.Bredt, Mrs.Bredt, Charlene, and, Lawrence, not to tell John what went on during the meeting;

116. During the meeting in his den, on April 15, 2002, Paul signed the writing in question, that is, the Will which gives his entire estate to John, outright and free of trust, and, which appoints John to serve as sole executor;

117. Before Paul signed the Will on April 15, 2002, Mr.Bredt took great care in reading it to Paul, so as to make sure that Paul understood what the provisions of the Will meant;

118. As Mr.Bredt finished reading each Paragraph of the Will to Paul, on April 15, 2002: Paul made some comment which indicated that Paul understood the meaning of the Paragraph; or, Mr.Bredt stopped to explain the Paragraph to Paul;

119. Paul's comments, in response to Mr.Bredt's reading of certain Paragraphs of the Will, on April 15, 2002, include the following, to wit: "After I'm dead"; and, "I hope he doesn't piss it all away";

120. In response to Paul's expression of concern that John might spend all of Paul's money at once, Mr.Bredt stated that he, Mr.Bredt, had no control over what John

would do with Paul's money;

121. During the meeting in Paul's den, on April 15, 2002, Paul told everyone present that he wanted to leave everything he had to John, and, that none of them were to tell John what occurred during the meeting;

122. During the meeting in Paul's den, on April 15, 2002:

a) Paul was mentally alert;

b) Paul understood the meaning of each Paragraph of the Will which had been prepared and read to him by Mr.Bredt; and,

c) Paul knew exactly what he was doing when he signed the said Will;

123. During the meeting in Paul's den, on April 15, 2002, Paul did not tell anyone present about Paul's dealings with Mr.Bauer;

124. After the group emerged from Paul's den, on April 15, 2002, as per Paul's instruction, none of the participants told John what had occurred during the meeting;

125. When she left Paul's Apartment, on April 15, 2002, Mrs.Bredt took the original of Paul's newly executed Will back to Mr.Bredt's office, so that she might make copies of the fully executed Will;

126. Paul's fully executed Will, dated April 15, 2002, remained in Mr.Bredt's office until after Paul's death;

127. Mr.Bredt did not seek, nor did he receive, any payment for his services in preparing and attending the execution of Paul's Will dated April 15, 2002;

128. At some time on Tuesday, April 16, 2002, Valerie placed a telephone call to Paul, and, she and Mr.Bauer spoke to Paul during that call;

129. During their call, on April 16, 2002, Valerie and Mr.Bauer told Paul:

- a) that a Second Codicil had been prepared pursuant to Paul's instructions to Valerie;
- b) that the Second Codicil was ready for Paul's signature; and,
- c) that Valerie and Mr.Bauer were available to bring the Second Codicil to Paul, for his signature, at any time;

130. Paul told Valerie and Mr.Bauer, on April 16, 2002, that Paul was not feeling well; and, that Paul would get back to them;

131. On the telephone, on April 16, 2002, Paul said nothing to Valerie or Mr.Bauer about Paul's dealings with Mr.Bredt;

132. Also on April 16, 2002, Valerie filed Exhibit "C-6", being the Power of Attorney which Paul had signed on April 2, 2002, in the Clerk of Orphans' Court, and, got certified copies of said Power;

133. John never made use of Exhibit "C-6" in Paul's lifetime;

134. In Paul's final days, when Paul did not want to be bothered with writing checks, John wrote out checks to pay Paul's bills, and, Paul signed said checks;

135. John called Valerie's home, on the night of Friday, April 19, 2002, and, told Valerie's son to tell Valerie that Paul had died;

136. Valerie was shocked to learn of Paul's death, and, called Mr.Bauer on Saturday, April 20, 2002, to advise Mr.Bauer of the death;

137. On Monday, May 6, 2002, the Register of Wills issued a Decree admitting the aforementioned Will and First Codicil, dated December 13, 1995 and April 9, 2002, to probate as Paul's Last Will and Testament;

138. The Register's Decree of May 6, 2002 also granted Letters Testamentary to Provident National Bank and

Mr.Bauer as Co-Executors;

139. For several weeks after the Register's Decree of May 6, 2002, Valerie was busy:

- a) getting Paul's papers and documents in order;**
- b) running around with John;**
- c) helping John with Paul's Apartment in Kennedy House; and,**
- d) answering John's many questions;**

140. John did not learn of the existence of the questioned writing, that is, the Will dated April 15, 2002, until some time in the month of June, 2002, when Mr.Bredt telephoned Paul's Apartment to inquire as to how Paul was doing;

141. When Mr.Bredt called the Apartment, in June of 2002, John informed Mr.Bredt that Paul had died;

142. Upon hearing that Paul had died, Mr.Bredt told John that Mr.Bredt had Paul's Will in Mr.Bredt's possession, to which John replied that Paul's Will had already been probated;

143. Upon hearing that another document had been probated, Mr.Bredt told John to come to Mr.Bredt's office where Mr.Bredt showed the Will dated April 15, 2002 to John;

144. On July 3, 2002, John filed a Petition For Probate And Grant Of Letters Testamentary, offering the writing dated April 15, 2002 for probate, with the Register of Wills;

145. On September 13, 2002, the Register issued a Decree admitting the writing dated April 15, 2002 to probate as Paul's Last Will and Testament; and,

146. On October 16, 2002, MANNA filed its Appeal to this Court from the Register's Decree dated September 13, 2002.

This Court believes that every witness who testified in this matter, including John Cerquitella, did so truthfully and to the best of his or her recollection. However, the foregoing Findings of Fact are based on my further belief that the testimony of John Cerquitella, Charlene Agnew, Alan Bredt, Jacquelyn Bredt, Lawrence O'Connor and Dolores Mescher is more accurate, reliable and convincing than that of Leigh Bauer, Valerie Harris and Shirley Spector.

Charlene was not John's agent in some sort of plot to keep Paul weak, confused and isolated in his Apartment in Kennedy House. Charlene treated Paul as her patient, and, she did so in a highly professional and humane manner. Charlene is to be commended for her caring and sensitive efforts which allowed Paul to die with dignity in his own home. By virtue of her training and long experience as a Registered Nurse, Charlene was the most qualified of all the witnesses to assess Paul's physical and mental condition on Monday, April 15, 2002, and, on each and every day thereafter until Paul's death on Friday, April 19, 2002. Charlene's constant presence in the Apartment, in Paul's final days, qualified her to assess the character of the relationship between Paul and John in that time period.

Dolores Mescher is another witness whose training and long experience, as a Medical Social Worker, including dealing with cancer patients and dying people, qualified her to assess Paul's physical and mental condition when she saw Paul in his final days, that is, on Thursday, April 18, 2002. Dolores' long friendship with Paul qualified her to assess the character of the relationship between Paul and John over a period of some years.

Based on the foregoing Findings of Fact, this Court is convinced, and, so holds, as a matter of law: that MANNA has not presented clear and convincing evidence that John stood in a confidential relationship to Paul at any time; that MANNA has not presented clear and convincing evidence that Paul's intellect was weakened at any time; and, that MANNA has not presented any direct evidence to prove that the writing in question, dated April 15, 2002, was procured by undue influence exerted upon Paul by John.

Findings of Fact Number 14 and 81 pertain to Paul's iron will, and, to his ruling of his roost in his final days. Paul had long experience in telling John what to do, and, John had long experience in following Paul's orders. John never succeeded in changing Paul's mind. Thus, this Court is not convinced that John had an overmastering influence over Paul at any point in their relationship.

Paul was not a prisoner in his Apartment in Kennedy House. A constant stream of phone calls and visitors came into the Apartment. Valerie and Mr.Bauer talked to Paul, on the phone, when they wished to do so. It was Paul, not John, who told Valerie and Mr.Bauer not to come over, with the Second Codicil, on Tuesday, April 16, 2002. It was Paul, not John, who decided not to go to the Hospital on Friday, April 19, 2002. Thus, this Court is not convinced that Paul was "weak" or "dependent" upon John in the sense in which those words are used in Leedom, supra.

John is one of the primary objects of Paul's bounty in Paul's Wills dated October 19, 1992 and December 13, 1995. John is the primary object of Paul's bounty in the First Codicil dated April 9, 2002. John receives all of Paul's estate,

outright and free of any trust, under the writing in question, dated April 15, 2002. And yet: John never saw any of the aforementioned testamentary documents, at any time, in Paul's lifetime; Paul directed those present in his den, on April 15, 2002, not to tell John about what went on in the den; and, Paul was unaware of the existence of the writing in question, dated April 15, 2002, until some time in June of 2002. Thus, this Court is not convinced that, when it came to Paul's testamentary plans, Paul reposed any particular trust in John.

In his Living Will dated April 22, 1997, Paul designated John to serve as Paul's agent in making medical treatments decisions should Paul become unable to communicate his wishes. And yet, it was Paul, not John, who decided to proceed with the Chemotherapy treatment on Friday, April 12, 2002. John never used the Power of Attorney dated Tuesday, April 2, 2002, and, there is no indication that John received a copy of said Power before Tuesday, April 16, 2002. John never used the First Union National Bank Power of Attorney, dated Wednesday, April 3, 2002, to sign checks for Paul. In discussing the meaning of confidential relationship, in Brantlinger Will, supra, at 250 (1965), our Supreme Court noted the following, to wit,

“ In *Kerr v. O'Donovan*, supra,, we pointed out situations which do not constitute a confidential relationship: ‘The fact that proponent performed business services for decedent does not establish a confidential relationship:, the fact that the proponent drew checks, paid bills and lived in the same room with decedent to take care of him did not prove a confidential relationship. In *King Will*, 369 Pa. 523, 528, 87 A.2d 469, the court found no confidential relationship between a testatrix and her niece who lived together, even though the niece wrote checks for her aunt, possessed a power of attorney for her safe deposit box and contacted the lawyer who wrote the will.’” (citations omitted)

Thus, this Court is not convinced that the Living Will and Powers of Attorney, dated April 22, 1997, April 2, 2002 and April 3, 2002, indicate the existence of a confidential relationship between John and Paul.

Counsel for MANNA argues that Paul must have been suffering from a weakened intellect because he was using two different attorneys to draft two different estate plans. This Court is not convinced by said argument.

John was the primary object of Paul's bounty. In his hospital room, on April 9, 2002, Paul told Mr. Bauer that John had a propensity to "blow" money, and, that Paul wanted to protect John against said propensity. Paul told Dolores Mescher that he did not want to give money to MANNA. In his den, on April 15, 2002, Paul expressed his intention to leave everything he had to John. Also in his den, on April 15, 2002, Paul made the comments: "After I'm dead"; and, "I hope he doesn't piss it all away." At all times, Paul was mentally alert, and, intent on benefiting John. At all times, Paul knew the difference between a gift in trust and an outright gift. Paul knew that the last testamentary document he signed would be his last Will and Testament. Paul was not confused or suffering from a weakened intellect. On the contrary, Paul was struggling with the question of whether or not he should use a trust to protect John from John. Paul's conversation with Valerie Harris, on the phone, on April 15, 2002, shows that his mind was still open to the possibility of using a trust. When Paul told Valerie and Mr. Bauer, on the phone, on April 16, 2002, that he would get back to them: Paul had not given up, but, instead, had opted not to use a trust to protect John from John.

This Court holds that the testimony of Valerie, Mr. Bauer and Shirley Spector, to the effect that Paul seemed sad, depressed, etc., is not as convincing as that of Charlene Agnew and Dolores Mescher, to the effect that Paul was lucid and in full possession of his mental faculties.

Because MANNA has not presented clear and convincing evidence that John stood in a confidential relationship to Paul at any time; because MANNA has not presented clear and convincing evidence that Paul's intellect was weakened at any time; and, because MANNA has not presented any direct evidence to prove that the writing in question, dated April 15, 2002, was procured by undue influence exerted upon Paul by John, this Court finds no merit in the Appeal of MANNA from the Decree of the Register of Wills, dated September 13, 2002, which Decree admits to probate the writing dated April 15, 2002 as Paul's Last Will and Testament. An appropriate Decree will be entered.

Date: _____

**_____
O'KEEFE, ADM. J.**