PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Earl Pough, Sr., Appeal from the Register of Wills
O.C. No. 348 AP of 2014
Control No. 155031

Earl Pough, Appeal From Register

20140034802019

OPINION

Introduction

The appeal of Paytrienne Pough raises the issues of whether the writing admitted to probate as the last will of her father, Earl Pough, should be declared invalid due to undue influence or lack of testamentary capacity. For the reasons set forth below, the contestant has failed to meet her burden of proof and her appeal is therefore denied.

Background

On January 28, 2015, Paytrienne Pough, the daughter of decedent Earl Pough Sr., filed an appeal from a January 28, 2014 decree of the Register of Wills that denied her petition to amend the letters of administration that had been granted to her brother, Earl Pough, Jr ("Earl, Jr.")[1] on the estate of Earl Pough, Deceased. In this January 28, 2014 decree, the Register ruled that the letters of administration C.T.A. it had issued to Earl Pough, Jr. remained in full force and effect. By an earlier decree dated November 18, 2013, the Register had granted letters of administration C.T.A. to Earl Pough, Jr. and ruled that an instrument dated January 5, 2013 was admitted to probate as the last will of the decedent. This January 5, 2013 instrument was a single page document signed by Earl Pough, witnessed by Earl Pough Jr. and notarized by Ashley P. Viozzi, Notary Public. This document essentially gives Earl Pough, Jr. the power to make financial and medical decisions for his father during his lifetime. It also gives Earl R. certain property upon his father's death:

> RE: **Will- Power of Attorney**
> Date: 01/05/2013
> This is a letter of record in reference to my Will and Power of Attorney. In the event I am not in sound mind and body I would like for my son (Earl Pough Jr.) to make all decision (sic.) for me medically and financially making him my power of attorney. If anything happens to me I would like to be buried in Orangeburg, SC with my mother. These plots were purchased by my mother and me. My son will handle any arrangements. My son will inherit the following items: (1) House on 8028 Williams Ave

[1] Because of the similarities between the names of decedent Earl Pough and his son, Earl Pough, Jr., the son/respondent will be referred to as Earl, Jr.

Philadelphia, PA (2) Bank accounts Bank of America (Checking), TD Bank (Checking) and South Carolina Bank Orangeburg SC. This letter of record will be notarized. Ex. R-1.

In challenging the Register's decree, Paytrienne Pough ("Ms. Pough") asserts that her father had not been of sound mind when the will was executed on January 5, 2013 due to severe and extended physical illness, hearing loss and loss of vision. She further asserts that he had been coerced to execute this document due to the undue influence of his son, Earl Pough Jr., who stood in a confidential relationship with him.[2] Earl Pough, Jr. filed an answer denying these assertions and a hearing was held on May 18, 2015.

At the hearing, Ms. Pough presented only three witnesses, none of whom was a physician. The first witness, Shirley Pough, was the sister of the decedent. She testified very generally that her brother drank excessive amounts of alcohol between the months of November through January around the anniversaries of the deaths of his mother, father and wife.[3] She recalled that her brother had told her that his son had asked him to sign a paper giving him control of his assets which he did not sign because he wanted everything split down the middle.[4] She could not recall, however, whether she had been with her brother around January 5, 2013 when the document at issue was signed.[5] She testified that he had been drinking around the December holidays but could not recall when she saw him after December 14, 2012.[6] As far as she knew, her brother had not suffered from hallucinations.[7]

The contestant's two other witnesses were her son, Terrell Pough, and herself. Terrell Pough's testimony was vague and conflicting as to his contacts with his grandfather. He stated that he had lived for a time with his grandfather but moved out of the house in August 2011, returning for breaks from college in South Carolina in December 2011 and during summer 2012.[8] This testimony was contradicted by Paytrienne Pough who stated that she and Terrell had left Earl Sr.'s home in 2007, not 2011.[9] Terrell Pough's testimony was also inconsistent as to whether he had been with his grandfather on the date the disputed will was executed: January 5,

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[2] 1/28/15 Paytrienne Pough Petition, paras. 17 & 18.
[3] 5/18/2015 N.T. at 12 (Shirley Pough).
[4] 5/18/2015 N.T. at 14 (Shirley Pough).
[5] 5/18/2015 N.T. at 15 (Shirley Pough).
[6] 5/18/2015 N.T. at 21 (Shirley Pough).
[7] 5/18/2015 N.T. at 24 (Shirley Pough).
[8] 5/18/2015 N.T. at 26-29 (Terrell Pough).
[9] 5/18/2015 N.T. at 31 (Paytrienne Pough).

2013. At one point during the hearing, he stated that he had not visited his grandfather on January 5, 2013; he subsequently contradicted this by stating he had been with him on or about that time.[10] He provided no concrete information about his grandfather's mental state, his relationship with the respondent or the execution of the January 5, 2013 will.

Finally, petitioner Paytrienne Pough testified that her father had long been plagued by alcoholism and that his drinking peaked during the period November to March due to the anniversaries of the deaths of family members. During these times, she testified, Earl Pugh would fail to pay his bills, leave doors open and become reclusive.[11] She and the respondent, Earl Jr., helped care for their father. Her father nonetheless made his own medical decisions.[12] She recalled that in August 2013 her father had complained that Earl Jr. had tried to get him to sign a document giving him everything, but he told her he had not signed the document. Ms. Pough, also testified that her father told her that Earl Jr. had prepared the document and that she should look into it.[13]

After the petitioner rested her case, the respondent, Earl Jr., presented testimony by a notary, Ashley Viozzi Jordan, and the physician who treated his father since 2010, Dr. Judith Long. The notary had no specific recollection of the signing of the January 5, 2013 document, though she did outline her general procedures for notarizing documents, stating that she would refuse to notarize a document if the customer was nodding off, slurring words or directed by someone else.[14] The testimony of Dr. Long, however, was highly relevant and ultimately persuasive. She testified that she had been treating Earl Pough since 2010 at the Philadelphia VA medical center. In addition to hypertension and hearing issues, Earl Pough had been treated for alcoholism. She had no concerns about his mental capacity in January 2013. She noted, moreover, that he showed no signs of mental incapacity or dementia based on a mini-mental status test administered in June 2013. Not only had he scored a very high 27 out of 30 on the mini mental status exam, but a CAT scan showed no abnormalities.[15] When specifically asked if

[10] 5/18/2015 N.T. at 27 & 28 (Terrell Pough).
[11] 5/18/2015 N.T. at 52, 33-34 (Paytrienne Pough).
[12] 5/18/2015 at 32-33 (Paytrienne Pough)
[13] 5/18/2015 N.T. at 37-38 (Paytrienne Pough).
[14] 5/18/2015 N.T.at 59-60 (Ashley Viozzi Jordan).
[15] 5/18/2015 N.T. at 73-76 (Dr. Judith Long)

Earl Pough. in her medical opinion was fully competent and had capacity to make decisions in his best interests financially and medically, Dr. Long concluded that he had that capacity.[16]

Legal Analysis

After a will has been probated, a contestant seeking to invalidate that will on the grounds of undue influence or lack of testamentary capacity has the burden of proof by clear and convincing evidence. In re Angle, 2001 Pa. Super. 144, 777 A.2d 114, 123 (Pa.Super. 2001); Estate of Bankovich, 344 Pa. Super. 520, 523, 496 A.2d 1227, 1229(1985). In the present case, Paytrienne Pough asserts that her father's will was invalid "as undue influence being exercised over him due to his lack of capacity."[17] Undue influence may be shown by either direct or indirect evidence. See, e.g. Paolini Will, 13 Fid. Rep.2d 185, 187 (O.C. Mont. Cty .1993). To establish undue influence to void a will by direct evidence, the contestant must show "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." Olshefski's Estate, 337 Pa. 420, 424, 11 A.2d 487 (Pa.1940). The contestant failed to present clear and convincing evidence that Earl Jr. had exerted this kind of direct influence on the testator. None of the contestant's witnesses offered any detailed facts as to the relationship between decedent and his son, Earl Jr.

Because of its insidious nature, "undue influence may be, and often can only, be proved by circumstantial evidence." Estate of Ziel, 467 Pa. 531, 541, 359 A.2d 728, 734 (Pa. 1976). In such cases, to show that a will was procured by undue influence, the contestant must establish "by 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 a substantial benefit under the will." Burns v. Kabboul, 407 Pa. Super. 289, 307,595 A.2d 1153, 1162 (Pa. Super 1991), *app. denied* 529 Pa. 655, 604 A.2d 247 (1992). See also Estate of Clark, 461 Pa. 52, 60, 334 A.2d 628, 632 (1975); Estate of Reichel, 484 Pa. 610, 614, 400 A.2d 1268, 1270 (Pa. 1979); Estate of Cooper, 351 Pa. Super. 482, 486, 506 A.2d 451, 453 (1986), *app. denied* 514 Pa. 647, 524 A.2d 493 (Pa. 1987).

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[16] 5/18/2015 N.T. at 76 (Dr. Judith Long).

[17] 8/18/2015 N.T. at 5 (Lynn Michele Summers, Esquire).

In the present case, the disputed will named Earl Jr. as the sole beneficiary of his deceased father's property. Consequently, the element of substantial benefit has been satisfied. Based on the facts presented during the hearing, Earl Jr. also had a confidential relationship with the testator. There is no precise formula for defining confidential relationship. A kinship relationship between parent and child, for instance, does not invariably create a confidential relationship, though it is a fact to consider. Estate of Keiper, 308 Pa. Super. 82, 87, 454 A.2d 31, 34 (Pa.Super. 1983). In broad terms, Pennsylvania courts conclude that a "confidential relationship exists 'whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness or dependence or justifiable trust, on the other." Estate of Lakatosh, 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (Pa. Super. 1995). None of the testimony at the hearing established this kind of domineering relationship between the proponent of the will and his testator father. In fact, the three witnesses presented by the contestant gave no details about the nature of the relationship between Earl Jr. and his father except for Paytrienne Pough who acknowledged that she and her brother shared the responsibilities of caring for their father.[18] When asked whether she or her brother had a confidential relationship with their father, Ms. Pough testified broadly that both she and her brother had a strong confidential relationship with the decedent without providing details to flesh out the elements of a confidential relationship.[19]

There are, however, instances when a confidential relationship is presumed to exist such as between an attorney/scrivener and testator. Estate of Thomas, 463 Pa. 284, 290 n.7, 344 A.2d 834, 836 n.7 (1975). Courts have also concluded that a confidential relationship may exist where a decedent grants a power of attorney to the proponent of his will, depending on the surrounding circumstances. See, e.g. Foster v. Schmitt, 429 Pa. 102, 108, 239 A.2d 471, 474 (1968)("given the circumstances of this case, if there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia"); Estate of Lakatosh, 441 Pa. Super. at 142, 656 A.2d at 1383 ("the existence of a power of attorney given by one person to another is a clear indication that a confidential relationship exists between the parties"); Estate of Keiper, 308 Pa. Super. at

[18] 5/18/2015 N.T. at 31-32 (Paytrienne Pough).
[19] 5/18/2015 N.T. at 36 (Paytrienne Pough).

86, 454 A.2d at 33 ("No clearer indication of a confidential relationship could exist than giving another person the power of attorney over one's entire life savings"). But see Estate of Ziel, 467 Pa. 531, 359 A.2d 728 (Pa. 1976) (power of attorney alone did not evidence confidential relationship). In the present case, the disputed "letter of record" that created the power of attorney was also labeled as Earl Pough's will. With this document, Earl Pough gave his son full authority to make all financial and medical decisions for him in the event he was not of "sound mind and body." The document then went on to name Earl Jr. as the sole beneficiary of certain property upon his father's death. Moreover, Paytrienne Pough testified that her father told her Earl Jr. had drafted this document,[20] thereby serving as the scrivener of the will. Based on these circumstances, a confidential relationship was evidenced between decedent and his son.

The final element for showing undue influence, weakened intellect, was not established in this case. Weakened intellect in the context of a will contest asserting undue influence differs from a claim of lack of testamentary capacity. Testamentary capacity, for instance, is evaluated in terms of a testator's mental condition on the day a will is executed. With a claim of weakened intellect and undue influence, in contrast, the focus may span a longer time period. Estate of Lakatosh, 441 Pa. Super. at 143-444, 656 A.2d at 1384. The test for testamentary capacity under Pennsylvania law 'is whether the testator, at the time he executed the will in question, had an intelligent knowledge regarding the natural objects of his bounty, of what his estate consists, and of what he desires done with his estate, even though his memory has been impaired by age or disease." Cohen Will, 445 Pa. 549, 551 n.1, 284 A.2d 754, 755 n.1, (1971). While there is no clear test for weakened intellect, Pennsylvania courts have recognized that "it is typically accompanied by persistent confusion, forgetfulness and disorientation." Estate of Nalaschi, 2014 Pa. Super. 73, 90 A.3d 8 (Pa. Super. 2014). Significantly, in undue influence cases, "a trial court has greater latitude to consider medical testimony describing a decedent's condition at a time remote from the date that the contested will was executed." Estate of Fritts, 2006 Pa. Super. 220, 906 A.2d 601, 607 (Pa. Super. 2006), *app. denied* 591 Pa. 673, 916 A.2d 1103 (Pa. 2007).

Testimony by two of contestant's three witnesses did not support her claim that Earl Pough had suffered from weakened intellect. On the contrary, they undermined it. Shirley Pough, the decedent's sister, testified specifically that Earl Pough did not suffer from hallucinations, even while noting that he drank heavily from the general period between

[20] 5/18/2015 N.T. at 37-38 (Paytrienne Pough).

November through January.[21] She could not remember if she had seen her brother around January 5, 2013 when the will was executed.[22] The only erratic behavior she could recall had taken place months earlier at Thanksgiving dinner when Earl Pough left her niece's house upset because it had taken too long to feed him.[23] She could not recall any other erratic behavior by him except that he would yell.[24] Pennsylvania courts have concluded that excessive drinking of alcohol, in and of itself, would not be sufficient to invalidate a will unless it could be shown that the testator was inebriated at the time he executed his will. Estate of Abrams, 419 Pa. 92, 101, 213 A.2d 638, 643 (1965). Paolini Will, 13 Fid. Rep. 2d 188, 190-91 (O.C. Mont. Cty 1993)(Taxis, J.). Shirley Pough's vague, tentative testimony did not come close to establishing inebriation at the time the will was executed.

The testimony of Terrell Pough, contestant's son, was vague and bereft of details about his grandfather Earl Pough's mental state. He did state unreservedly, however, that his grandfather did not have hallucinations. In addition to its vagueness, Terrell Pough's testimony was contradictory as to whether he had seen his grandfather on January 5, 2013. At one point, he stated that he had not been with his grandfather on that date, but he subsequently changed that testimony that he had been with him,[25] thereby undermining the credibility of his testimony.

Finally, the testimony of contestant Paytrienne Pough was inconclusive on the issue of weakened intellect and undue influence. Ms. Pough testified that during the period around January 2013 when the decedent was drinking heavily, he would fail to pay his bills, leave the doors of his home open, fail to answer the phone and become reclusive.[26] On the other hand, she acknowledged that she had no firsthand knowledge of the circumstances surrounding the execution of the will and of decedent's mental state at that precise time.[27] The credibility of this testimony is subject to Ms. Pough's direct interest in her deceased father's estate. Moreover, courts have concluded that even habitual drunkenness does not constitute incapacity to execute a

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[21] 5/18/2015 N.T. at 24 (Shirley Pough).

[22] 5/18/2015 N.T. at 15 (Shirley Pough). In fact, she could not recall when she had seen him after December 14, 2012. Id. at 21.

[23] 5/18/2015 N.T. at 16-17 (Shirley Pough).

[24] 5/18/2015 N.T at 17-18 (Shirley Pough).

[25] 5/18/2015 N.T. at 27 & 28 (Terrelll Pough).

[26] 5/18/2015 N.T. at 33-34 (Paytrienne Pough).

[27] 5/18/2015 N.T. 36-37 (Paytrienne Pough).

will as suggested by the Pennsylvania Supreme Court in Olshefski's Estate when analyzing testimony by similarly "interested" parties:

> The contestants, all of whom are decidedly interested, testified that at times their mother had lapses of memory and delusions, attributed to her impaired physical condition and to her alleged use of alcohol. It is well established, however, that it requires more than failure of memory, or even habitual drunkenness, to constitute incapacity to execute a will Olshefski's Estate, 337 Pa. 420, 423, 11 A.2d 487 (Pa. 1940).

These same assertions likewise did not support the claim for undue influence that was also at issue in Olshefski's Estate. See also Paolini Will, 13 Fid. Rep. 2d 185,190-91 (O.C. Mont. Cty 1993) (allegation that decedent drank alcohol excessively did not support claim of undue influence).

In rebuttal of this testimony, the proponent of the will, Earl Jr., presented highly persuasive testimony by the notary who signed the executed will and especially by the physician who had treated the decedent since 2010. The notary, Ashley Viozzi Jordan, testified forthrightly that she had no independent recollection of Earl Pough's execution of his will on January 5, 2013. She nonetheless testified convincingly as to her practice in notarizing a document: she would not notarize a document where a party was nodding off, slurring his words, or being directed by others.[28] The testimony of Dr. Judith Long, who had treated the decedent since 2010, was decisive. She noted that he suffered from hearing loss, hypertension and had been treated at the VA Hospital where she worked for alcoholism. Despite these conditions, she had no concerns about his mental capacity in the period around January 1, 2013.[29] Moreover, this perception was backed up by a Mini Mental status test she subsequently gave to the decedent during which he scored a high score of 27 out of 30. A CAT scan administered at the same time showed no abnormalities. Based on this, Dr. Long found no signs of dementia. She confirmed that in her medical opinion, Earl Pough had been fully competent and had the capacity to make decisions in his best interests.[30]

Conclusion

Based on this record, contestant failed to meet her burden of clear and convincing evidence that decedent's will was the result of undue influence or the lack of testamentary capacity. The appeal is therefore denied as set forth in a contemporaneously issued decree.

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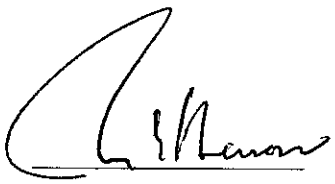
[28] 5/18/2015 N.T. at 59-60 (Ashley Viozzi Jordan).

[29] 5/18/2015 N.T. at 73 (Dr. Judith Long).

[30] 5/18/2015 N.T. at 75-76 (Dr. Judith Long).

Date: June 22, 2015

BY THE COURT:



John W. Herron, J.

Earl Pough
8028 Williams Ave
Philadelphia, PA 19150
Home: 215-276-2576
DOB: 11/08/1944
SSN: 251-74-8094

Earl Pough Jr.
101 Beechnut Court
Lumberton, NJ 08048
Home: 609-914-4220
Cell: 609-284-5083
DOB: 06/02/1977
SSN: 179-64-8075

RE: Will – Power of Attorney

Date: 01/05/2013

This is a letter of record in reference to my Will and Power of Attorney. In the event I am not in sound mind and body I would like for my son (Earl Pough Jr.) to make all decision for me medically and financially making him my power of attorney. If anything happens to me I would like to be buried in Orangeburg, SC with my mother. These plots were purchased by my mother and me. My son will handle any arrangements. My son will inherit the following items: (1) House on 8028 Williams Ave Philadelphia, PA (2) Bank accounts Bank of America (Checking), TD Bank (Checking) and South Carolina Bank and Trust (Savings) (3) Original Copy of Death Certificate (4) Any Property in Orangeburg SC. This letter of record will be notarized.

Earl Pough Earl Pough Earl Pough Jr. Earl Pough

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
ASHLEY P VIOZZI, NOTARY PUBLIC
CITY OF PHILADELPHIA, PHILADELPHIA COUNTY
MY COMMISSION EXPIRES JULY 26, 2016

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Department of Veterans Affairs
Medical Center
University and Woodland Avenue
Philadelphia PA 19104

April 9, 2015

To Whom It May Concern,

Mr. Earl Pough (8094) was my primary care patient at the Philadelphia VA Medical Center before he died in 2013. He frequently came to appointments with his son Earl Pugh Jr. Mr Pough Sr. always had decisional capacity when I saw him. On the last visit on 6/10/2013 Mr. Pough Jr. mentioned that he was concerned his father may have early dementia. At that time I performed a mini-mental status exam (MMSE) and he got a score of 27/30 indicating that dementia was unlikely. As part of the evaluation a CT of his head in June 2013 showed the following.

> " No evidence of acute transcortical infarct, acute intracranial bleed or extra-axial fluid collection. There is no mass effect. Ventricles, sulci and cisterns are age appropriate in size. There are periventricular hypodensities bilaterally, likely on the basis of small vessel ischemic changes. Visualized portions of the mastoid, sinuses and calvarium are unremarkable."

I hope this information is helpful.

Sincerely,

Judith A. Long, MD

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