COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Alberta Wiggs, Deceased
O.C. No. 1043 AP of 2016
Control No. 163309

Alberta Wiggs, Appeal From Register

20160104302020

OPINION

Petitioner, who was disinherited by her mother (hereinafter "Testator"), has appealed probate of the Will claiming that the Testator lacked testamentary capacity and/or that the Will was the product of undue influence and weakened intellect. For the reasons stated below, the Court denies the appeal.

I. BACKGROUND

Alberta Wiggs ("Testator") died testate survived by seven children on July 2, 2016 (Petition for Citation, ¶ 4; Answer ¶ 4). On July 8, 2016, Ernestine Yvette Wiggs ("Respondent"), Executor of the Estate of Alberta Wiggs, filed a Petition for Grant of Letters with the Philadelphia County Register of Wills ("Register") to probate Testator's Last Will and Testament dated June 9, 2016 ("Will"). The Will appoints Respondent as Executor and Christine Wiggs ("Petitioner") as contingent Executor (Petition for Citation, Ex. A). Petitioner and Respondent are Testator's daughters. The Will bequeaths all of Testator's property to Testator's grandson, Marquis Adrian Williams ("Marquis"), who is also the son of Respondent. In a Decree dated July 8, 2016, the Register granted Letters Testamentary to Respondent. On September 16, 2016, Petitioner filed a Notice of Appeal from the Register's Decree and a Petition for Citation wherein she alleged, among other allegations,[1] that the Will "was procured by [Respondent] while [Testator] was in

1 The other allegations (besides the material facts set forth in the body of this Opinion) are irrelevant. Petitioner alleged as bases for revoking Letters Testamentary that "[t]he Death Certificate submitted to the Register … listed an incorrect Social Security number" and "[t]he Petition [for Letters Testamentary] was filed before the interment [of Testator] in violation of procedures of the Register of Wills" (Petition for Citation ¶¶ 5-7). The Court did not find the latter allegation to be a basis for revoking Letters Testamentary because it only implicated the internal operating procedures of the Register. In a Decree dated November 21, 2016, the Court ordered Petitioner to file "a brief setting forth the legal basis for sustaining a will appeal based on the allegation that [Testator's] Death Certificate that [Respondent] submitted to the Register … contained an incorrect Social Security number." In the brief, Petitioner alleged that the Social Security number on Testator's Death Certificate as issued is incorrect and "Respondent altered the Death Certificate to show the correct Social Security [n]umber" before submitting it to the Register. However, Petitioner did not cite to a Pennsylvania statute or case law to support her assertion that such allegations, even if true, would be cause to revoke Letters Testamentary and the Court did not find any such law. The closest case that the Court could find was *Brokans v. Melnick*, where the Superior Court held that the administrator's "lack of interest in the estate" was a "bar to granting letters of administration" to him while also "not[ing] numerous defects in his original petition upon which letters were granted," including the complete lack of a death certificate, and "admonish[ing] the Philadelphia Register of Wills for summarily granting such a woefully lacking petition." 391 Pa.

extremis and lacking testamentary capacity" (Petition for Citation, ¶ 10). In a Preliminary Decree dated September 26, 2016, this Court awarded a Citation, "directed to Respondent and all persons or entities named as beneficiaries otherwise having an interest under the probated Will to show cause why the appeal of the decision of the Register of Wills to probate the Will should not be sustained and Letters Testamentary revoked." In Respondent's Answer to the Petition for Citation, Respondent denied that Testator lacked testamentary capacity at the time the Will was executed or that Respondent procured the Will while Testator was in extremis (Answer, ¶10). During the trial held on February 28, 2017, the Court heard testimony from Norman Bach, Respondent, and Petitioner.[2] Respondent and Petitioner thereafter both filed briefs in support of their respective positions. The Court carefully considered the record in this matter and the legal arguments advanced by the parties. This Opinion follows.

II. DISCUSSION

In Petitioner's brief, she argues that the Will should be invalidated due to Respondent's alleged undue influence on Testator or, alternatively, due to Testator's alleged lack of testamentary capacity, but the brief focuses almost entirely on undue influence. Upon evaluating the legal and factual bases for undue influence and testamentary incapacity, the Court concludes that Petitioner had the burden of proof as to undue influence and testamentary incapacity and Petitioner failed to meet her burden of proof for either undue influence or testamentary incapacity.

Super. 21, 30, 569 A.2d 1373, 1377 (Pa. Super. Ct. 1989). But there the administrator's "lack of interest in the estate" was alone reason to hold that the decision of the Register to grant letters of administration to an administrator was void and mention of the fact that the administrator failed to provide a death certificate at all, not merely an incorrect or modified one as is alleged here, is thus dicta. Petitioner also alleged in her Petition for Citation that "Respondent depleted funds of [Testator] without the knowledge of [Testator], including liquidation of certain bank accounts, thereby depleting the Estate of the Deceased" (Petition for Citation, ¶ 9). However, this allegation does not seem to pertain to Respondent's conduct in her capacity as Executor because, by noting that Testator was unaware of the alleged depletion, Petitioner implies that the alleged depletion occurred while Testator was still alive (i.e., before Respondent became Executor). The allegations that Respondent "misappropriated personal property of the other members of the family of [Testator]" does not implicate Respondent's conduct in her capacity as Executor insofar as the alleged misappropriation of the personal property of other family members does not involve property of Testator's Estate. Finally, it's unclear from the allegation that Respondent "changed the locks on the family home" whether "the family home" is part of Testator's Estate or not, but, if it is, Respondent would have the right to change the locks and, if it is not, the allegation does not implicate the Respondent's conduct in her capacity as Executor.

[2] Norman Bach is "the operations manager in medical records at Hahnemann University Hospital" whose only testimony was that the medical records that Petitioner admitted into evidence were "records kept in the normal course of business by the hospital," were "[b]ased on reports by the attending nurses and physicians," and were "reviewed intermittently by professional persons" (Trial Transcript, p. 8).

A. **Undue Influence**

In cases where undue influence is alleged, a presumption of the absence of undue influence arises when a will proponent presents evidence that the will in question was formally probated. *In re Clark's Estate*, 461 Pa. 52, 59, 334 A.2d 628, 631 (Pa. 1975) (citing *In re Abrams' Estate*, 419 Pa. 92, 98, 213 A.2d 638, 641 (Pa. 1965) and *Kerr v. O'Donovan*, 389 Pa. 614, 623, 134 A.2d 213, 217 (PA. 1957)). However, a presumption of undue influence will arise if the will contestant proves by clear and convincing evidence that (1) the testator suffered from a weakened intellect at the time the will was executed; (2) there was a person in a confidential relationship with the testator; and (3) the person in the confidential relationship received a substantial benefit under the challenged will. *In re Estate of Nalaschi*, 2014 PA Super 73, 90 A.3d 8, 14 (Pa. Super. Ct. 2014) (quoting *In re Bosley*, 2011 PA Super 126, 26 A.3d 1104, 1108 (Pa. Super. Ct. 2011)); *see also Estate of Reichel*, 484 Pa. 610, 615, 400 A.2d 1268, 1270 (Pa. 1979) (noting that "a contestant to a will needs to show 1) confidential relationship, 2) substantial benefit[,] and 3) weakened intellect ... by clear and convincing evidence" in order for "the burden of proof [to] then return to the proponent of the will"). If such presumption of undue influence arises, the court will invalidate the provisions of the will tainted by such undue influence unless the will proponent proves by clear and convincing evidence the absence of undue influence. *In re Button's Estate*, 459 Pa. 234, 240–41, 328 A.2d 480, 484 (Pa. 1974) (citation omitted). In order to prove the absence of undue influence, a will proponent must "prove that the act or gift or bequest was the free, voluntary and clearly understood act of the [testator] and that the entire transaction, gift or bequest was unaffected by undue influence or imposition or deception or fraud." *Williams v. McCarroll*, 374 Pa. 281, 295, 97 A.2d 14, 21 (Pa. 1953).

Since all parties admit that the Register probated the Will, it is presumed at the outset that the execution of the Will was free from undue influence (Petition for Citation, ¶ 8; Answer ¶ 8). Petitioner argues in her brief that she presented sufficient evidence of confidential relationship, substantial benefit, and weakened intellect to establish a presumption of undue influence. However, a review of the record and applicable law demonstrates that Petitioner has failed to prove any of the three elements—much less all three as required to establish a presumption of undue influence.

1. **Confidential Relationship**

A confidential relationship exists between a testator and another person when the testator "has reposed a special confidence in [the other person] 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, dependence[,] or justifiable trust, on the other" thereby resulting in "such a disparity in position that the [testator] places complete trust in the [other] party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." *Estate of Lakatosh*, 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995) (citations and internal quotation marks omitted); *In re Estate of Fritts*, 2006 PA Super 220, ¶ 19, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (citation and internal quotation marks omitted). A confidential relationship is a somewhat amorphous concept that "cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line" and thus "each case must be analyzed on its own facts." *In re Scott's Estate*, 455 Pa. 429, 432, 316 A.2d 883, 885 (Pa. 1974) (citation omitted). "Although a parent-child relationship does not conclusively suggest a confidential relationship, it is a fact to be considered" when determining whether a confidential relationship existed. *Estate of Gilbert*, 342 Pa. Super. 82, 88, 492 A.2d 401, 404 (Pa. Super. Ct. 1985) (citation omitted). Although "[t]he clearest indication of a confidential relationship is that an individual has given power of attorney over her savings and finances to another party," if "there was no overmastering influence on [the alleged undue influencer's] part, the trial court [is] not legally bound to infer that a power of attorney gave rise to the existence of a confidential relationship" and, furthermore, "the fact that the [will] proponent has a power of attorney where the [testator] wanted the [will] proponent to act as attorney-in-fact" does not alone establish a confidential relationship. *In re Estate of Fritts*, 2006 PA Super 220, ¶ 19-21, 906 A.2d 601, 608-609 (Pa. Super. Ct. 2006) (citation omitted); *In re Estate of Angle*, 2001 PA Super 144, ¶ 43, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) (citation omitted).

Petitioner contends that she proved the presence of a confidential relationship between Respondent and Testator because the evidence establishes that "Respondent had a bossy attitude toward" Testator; "Respondent claimed to have a Power of Attorney from" Testator; Respondent "was a signer on [Testator's] bank account, from which she made withdrawals"; "[o]n the day of the execution of the Will, Respondent chose the lawyer, transported [Testator] to the attorney's office, and[,] on the way to the attorney's office[,] elicited from [Testator] that the Respondent's son was to be the sole beneficiary[,] ... was present while the Will was being discussed with the attorney, and watched over [Testator] while [she] signed the Will" (Petitioner's Brief, p. 7). However, the record shows that, although Respondent had a power of attorney over one or more of Testator's accounts at one bank, Respondent did not exercise an overmastering influence over Testator because Testator, who had several caretakers, was not entirely dependent on Respondent for advice or her daily needs. Therefore, Petitioner failed to prove that a confidential relationship existed between Testator and respondent.

Petitioner's testimony that Respondent was "overpowering ... in her overall demeanor" and "at times, bossy" in her relationship with Testator is a vague and conclusory description of Testator's relationship with Respondent and is accompanied by little detail (Trial Transcript, p. 18). The detail that Petitioner did provide suggests that Respondent's allegations of bossy and overpowering behavior reflect more about Respondent's relationship with Petitioner than Respondent's relationship with Testator; Petitioner testified that she "wasn't there at every moment that [Respondent] was with [Testator]" and, "[t]here were times when I was present that I would actually leave because if I said something to [Testator] and [Respondent] interjected, it would be an argument" (Trial Transcript, p. 18-19). Despite Petitioner's claim that Respondent "chose the lawyer" who drafted the will, the only evidence regarding the selection of a scrivener-attorney is Respondent's testimony that, in response to being informed by Testator's caretaker that Testator wanted a will, Respondent "called SeniorLaw and they assigned [Testator] these attorneys." (Trial Transcript, p. 18-19). Likewise, despite Petitioner's claim that Respondent "on the way to the attorney's office[,] elicited from [Testator] that the Respondent's son was to be the sole beneficiary," Respondent merely testified that she first learned that her son was to be the sole beneficiary "when [Testator] told me she wanted the will" and there is no evidence that Respondent "elicited" this information from Testator (Trial Transcript, p. 33). Although Respondent accompanied Testator to the attorney's office to make the will and was present when it was discussed and signed, that conduct does not evidence a confidential relationship between Testator and Respondent. In *Wetzel v. Edwards*, the Pennsylvania Supreme Court upheld the trial court's holding that there was "no basis" for finding a confidential relationship even though "[t]he will had been prepared by testator's attorney to whom appellee at the attorney's office explained what testator 'wanted done'" *Wetzel v. Edwards*, 340 Pa. 121, 122, 16 A.2d 441, 441 (Pa. 1940). Here, in contrast, several other people, including two of Testator's caregivers, also accompanied Testator to the attorney's office and Testator spoke directly with the scrivener-attorney regarding her testamentary plans without input from Respondent. These facts simply do not tend to show the required "overmastering influence" by Respondent or "weakness, dependence[,] or justifiable trust" by Testator that caused Testator to "place[ ] complete trust in [Respondent's] advice and seek[ ] no other counsel." *See In re Estate of Fritts*, 2006 PA Super 220, ¶ 19, 906 A.2d 601, 608 (Pa. Super. Ct. 2006).

The strongest evidence of confidential relationship in the record is Respondent's testimony that Testator's "bank has a financial power of attorney" such that Respondent was "able to make deposits and withdrawals for [Testator]," which appears to establish that Respondent had a financial power of attorney over one or more of Testator's accounts at one bank (Trial Transcript, p.29). Courts have noted that "no clearer indication of a confidential relationship could exist than giving another person the

power of attorney over one's entire life savings." *In re Ziel's Estate*, 467 Pa. 531, 542, 359 A.2d 728, 734 (Pa. 1976) (citing *Foster v. Schmitt*, 429 Pa. 102, 108, 239 A.2d 471, 474 (Pa. 1968)); *see also Estate of Lakatosh*, 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995) (citations omitted) (noting that "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," especially when "the alleged donee is shown to have spent a great deal of time with the [testator] or assisted in [the testator's] care"). However, it is not clear that Testator's "entire life savings" was at the bank at which Respondent had a power of attorney. More importantly, "assigning power of attorney does not in and of itself give rise to a confidential relationship" because "[a] confidential relationship exists only where there is overmastering influence on the part of the proponents." *In re Estate of Fritts*, 2006 PA Super 220, ¶ 21, 906 A.2d 601, 609 (Pa. Super. Ct. 2006). Here, there is no evidence of such an "overmastering influence" by Respondent over Testator. In *Fritts*, the fact that the testator had named the alleged undue influencer as agent under power of attorney did not prove a confidential relationship between the testator and the alleged undue influencer. *Id.* There, the alleged undue influencer, who did not live with the testator, visited the testator every other week and took the testator grocery shopping during such visits and the testator had "a trained nurse's aide" who "perform[ed] daily tasks such as keeping [the testator's] home clean, ensuring that she ate regularly, and accompanying her to the store." *Id.* Furthermore, the testator solicited and received advice, including legal advice, regarding her decision to make the power of attorney in question and the will contestant at one point agreed that the alleged undue influencer should be the testator's agent under power of attorney. *Id.* Although here the circumstances surrounding the execution of the power of attorney and the advice that Testator obtained before doing so, if any, are unclear, the record does show that, as in *Fritts*, Testator had a caregiver, Respondent did not live with Testator around the date of the execution of the Will, Respondent visited Testator occasionally, and there is no evidence that Respondent provided for the daily needs of Testator (Trial Transcript, pp. 24-25, 27). Furthermore, the record shows that Petitioner also visited her mother, Petitioner was present during some of Respondent's visits with Testator, Testator discussed with one of her caregivers that she wanted to make a will, two of Testator's caregivers accompanied Testator to the attorney-scrivener's office, and Testator herself discussed Testator's desired testamentary disposition with the attorney-scrivener without Respondent having any part in the conversation (Trial Transcript, p. 18-19, 27-32). The lack of anything approaching total or near-total reliance by Testator on Respondent for care or advice, the fact that Respondent did not draft the Will or participate in Testator's discussion with the scrivener, and the lack of evidence that Testator had any discussion with Respondent concerning her testamentary desires before deciding to make a will and

bequeath her Estate to Marquis makes this case readily distinguishable from cases where courts have found that an alleged undue influencer who was the testator's agent under power of attorney had a confidential relationship with the testator. *See e.g., Estate of Lakatosh*, 441 Pa. Super. 133, 142–43, 656 A.2d 1378, 1383 (Pa. 1995) (finding confidential relationship where the alleged undue influencer, who was the testator's agent under power of attorney, "visited [the testator] at least once a day and sometimes as often as two or three times a day," the testator "had very little contact with other individuals," and the testator was "dependent upon [the alleged undue influencer's] assistance in her everyday life"); *In re Estate of Schumacher*, 2016 PA Super 17, 133 A.3d 45, 54–55 (Pa. Super. Ct. 2016), *reargument denied* (Mar. 30, 2016), *appeal denied*, 157 A.3d 477 (Pa. 2016) (finding confidential relationship where alleged undue influencer and another person were "legal representatives, business representatives, confidants, and advisors" insofar as, in addition to the alleged undue influencer becoming co-owner of the testator's bank account, he slept at the testator's house several times a week, "wrote a new will and trust" and gathered [his] friends as witness[es] to the will's signing"); *See also In re Estate of Bankovich*, 344 Pa. Super. 520, 524, 496 A.2d 1227, 1229–30 (Pa. Super. Ct. 1985); *In re Mampe*, 2007 PA Super 269, ¶ 24, 932 A.2d 954, 963 (Pa. Super. Ct. 2007); *Foster v. Schmitt*, 429 Pa. 102, 108, 239 A.2d 471, 474 (Pa. 1968); *Owens v. Mazzei*, 2004 PA Super 106, ¶ 23, 847 A.2d 700, 710–11 (Pa. Super. Ct. 2004). Therefore, as in *Fritts*, here the fact that Respondent had a power of attorney over one or more of Testator's bank accounts at one bank did not establish a confidential relationship between Testator and Respondent.

2. **Substantial Benefit**

There is "no hard and fast rule" as to how large a bequest must be to be considered a "substantial benefit." *In re Adams' Estate*, 220 Pa. 531, 534, 69 A. 989, 990 (Pa. 1908). While a bequest of 25% of an estate is likely too small to be considered a substantial benefit, a bequest of an entire estate definitely constitutes a substantial benefit. *See In re Estate of Simpson*, 407 Pa. Super. 1, 9–10, 595 A.2d 94, 98 (Pa. Super. Ct. 1991); *In re Estate of Smaling*, 2013 PA Super 294, 80 A.3d 485, 498 (Pa. Super. Ct. 2013). Furthermore, a person is not considered to derive a substantial benefit from a will merely by virtue of "appointment as executor with the right to receive the usual commissions." *Id.*; *In re Estate of LeVin,* 419 Pa. Super. 89, 101, 615 A.2d 38, 44 (Pa. Super. Ct. 1992).

As previously noted, the sole beneficiary under the Will is Marquis, who is Respondent's son and Testator's grandson. Petitioner argues that the fact that Respondent's son receives the entirety of the Testator's Estate constitutes a substantial benefit to Respondent and, in support of that position, cites to *In re Button's Estate* where the Pennsylvania Supreme Court determined that the two alleged undue

influencers, who were husband and wife, received a substantial benefit under the contested will even though their "three minor children would receive...practically the entire probate estate." *In re Button's Estate*, 459 Pa. 234, 240, 328 A.2d 480, 483-84 (Pa. 1974). Respondent argues that the bequest to Respondent's son does not constitute a substantial benefit to Respondent, citing to *In re Estate of Simpson*, where the Superior Court decided that "[t]here is no basis in law or logic for including the share bequeathed to [the son of the alleged undue influencer] in the total of [the alleged undue influencer's] bequest" without addressing *Button*. *In re Estate of Simpson*, 407 Pa. Super. 1, 10, 595 A.2d 94, 99 (Pa. Super. Ct. 1991). Since *Simpson* does not explicitly address how its holding that the bequest to the child of the alleged undue influencer should not be imputed to the alleged undue influencer is consistent with the holding in *Button* that the testator's devise of virtually all of her estate to the alleged undue influencers' children satisfied the substantial benefit element, it is helpful to analyze the few other Superior Court cases that address this issue.

In *In re Estate of Stout*, the contested will bequeathed $5,000.00 each to two organizations, 50% of the residue to testator's nephew, and 50% of the residue to testator's grandniece, who was the nephew's daughter, and appointed the alleged undue influencer, who was the father of the nephew beneficiary, as executor. *In re Estate of Stout*, 2000 PA Super 37, ¶ 5, 746 A.2d 645, 647 (Pa. Super. Ct. 2000). The Superior Court upheld the orphans' court's conclusion "that [the will contestant] did not establish that [the alleged undue influencer] received a substantial benefit under the [contested] will" and thus failed to establish a presumption of undue influence. *Id.* at 648. The Superior Court acknowledged that it is possible for an alleged undue influencer to receive "a substantial benefit ... via collateral benefits" without directly receiving a bequest under the disputed will, but noted that, in cases where courts have found substantial benefit via collateral benefits, "[t]he common element ... is that the executor/trustee had control, discretion, or authority to dispose of or act on behalf of the estate, rather than merely complying with the testator's directions" and thus "being named an executor is not enough to establish substantial benefit." *Id.* at 649. Since in *Stout* "specific bequests made by" the testator "completely dispose of the estate," the "collateral benefits" rule was inapplicable. *Id.* Furthermore, the Superior Court, citing to *Simpson* where "[w]e refused to consider the bequest to the son in the substantial benefit analysis because the proponent's son was also the grandson of the testator," noted that "where there is a blood relationship between the testator and the beneficiaries of her estate, that fact alone forms a sufficient, independent basis for the bequest." *Id.* (internal quotation marks omitted). Therefore, the Superior Court explained, since "both [beneficiaries] are [the testator's] blood relatives ... we refuse to consider the bequests made to them in our analysis of whether [the alleged undue influencer] received a substantial benefit under the will." However, in a parenthetical comparison citation

without further explanation, the Court acknowledges that, in *Button*, the Pennsylvania Supreme Court found "undue influence where confidants were not related to testator." *Id.*

In *In re Bosley* the Superior Court engaged in a more extensive discussion of the issue. There, the contested will appointed the alleged undue influencer, who was the testator's second cousin, as executor and bequeathed two parcels of real estate to the son of the alleged undue influencer, six acres of land to the testator's brother (the will contestant) and all other property to his three siblings. *In re Bosley*, 2011 PA Super 126, 26 A.3d 1104, 1106 (Pa. Super Ct. 2011). The Superior Court affirmed the orphans' court holding that the alleged undue influencer "did not receive a substantial benefit under the [contested] will" and thus the presumption of undue influence did not arise. *Id.* at 1107. On appeal to the Superior Court, appellant, relying on *Button*, "argue[d] that the court erred by declining to apply the 'collateral benefits' doctrine to impute [the alleged undue influencer's son's] benefits under the will to [the alleged undue influencer] because of their familial relationship as father and son." The Superior Court, in affirming the portion of the orphans' court decree pertaining to the will appeal, found the will contestant's "reliance on *Button* unavailing" because, in *Button*, "the Court did not address the issue of substantial benefit in any detail, other than to mention in passing that the minor children were to receive nearly the entire probate estate" and "the Court's analysis turned on the failure of the proponents to demonstrate the absence of undue influence by clear and convincing evidence." *Id.* at 1108. The Superior Court then reviewed its discussion of the collateral benefits doctrine in *Stout* and determined that, notwithstanding "boilerplate language granting to the executor the authority and powers necessary to effectively administer and distribute [the testator's] estate," the alleged undue influencer, "as executor, was not given significant latitude or discretion in distributing [the testator's] assets" because the testator "was specific in all of his devises and bequests, leaving no room for any exercise of discretion as to the identity of beneficiaries or the amount of their gifts" and the testator "created no ongoing trust under which his executor might maintain control of [the testator's] assets for any significant duration of time." *Id.* at 1110. Furthermore, the Superior Court recited its holding in *Simpson* that, "where an independent basis exists to explain a testator's bequest to a beneficiary ... the 'collateral benefits' rule [is] inapplicable." *Id.* However, unlike in *Stout* where the bulk of the testator's estate went to the testator's nephew and grandniece and *Simpson*, where the bequest in question was to the grandson of the testator, in *Bosley*, the bequest in question was to a second cousin once removed of the testator.[3] But despite the lack of a close blood relation between the son of the alleged

[3] Second cousins are not entitled to inherit intestate under Pennsylvania's intestate statutes, 20 Pa C.S. § 2102-2103, even if they are the closest living relatives of a decedent to survive the decedent.

undue influencer and the testator, their relationship was nonetheless an independent basis for the bequest in question because there was "testimony establishing that [the alleged undue influencer's son] had a familial relationship with the [testator] dating back to [his] childhood, when he would spend more time working with [the testator] on the family farm and [the testator] would pick him up from school." *Id.*

3. Weakened Intellect

As with substantial benefit, there is not "a bright-line test by which weakened intellect can be identified to a legal certainty." *Owens v. Mazzei*, 2004 PA Super 106, ¶ 13, 847 A.2d 700, 707 (Pa. Super. Ct. 2004) (citing *In re Estate of Glover*, 447 Pa. Super. 509, 517, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996)). In cases where Pennsylvania courts have found weakened intellect, it is usually marked by "persistent confusion, forgetfulness[,] and disorientation." *Id.*; *In re Estate of Schumacher*, 2016 PA Super 17, 133 A.3d 45, 52 (Pa. Super. Ct. 2016), *appeal denied*, 157 A.3d 477 (Pa. 2016) (quoting *In re Estate of Fritts*, 2006 PA Super 220, ¶ 15, 906 A.2d 601, 607 (Pa. Super. Ct. 2006)). *See also In re Estate of Glover*, 447 Pa. Super. 509, 517, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996) (observing that, "in cases where the appellate courts have found the requirement of weakened intellect satisfied, the testator/testatrix was in ill-health and suffering from confusion, forgetfulness[,] and disorientation"). However, "contradicted testimony of occasional confusion or lapses of memory" by the testator does not amount to "clear and convincing evidence of the weakened mental condition of" the testator. *In re Ziel's Estate*, 467 Pa. 531, 540, 542, 359 A.2d 728, 733-34 (Pa. 1976). Furthermore, evidence of physical illness or infirmity does not constitute evidence of weakened intellect. *In re Gold's Estate*, 408 Pa. 41, 52, 182 A.2d 707, 713 (Pa. 1962) (holding that "there is no evidence of a weakened intellect on the part of [testator] at the time she executed this will" because the evidence showed "only that decedent suffered various physical infirmities") (italics removed). Finally, although testamentary incapacity and weakened intellect both touch on the nature and extent of a testator's mental deficiencies, "[t]he weakened intellect necessary to establish undue influence need not amount to testamentary incapacity" and, since "undue influence is generally accomplished by gradual, progressive inculcation of a receptive mind," "the particular mental condition of the testator on the date he executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity. *In re Estate of Smaling*, 2013 Pa. Super. 294, 80 A.3d 485, 498 (Pa. Super. Ct. 2013) (citing *In re Clark's Estate*, 461 Pa. 52, 65, 334 A.2d 628, 634 (Pa. 1975)).

Petitioner contends in her brief that the following constitutes "ample evidence of the poor mental and physical condition of the [Testator] in her final days": Testator "did not recognize Petitioner"; the nurses who attended to Testator described her as

'confused' only days before the Will was executed"; and the physician who attended to Testator "indicated [that] the excruciating pain [Testator] was suffering was caused by metastasizing of her breast and uterine cancer throughout her body, necessitating massive doses of morphine" (Petitioner's Brief, p. 7). At trial, Petitioner presented the following testimony of the physical and mental condition of Testator: "during the last month or so of [Testator's] life" she "sometimes was not able to understand what we were saying to her because she was ... in a lot of pain"; "there were times that I would [visit Testator] and she wouldn't even know that I was there;" Testator was taking "many medications for the pain she was in"; Testator had uterine cancer that "spread throughout her body" and breast cancer; Testator thought the cancer "spread to her brain and other parts of her body"; Testator "fell a lot," including one incident where she "hit her head and broke the [toilet] seat"; Testator had a stroke in November 2015 whereafter Testator "became pretty much wheelchair-bound because of all of the falls"; Testator "had a mini stroke" in April 2015 that "slowed her down tremendously" to the point where "she couldn't move about anymore"; in the weeks before Testator's death, Testator's mental condition was "deteriorating" and "she just wasn't there anymore" insofar as "at times, you would talk to her and ... in my opinion, she wouldn't understand what I was saying to her" (Trial Transcript, pp. 20-25). Petitioner admitted that she had no idea what Testator's mental condition was on June 9, 2016, the date that the Will was executed (Trial Transcript, p. 26).

Respondent's testimony relevant to Testator's physical and mental condition, summarized as follows, pertains to June 9, 2016: on June 9, 2016, Respondent accompanied Testator to the office of White and Williams LLP for the preparation of the Will; Testator "was talking to us all the way down town," including saying "Ernestine, we're downtown now, aren't we?"; Testator "spoke directly to her attorneys" regarding the Will while Respondent "couldn't say a word because they told me [Testator] has to speak in her own tongue to them"; Testator was "able to talk to her attorney" and understood "the instructions that were told to her by the attorney"; Testator was "[c]lear and lucid" that day (Trial Transcript, pp. 31-32, 41).

After the Court heard testimony at trial, counsel presented argument to the Court. Counsel for Petitioner, John S. DiGiorgio, Esquire, drew the Court's attention to three pages of the medical records admitted into evidence as P-1, which consist of a 30 page "selection of records pertaining to the condition of" Testator. (Trial Transcript, p. 43). Mr. DiGiorgio first noted that page 303 of 768, titled "Discharge Summary" for Testator's hospital stay from 05/25/2016 to 06/06/2016, states that Testator's "principal diagnosis" was "abdominal pain, likely secondary to metastatic endometrial carcinoma" and that Testator "presented to the Emergency Room complaining of diffuse abdominal pain" that "radiated to the back and was exacerbated with movement." Mr. DiGiorgio next directed the Court page 576 of 768, which is titled "Assessment – Neurological"

and contains entries by three different Registered Nurses ("RNs") for 05/28/2016 and entries by two other individuals (whose titles are not present) for 05/27/2016. One of the two other individuals with unknown credentials described Testator's "level of consciousness" as "lethargic," her "thought process" as "confused" and states that she gave "slow responses" and "limited verbal answers" and two of the RNs described Testator's orientation as "not oriented to time." However, as the Court noted, all three RNs who provided an assessment on that page described Testator's "thought process" as "coherent," her "attention span" as "appropriately attentive," and her "speech" as "clear." Furthermore, the two other individuals described Testator's orientation" as "identifies self" and one of them describes Testator's "level of consciousness" as "quiet alert." Mr. DiGiorgio then directed the Court to page 569 of 768 which is titled "Assessment – Neurological" and contains entries by three RNs (including one of the three RNs who made entries on page 576 of 768) for 06/05/2016 and 06/06/2016. As with page 576 of 768, the descriptions on this page are vague, difficult to interpret, and somewhat contradictory; one of the RNs describes Testator's "attention span" as "easily distracted"; two of the RNs describe Testator's "speech" as "clear"; at least one of the RNs describes Testator's "orientation" as "identifies self, not oriented to place, not oriented to situation, [and] not oriented to time"; and at least one of the RNs describes Testator as "fully aware of self/surroundings."

The medical records and Petitioner's testimony are insufficient to prove that Testator was suffering from a weakened intellect. The evidence that pertains to Testator's physical condition is largely irrelevant to her mental state. The evidence that pertains to her mental state is vague and missing important details insofar as the medical records do not describe Testator's behavior that demonstrated that she was confused or disoriented at times and Petitioner's testimony does not describe the circumstances under which Testator sometimes failed to understand what was said to her or what exactly she failed to understand.

Evidence that, at the time around the execution of the Will, Testator had a stroke and a mini-stroke, was wheelchair-bound, suffering from "excruciating pain" related to various physical ailments, including two types of cancer, and taking "many medications for the pain that she was in" is largely irrelevant to determining whether Testator had a weakened intellect. *In re King's Estate*, 369 Pa. 523, 528, 87 A.2d 469, 472 (Pa. 1952). In *In re King's Estate*, the testator suffered from Multiple Sclerosis, which "deprived [her] of much of the use of her hands," and a "throat affliction" that "distorted her speech to the point often of unintelligibility" and, about two years before the testator executed her will, she "fell and sustained injuries [that] grievously disabled her," resulting in damage to the "[n]erves of [her] spinal column [that] prevent[ed] her from assuming an erect posture" and "confined [her] to bed or chair" *Id.* at 471. These assorted "afflictions progressively enfeebled her and subjected her to great pain and

suffering, and she wept considerably." *Id.* Notwithstanding such "physical pain and spiritual agony" and the fact that the testator's severe "bodily infirmities prevented her from attending to her business affairs," the Pennsylvania Supreme Court held that such evidence "in no way" proved that the testator had weakened intellect. *Id.* at 472. Just like the testator in *King*, here Testator had multiple physical ailments and, just as the testator in *King* was confined to a bed or chair due to nerve damage from a fall, Testator was "pretty much wheelchair-bound because of all of [her] falls" (Trial Transcript, p. 23). Actually, the testator in *King* was more physically debilitated than the evidence here, even if true, suggests that Testator was insofar as the testator in *King* could not even assume an erect posture or speak intelligently whereas there is no evidence in this case that Testator's physical infirmities were that extreme. Therefore, just as in *King* the evidence of physical pain and infirmity did not show weakened intellect, here too the evidence of Testator's physical pain and infirmity, even if true, does not show weakened intellect. *See also In re Lauer's Estate*, 351 Pa. 438, 440–41, 41 A.2d 552, 553 (1945) (holding that "[p]hysical weakness and the fact that [the testator] was a sick woman" did not constitute evidence of weakened intellect). Just as in *In re Estate of Glover*, the fact that the testator "suffered a stroke ... [that] left her confined to a wheelchair" before executing her will did not establish weakened intellect, here Petitioner's testimony that Testator had a stroke and then a mini-stroke that made it difficult for her "get out of the house" and "move about," even if true, does not establish weakened intellect. *See In re Estate of Glover*, 447 Pa. Super. 509, 517, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996).

Although unlike in *King*, where "no one questioned the clarity and the direction of [the testator's] mind," *King*, 87 A.2d at 472, and unlike in *Glover*, where the will contestants "failed to offer any evidence that [the testator] suffered from spells of confusion, forgetfulness or disorientation," *Glover*, 669 A.2d at 1015, here Petitioner does question the clarity and direction of Testator's mind and proffered her own testimony and medical records that constitute some evidence that Testator suffered from occasional confusion, forgetfulness, or disorientation. However, Petitioner's proffered evidence of Testator's mental condition does not prove weakened intellect insofar as it does not establish that Testator suffered from "persistent confusion, forgetfulness[,] and disorientation." *See In re Estate of Nalaschi*, 2014 PA Super 73, 90 A.3d 8, 15 (Pa. Super. Ct. 2014) (quoting *In re Estate of Fritts*, 2006 PA Super 220, ¶ 15, 906 A.2d 601, 607 (2006)). Other than vague, contradictory, and unclear portions of Testator's medical records, Petitioner's own testimony, which was also vague, was the only other evidence of Testator's alleged weakened intellect that Petitioner presented. Petitioner did not state how often Testator failed to understand something someone said to her or failed to recognize Petitioner during some of Petitioner's visits, which is important because generally "confusion, forgetfulness[,] and disorientation" must be "persistent"

to establish weakened intellect. *See Owens*, 847 A.2d at 707. Petitioner also did not provide any examples of, or details about, how Testator sometimes failed to understand something someone said to her or failed to recognize Petitioner during some of Petitioner's visits that would have given the Court insight into the nature of what Testator did not understand and what Testator's state was when she failed to recognize Petitioner. That Testator may have not understood something Petitioner or someone else said to her a few times does not necessarily establish weakened intellect. *See In re Geist's Estate*, 325 Pa. 401, 409-10, 191 A. 29, 32–33 (Pa. 1937) (holding that weakened intellect was not proven even though a witness who saw the testator three times in the week before the execution of the will testified that, on one occasion, the testator was "unable to hear or understand what the witness was saying" and another witness testified that the testator "was too sick to talk" at least once during that same time); *In re Devereux's Estate*, 18 Pa. D. & C. 289, 291-93, 300 (Pa. Orph. Ct. 1933) (declining to find weakened intellect even though there was testimony that the testator was "confused," "could not form a sentence," had several delusions, "could never hold a conversation with anybody," and "had a poor memory" and the wife of the will contestant testified that the testator "could not hold a conversation with her," did not respond to her questions, and could not "understand what was said"). For these reasons alone, Petitioner failed to prove weakened intellect. It is also worth noting that Petitioner admitted that she did not see Testator the day that the Will was executed and thus could not testify to Testator's mental condition on that day, which is important because even though evidence of a testator's intellect for a reasonable time before the execution of a will is relevant to the weakened intellect analysis, weakened intellect must exist at the time of the execution of the will. *See In re Fickert's Estate*, 461 Pa. 653, 657, 337 A.2d 592, 594 (Pa. 1975) (citing *In re Clark's Estate*, 461 Pa. 52, 61, 334 A.2d 628, 632 (Pa. 1975)) (holding that, to raise a presumption of undue influence, the will contestant must prove that "when the will was executed the testator was of weakened intellect").

In *In re Ziel's Estate*, the Pennsylvania Supreme Court held that "contradicted testimony of occasional confusion or lapses of memory…is insufficient to demonstrate clearly and convincingly" either weakened intellect or testamentary incapacity. 467 Pa. 531, 540, 359 A.2d 728, 733 (Pa. 1976). There, a doctor who had examined the testator on several occasions testified that, on the last occasion that he examined the testator, roughly 16 months before the date of the execution of the challenged will, the testator "was confused but not totally disoriented." *Id.* at 732. Another doctor who saw the testator multiple times from seven months before the execution of the will to 14 months after the execution of the will, which was also 3 months after the execution of the last codicil thereto, testified "that one could tell on these occasions that [the testator] was 'not himself'" and that, during some visits, the testator "was uncooperative and

disoriented" and, during other visits, the testator was "'a little more responsive and asked me how things were going, and how he was doing.'" *Id.* The will contestant's wife, who had seen the testator twelve months before the execution of the will and 13 months after the execution of the will, testified that the testator "had not recognized her" on those occasions and the will contestant, who "saw [the testator] only infrequently in the relevant time period," testified that the testator "failed to recognize him also on a number of occasions." *Id.* However, the will proponents testified that the testator had recognized the will contestant and his wife on those occasions and that the testator "was alert and normal on the respective dates of execution of the will and the two codicils." *Id.* The will contestant testified that the testator's "mental condition began its downsizing [six years before the will was executed] and that by [two years before the will was executed] he was completely incapable of handling his own affairs." *Id.* A neighbor of the testator testified that the testator "appeared a little confused at times," but "was generally mentally alert." *Id.* at 733 n. 5. The chief of the local police force testified that one of the alleged undue influencers "requested that the police escort [the testator] back home whenever he wandered off on a walk" and that "it seemed that the [testator] was a little confused" despite the fact that "he was always dressed neat and sharp." *Id.* A staff doctor at the hospital where the testator had worked as a doctor testified that the testator "had been moved to honorary status because he was no longer able to handle his caseload." *Id.* Here, the evidence of weakened intellect is at least as weak and contradictory as it was in *Ziel*. Admittedly, in this case the scrivener of the Will did not testify while, in *Ziel*, the scrivener of the will and codicils "testified unequivocally that [the testator] was mentally competent at the times the documents were executed and, indeed, was active in their preparation." However, that is balanced by the fact that, unlike here where Petitioner provided no testimony from medical personnel and instead provided vague, unclear, and terse medical records with entries authored by five RNs and two individuals with unknown credentials, the will contestant in *Ziel* presented testimony from at least two doctors who had examined the testator multiple times and, unlike here where the only substantive testimony Petitioner presented was Petitioner's testimony, in *Ziel* a disinterested police chief and a disinterested neighbor both described the testator as "a little confused" and the police chief testified to the testator having "wandered off" and having been escorted back to his house by the police. *See id.* After accounting for these differences, which seem to roughly balance each other out, this case and *Ziel* are analogous. Just as in *Ziel*, the doctors' testimony that described the testator at different times as "confused," "not himself," "confused but not totally disoriented," "a little more responsive," "uncooperative and disoriented," and "quite cooperative" did not clearly establish that the testator had a weakened intellect, here the medical records' terse and unclear descriptions of Testator's mental condition, mood, behavior, and speech by different

RNs at different times as "coherent," "confused," "appropriate," "clear," "appropriately attentive," "easily districted," "lethargic," "quiet alert," "age appropriate, calm," "identifies self, not oriented to place, not oriented to situation, not oriented to time," and "fully aware of self/surroundings" do not clearly establish that Testator had a weakened intellect. *See id* at 732. Just as in *Ziel*, the will contestant's testimony that the testator "failed to recognize him also on a number of occasions," "was completely incapable of handling his own affairs," and had a mental condition that had been "downsizing" for years before the will was executed and the testimony of other witnesses from the testator's community that the testator was "a little confused," some of which was contradicted by the testimony of the will proponents, did not clearly establish that the testator had a weakened intellect, here Petitioner's testimony that Testator had a "deteriorating" mental condition, "just wasn't there anymore," and "wouldn't understand what I was saying to her," which is tempered by Respondent's testimony that, on the day the will was executed, Testator was "[c]lear and lucid," knew when she and Respondent arrived downtown, and was able to speak to and "understand the instructions" of the attorney-scrivener at White and Williams LLP, does not clearly establish that Testator had a weakened intellect. *See id. See also In re Estate of Nalaschi*, 2014 PA Super 73, 90 A.3d 8, 14 (Pa. Super. Ct. 2014); *In re Estate of Rosato*, No. 0604-1431, 2007 WL 3775923, at *7 (Pa. Orph. Ct. June 25, 2007). *Cf. In re Estate of Smaling*, 2013 PA Super 294, 80 A.3d 485, 498 (Pa. Super. Ct. 2013) (affirming finding of weakened intellect where the testator's doctor testified that the testator "had complained of memory loss" as early as three years before he executed the disputed will and, by the time of the execution, the testator "was suffering from 'late stage dementia'" and the testator's "[f]amily members testified ... that [the testator] had difficulty recognizing them as early as" two years before the execution); *In re Mampe*, 2007 PA Super 269, ¶ 19, 932 A.2d 954, 961–62 (Pa. Super. Ct. 2007) (affirming finding of weakened intellect where the testator, who had been diagnosed with Alzheimer's dementia eight months before the execution of the disputed will, "was unable to punctuate her sentences properly or spell words correctly [and] would end her sentences abruptly and incorrectly"; "would simply hit the ball in any direction" when playing miniature golf; "would appear in public in an untidy and disheveled manner"; "could not locate her room key unless she hung it around her neck, and "would send duplicate birthday cards and monetary gifts").

B. **Testamentary Capacity**

A testator has testamentary capacity if, at the time of the will execution, "the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease." *Estate of Reichel*, 484 Pa. 610, 614, 400 A.2d 1268, 1270

(Pa. 1979) (citing *Brantlinger Will*, 418 Pa. 236, 210 A.2d 246 (Pa. 1965)). "Less capacity is needed to make a valid will than is necessary to transact ordinary business." *In re Hastings' Estate*, 479 Pa. 122, 129, 387 A.2d 865, 868 (Pa. 1978) (citations omitted). A testator does not necessarily lack testamentary capacity due to "old age, ... untidy habits, partial loss of memory, inability to recognize acquaintances, and[/or] incoherent speech." *Id.* (quoting *Aggas v. Munnell.* 302 Pa. 78, 85, 152 A. 840, 843 (Pa. 1930)); see also *In re Kuzma's Estate*, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (Pa. 1979) (noting that "old age, sickness, distress or debility of body neither proves nor raises a presumption of incapacity"). Furthermore, "testamentary capacity is to be determined by the condition of the testat[or] at the very time she executes the will," although "evidence of incapacity for a reasonable time before and after the making of a will is admissible as an indication of lack of capacity on the day the will is executed." *In re Hastings' Estate*, 479 Pa. 122, 127, 387 A.2d 865, 867 (Pa. 1978) (citations omitted). "The burden of proving testamentary capacity is initially with the proponent," but "a presumption of testamentary capacity arises upon proof of execution by two subscribing witnesses" and "the burden of proof as to incapacity shifts to the contestants to overcome the presumption by clear, strong and compelling evidence." *In re Kuzma's Estate*, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (Pa. 1979) (citations omitted).

Here, it is undisputed that the Will was subscribed to by two witnesses as evidenced by the signatures on the second page of the Will and the self-proving affidavit on the third page that is substantially in the form set forth in 20 Pa.C.S. 3132.1(b) (Petition for Citation, ¶ 2, Ex. A; Answer ¶ 2). Accordingly, Petitioner has the burden of proving by clear and convincing evidence that, at the time Testator executed the Will, she lacked testamentary capacity. Petitioner fell far short of meeting this burden for largely the same reasons that she failed to prove weakened intellect.[4]

Petitioner cites to two cases in her brief for the proposition that "[i]n a case where the only testimony of the condition of the [testator] at the time of execution (in this case the contradictory testimony of Respondent) the lack of any testimony from the scrivener is fatal [sic]." *In re Estate of Stafford*, 25 Fiduc. Rep. 2d 265, No. 530 AP 2002, 2005 WL 352530 (Pa. Com. Pl. Jan. 13, 2005); *In re Wells Will*, 14 Fiduc. Rep. 2d 383 (Pa. Com. Pl. October 6, 1994). However, these cases are easily distinguishable from this matter in such ways that they do not support the aforesaid proposition or the Petitioner's position in general. In *Wells*, the court stated that "[f]ailure to call a ... witness present at execution is a material and damaging circumstance to be considered by the Court particularly when that person is a nonrelative with no bias toward the

[4] Notably, the *Ziel* Court's holding that the will contestant failed to prove either testamentary incapacity or weakened intellect were based on the same analysis. *In re Ziel's Estate*, 467 Pa. 531, 542, 359 A.2d 728, at 734 (Pa. 1976).

proponent." *In re Wells Will*, 14 Fiduc. Rep. 2d 383, 389 (Pa. Com. Pl. October 6, 1994) (citations omitted). The Court agrees that the failure of Respondent to call the attorney-scrivener to testify weighs against Respondent, but that does not shift the burden of proof on the issue of testamentary capacity from Respondent to Petitioner. In *Wells*, the Court credited testimony from at least five disinterested witnesses, including a doctor and two long-time friends of Testator, to find, among other facts, that at the time the will was executed, the decedent had just come home from the emergency room, was unable to swallow, the victim of seizures and disturbed neurological function, ... under heavy analgesics, unable to breathe without oxygen or to speak more than monosyllables, calling all women 'Arlene,' disoriented as to time, ... [and] talking nonsense." *Id.* at 383 and 390. It was in the face of this evidence, which is in sharp contrast with the dearth of evidence beyond interested testimony and largely unhelpful medical records in this case, that the will proponent's failure to call "the unbiased subscribing witness" harmed the will proponent's position and precluded her from overcoming the "strong, clear, compelling, and convincing evidence of [the] contestant" with "credible, countervailing testimony." *Id.* at 390-91. In *Stafford*, the court found that the testator suffered from weakened intellect and that the will contestant proved all of the elements necessary to establish a rebuttable presumption of undue influence. *In re Estate of Stafford*, 25 Fiduc. Rep. 2d 265, No. 530 AP 2002, 2005 WL 352530 (Pa. Com. Pl. Jan. 13, 2005). *Id.* at 276. The court noted that the will proponent's failure to present "any testimony by the scrivener is ... a serious omission in [the will proponent's] effort to rebut the presumption of undue influence." *Id.* But that case is readily distinguishable from this case for numerous reasons. First, the court, explaining that the evidence as it pertained to testamentary capacity "was not as clear cut as the evidence of [the testator's] weakened intellect," declined to decide whether the will contestant had proven testamentary incapacity because "it is not necessary to dwell on [the testator's] testamentary capacity where the evidence of weakened intellect and resulting undue influence is so compelling." *Id.* at 278-79. More importantly there, unlike here where Petitioner presented only her own testimony, the will contestant presented the testimony of seven witnesses, including two doctors (the testator's treating physician in the hospital on the date of the will execution and psychiatrist who qualified as an expert witness), a nurse who witnessed the execution of the will, and a notary. *Id.* at 268. The testator's physician testified that she was "noncommunicative" on the day of the execution and had attempted at various points to pull tubes out of her and opined that "it would be hard for me to believe that she was of sound mind" when she executed the will and the expert opined that the testator "was suffering from weakened intellect" at the time of the execution. *Id.* at 273-74. As with *Wells*, the quality and nature of the testimony presented by the will contestant in *Stafford* is far

superior to the testimony that Petitioner presented in this case and thus those cases are too distinguishable to help Petitioner's position.

Here, the only evidence concerning Testator's mental state on the day and at the time of the execution of the Will is Respondent's testimony that Testator was "clear and lucid" and discussed her testamentary wishes with the attorney-scrivener without Respondent's input. *See Kuzma*, 408 A.2d at 1371; *Smaling*, 80 A.3d at 498. In fact, the Court could not find a reported Pennsylvania appellate case where a will contestant who failed to prove the weakened intellect element of a prima facie showing of undue influence successfully proved testamentary incapacity.

As with weakened intellect, the physical condition of a testator is largely irrelevant and thus the evidence of Testator's physical infirmities around the time of the execution of the Will is largely irrelevant to the question of whether Petitioner proved that Testator lacked testamentary capacity when she executed the Will. *See In re Rupert's Estate*, 349 Pa. 58, 58, 36 A.2d 500, 501 (Pa. 1944). In fact, there have been numerous cases where will contestants failed to prove testamentary incapacity despite the fact that the testator in those cases seemingly had more severe physical infirmities or pain than Testator. *See e.g.*, *In re King's Estate*, 369 Pa. 523, 525, 87 A.2d 469, 471 (Pa. 1952) (affirming orphans' court holding that testamentary incapacity not proven where, by the time the testator executed the will, she was "deprived of much of the use of her hands" and had a "throat affliction" that "distorted her speech to the point often of unintelligibility" and injuries from a fall that "grievously disabled her" and damaged "[n]erves of [her] spinal column [that] prevent[ed] her from assuming an erect posture" and "confined [her] to bed or chair"); *In re Kuzma's Estate*, 487 Pa. 91, 94, 408 A.2d 1369, 1370 (Pa. 1979) (affirming orphans' court holding that testamentary incapacity not proven where, during the week of the signing of the will, the testator was "described as critically ill" after being "admitted to the hospital" for "intense pain in the abdomen, … nausea[,] … fever[,] … jaundice, hernia, and an enlarged liver," among other ailments that required surgery the day after the will execution).

The portions of Petitioner's testimony and Testator's medical records that pertain to the mental condition of Testator indicate, at worst, that Testator was, on occasion, "confused" and disoriented a few days before the execution of the Will. Petitioner testified that, "during the last month or so of [Testator's] life," Testator "*sometimes* was not able to understand what we were saying to her"; "*there were times* where … she wouldn't even know I was there"; and "*at times*, you would talk to her and she wouldn't understand" (Trial Transcript, pp. 20-21, 24) (emphasis added). Petitioner did not provide examples of what types of things Testator did not understand or the circumstances surrounding those incidents. Petitioner's testimony also indicates that she did not see or speak with Testator on June 9, 2016, the day that the Will was executed, and Petitioner admitted it was fair to say that she "ha[d] no idea what [Testator's]

mental condition was on" June 9, 2016 (Trial Transcript, p. 25). Thus, Petitioner's testimony is vague, lacks detail, does not pertain to the time—or even the day—when the Will was executed, and indicates that Testator's confusion and failure to understand only occurred sometimes. The relevant portion of the medical records, which were set forth exhaustively in Section II.A.3, suffer the same weaknesses insofar as they are vague, lack detail, do not pertain to the day of the Will execution, and indicate that Testator was only sometimes confused and disoriented. In fact, the medical records also affirmatively indicate that sometimes Testator was "coherent," "clear," "appropriately attentive," and "fully aware of self/surroundings." The only evidence presented about Testator's mental condition on the day of the execution of the Will is Respondent's testimony, which indicates that Testator was "clear and lucid" and "spoke directly to her attorneys" regarding her testamentary wishes without any help or input from Respondent (Trial Transcript, p. 31-32).

Since "it is the testator's testamentary capacity at the time the will was executed which controls," Respondent's testimony that Testator was clear and lucid is much more probative than Petitioner's testimony as to the issue of testamentary capacity. *See In re Masciantonio's Estate*, 392 Pa. 362, 379, 141 A.2d 362, 370 (Pa. 1958); *Williams v. McCarroll*, 374 Pa. 281, 293, 97 A.2d 14, 19-20 (Pa. 1953); *In re Estate of Smaling*, 2013 PA Super 294, 80 A.3d 485, 496–97 (Pa. Super. Ct. 2013). The evidence that Testator was sometimes—through not always—confused, disoriented, or unable to understand what was said to her a few days or weeks before the execution does not prove that Testator lacked testamentary capacity at the time of execution. *See In re Rupert's Estate*, 349 Pa. 58, 58, 36 A.2d 500, 501 (Pa. 1944) (affirming orphans' court holding that will contestant failed to prove testamentary incapacity because, although the will contestants presented testimony that "the testator did not know where she was, or thought herself at home[,] [and used] salacious and blasphemous conversation at times, ... [a]ll of this might be true and still a verdict might not be sustained against the will" and "one even suffering any delusion, if in a lucid interval, may at that time make a competent will"); *In re Higbee's Estate*, 365 Pa. 381, 383–84, 75 A.2d 599, 600 (Pa. 1950) (affirming orphans' court holding that the will contestants failed to prove testamentary incapacity where the will proponent presented testimony from three witnesses to the will execution that the testator had testamentary capacity even though the will contestants "proved that the [testator] was old, forgetful, at times confused[,] very eccentric[,] ... lived in poverty and filth[,] [had] rages and tantrums[,] ... locked herself in her house[,] ... [and] refused medical attention when she should have obtained it"). Just as in *In re Morrish's Estate*, where the testator executed the will less than three months before her death, the "testimony that testatrix had been failing for some time prior to her death, physically as well as mentally, with signs of senility" and "at times she was forgetful, timid, and mentally confused" was insufficient to prove

testamentary capacity and "on the contrary it has been established that testatrix was mentally capable" because testator "sold her house and knew the sale price," engaged in "intelligent" conversations, and wrote "coherent" letters around the time that she executed the will, here the testimony that Testator was at times confused, disoriented, or unable to understand what was said to her is insufficient to prove testamentary incapacity and Respondent's testimony that Testator was "clear and lucid" at the time of the execution and spoke on her own behalf with the attorney-scrivener concerning her testamentary desires undermines any faint suggestion of testamentary incapacity that Petitioner's evidence presented. *See also In re Hastings' Estate*, 479 Pa. 122, 129–30, 387 A.2d 865, 868–69 (Pa. 1978) (holding that there "is insufficient evidence of testamentary incapacity" where a doctor testified that the testator "evidenced memory loss and mental confusion," the will contestant testified that the testator was "forgetful and unable to handle her financial affairs," and the scrivener and his secretary testified that, at the time of execution, the testator "knew who her relatives and friends were and was aware of the assets of her estate").

III. Conclusion

For the reasons stated above, the only evidence that Petitioner presented—her own testimony and portions of medical records pertaining to the days and weeks before the execution of the Will—failed to prove a prima facie case of undue influence or testamentary incapacity.

For the reasons set forth above in this Opinion, the appeal from the Register of Wills' decision to probate the Will is DENIED.

BY THE COURT:

JOHN W. HERRON, J.

Dated this 30th day of August 2017

John S. DiGiorgio, Esquire
Thomas F. Grady, Esquire