COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Ronald R. Fluellen, Appeal from the Register of Wills
O.C. No. 540 AP of 2018
Control No. 185343

OPINION SUR APPEAL

Introduction

LaCretia Fluellen ("Appellant"), daughter of Ronald R. Fluellen ("Decedent"), appeals the Court's Decree dated October 31, 2018, dismissing her appeal from the Register of Wills. The proponent of the will met their initial burden of proof by introducing Decedent's will dated October 9, 2017, which was admitted to probate by the Philadelphia Register of Wills on February 21, 2018. Decedent signed the will in the presence of two witnesses who also signed. The will is supported by a testator's acknowledgment and affidavit of witnesses—both of which are notarized. Proper execution of the will established, the burden shifted to Appellant; however, Appellant failed to present clear and convincing evidence regarding Decedent's lack of testamentary capacity and undue influence. For this reason, the Court granted the proponent's motion for a non-suit.

I. Background

On September 6, 2017, Ronald R. Fluellen, resident of Philadelphia, executed a will leaving his entire estate to Appellant and named Appellant executor of his estate. Hr'g Tr. 59:10–14, 60:11–15. On September 18, 2017, Decedent met with Saul Langsam, Esquire, the scrivener of the September 6 will. Without objection, Mr. Langsam testified to this meeting with Decedent. Decedent suspected Appellant of having withdrawn $8,000.00 from his bank account without his knowledge or consent. *Id.* 62:18–25. Decedent asked Mr. Langsam to send a letter on his behalf to Appellant informing her the bank account was now closed and to return his debit

card immediately.[1] Decedent also expressed his desire to change his will, removing Appellant as executor and sole beneficiary of his estate. Hr'g Tr. 63:6–11. Decedent wanted his brother, Robert Fluellen ("Respondent"), to serve as executor and his granddaughter, Shawna Overby-Blackston, to be the sole beneficiary of his estate. *Id.* Mr. Langsam made the requested changes.

Not long after this, Decedent entered the hospital. His prognosis was bleak. Cancer had metastasized throughout Decedent's body, including his brain.

On October 9, 2018, unable to return to Mr. Langsam's office to execute the second will, Decedent called Mr. Langsam and authorized him to release the will to his granddaughter so she could bring it to the hospital. *Id.* 75:23–76:3. Mr. Langsam complied, and Ms. Overby-Blackston delivered the revised will to Decedent in the hospital where it was signed, witnessed, and notarized. Decedent died less than a month later on October 29, 2017.

On February 21, 2018, the Philadelphia Register of Wills admitted to probate Decedent's will dated October 9, 2017. Letters Testamentary were granted to Respondent who was named executor in Article Fifth of the will. As mentioned above, this probated will was signed by Decedent as well as by two witnesses. This will was also supported by a testator's acknowledgment and an affidavit of witnesses. Both the acknowledgment and affidavit were notarized and signed by a notary public.

On April 24, 2018, Appellant appealed the decree of the Register of Wills asserting Decedent's will was invalid on four grounds. First, Appellant claimed the will had been procured through fraud and forgery. Second, Appellant asserted Decedent lacked testamentary capacity to execute the will. Third, Appellant claimed the will was obtained through the undue

[1] Appellant addresses this accusation for the first time on page four of her 1925(b) statement where she asserts her "trusting bond" with Decedent as his only daughter. Appellant's states this "bond" gave her the "responsibility to transfer assets of the Estate to her siblings that were distant in their relationship with their father."

influence of two people: Respondent and Ms. Overby-Blackston. Lastly, Appellant claimed mistakes by the Register of Wills.

On May 7, 2018, the Court issued a decree dismissing Appellant's allegations of fraud and forgery as they were pled with insufficient particularity. The remaining issues were allowed to proceed. Appellant failed to file a timely response to the dismissal of the fraud and forgery claims.

On June 22, 2018, Respondent filed an answer with new matter. On July 16, 2018, Appellant filed a "Petition for Citation of Declaratory Judgment." Then, in rapid succession, Appellant filed an answer to new matter, an addendum to the petition for declaratory judgment, and an amended petition for declaratory judgment. Then on August 15, 2018, Appellant filed an addendum to her amended petition.

Meanwhile, on July 25, 2018, Respondent had filed preliminary objections to the petition for declaratory judgment, arguing Appellant's petition for declaratory judgment violated a rule of court—which it did. The Pennsylvania Orphans' Court Rules limit the types of pleadings that may be filed after the initial petition, and a petition for declaratory judgment is not one of them. *See* Pa. O.C. Rule 3.6. Appellant did not file a response to these preliminary objections.

On September 10, 2018, the Court issued two decrees. The first decree sustained the preliminary objections and dismissed Appellant's petition for declaratory judgment. The second decree reiterated the dismissal of the allegations of fraud and forgery for lack of particularity and also dismissed the allegation of mistakes by the Register of Wills, citing the *de novo* standard of review for appeals from the Register. Both decrees scheduled a hearing for October 31, 2018, on the remaining issues of lack of testamentary capacity and undue influence. Both decrees advised Appellant to obtain legal counsel to assist in the presentation of her will contest so as to

thoroughly and effectively litigate the remaining issues and present the requisite evidence to support her allegations.

On October 11, 2018, the Court denied Appellant's request for a continuance. Appellant offered the Court a litany of reasons it should grant the continuance including her inability to secure the assistance of counsel. Nonetheless, in light of opposing counsel's objection and the ample time Appellant had to retain an attorney, the Court denied the request. It should be noted Petitioner filed her Petition for Citation on April 24, 2018, and thus had ample time to retain counsel.

The hearing went ahead as scheduled on October 31, 2018. Appellant appeared at the hearing without counsel. During the hearing, counsel for Respondent introduced the probated will, establishing proper execution. Hr'g Tr. 5:23–6:23.

The burden of proof then shifted from proponent to contestant, and Appellant called four witnesses to testify to Decedent's lack of testamentary capacity and undue influence—none of whom supported Appellant's assertion of either lack of capacity or undue influence.

The first witness, Martia Fluellen, neither visited Decedent the day he executed the will nor was she in the room when the will was executed. *Id* 16:13–19.

The second witness, Ms. Overby-Blackston, a resident of Maryland, would occasionally visit Decedent on weekends. During these visits, she helped him run errands. *Id.* 20:1–16, 37:17–18. Decedent planned to move in with her following his release from the hospital. *Id.* 25:20. However, Ms. Overby-Blackston never had access to Decedent's finances and was never his principal caregiver. *Id.* 36:15–18, 37:1–5. When asked if she ever thought Decedent's mind was impaired by his cancer, even after it had spread to his brain, Ms. Overby-Blackston replied:

"Never." Hr'g Tr. 22:23–23:1. On cross-examination, Ms. Overby-Blackston again stated her impression of Decedent's mental state was fine until his death. *Id.* 37:24.

Appellant then attempted to introduce certain medical records into evidence. *Id.* 40:5–41:2. Counsel for Respondent objected to the introduction of the documents, arguing they were inadmissible hearsay as no custodian of records was present at the hearing to properly authenticate them. *Id.* 41:3–17. The Court sustained the objection. *Id.* 41:18.

Appellant proceeded to call her third witness, Ronald R. Fluellen, Jr., Decedent's son. Mr. Fluellen described his relationship with his father as "very, very distant" and saw Decedent only a few times in the weeks prior to his death. Hr'g Tr. 43:22–23, 44:16–17. Further, Mr. Fluellen was not in the room with Decedent when the probated will was executed, *id.* 56:14–16, and, more importantly, he did not testify that his father lacked testamentary capacity.

The fourth, and final witness, was Mr. Langsam, scrivener of the probated will. While Mr. Langsam was not at the hospital for the execution of the probated will, Mr. Langsam had met with Decedent several times in the weeks before his death. Time and again, Mr. Langsam vouched for Decedent's demeanor and mental state during these encounters. *See id.* 58:21–25 ("I have to have a certain comfort level that the person is aware of what they're instructing me to do and they mean what they're telling me to do. There was nothing about [Decedent's] demeanor that caused me any concern."); Hr'g Tr. 59:24–25 ("There was nothing about [Decedent's] demeanor that caused me concern."); *id.* 64:4–5 ("[Decedent's] demeanor was very focused and very matter-of-fact and to the point."); *id.* 72:3 ("[Decedent] was very clear."); *id.* 72:13–17 ("Very focused. There was nothing about [decadent's] demeanor that cause me to question, and the one thought that did enter my mind was I am looking at somebody who has been diagnosed with brain cancer and just does not look the part or act the part."); *id.* 78:9–14 ("[Decedent] was

always focused. He was never—never gave me a sense that he was confused. He was rather emphatic, and when I saw him or even when I spoke with him, I was always left impressed with the fact that here is somebody that has been diagnosed with brain cancer and they're very, very focused.").

Following Mr. Langsam's testimony, Appellant rested. Counsel for Respondent moved for a non-suit, arguing Appellant had failed to offer clear and convincing evidence Decedent lacked testamentary capacity or that the probated will was the product of undue influence. Appellant objected, claiming she had met her burden of clear and convincing evidence regarding both lack of testamentary capacity and undue influence.

The Court granted the non-suit. Later that same day, the Court issued a Decree dismissing Appellant's appeal from the Register of Wills, stating: "The respondent met his burden of proving the proper execution of Ronald R. Fluellen's will while the [Appellant] failed to present clear and convincing evidence that Decedent lacked testamentary capacity or that the will had been procured by undue influence."

II. Issues on Appeal

On November 30, 2018, Appellant filed a notice of appeal. The Court issued a 1925(b) order on December 4, 2018, directing Appellant to file a concise statement of matters she intended to raise on appeal. On December 26, 2018, Appellant timely filed her "Statement of Reasons for Appeal to Superior Court."

Appellant's 1925(b) statement is problematic and raises the issue of waiver. Appellant has waived all the issues she intends to appeal in two ways: first, failure to raise those issues with this Court; and second, failure to comply with Pennsylvania Rule of Civil Procedure 1925 when drafting her 1925(b) statement.

A. Failure to raise

Most of the issues raised in Appellant's Rule 1925(b) statement were not properly preserved and need not be addressed in this Opinion. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R. App. P. 302(a). Raising the issues in a 1925(b) statement does not cure this fatal defect either. "A party cannot rectify the failure to preserve an issue by proffering it in response to a Rule 1925(b) order. A Rule 1925(b) statement of matters complained of on appeal is not a vehicle in which issues not previously asserted may be raised for the first time." *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437, 444 (Pa. Super. Ct. 2003) (citations omitted).

Here, Appellant's response to the Court's 1925(b) order touches on numerous claims ranging from bias and conflicts of interest on the part of the Court to claims the Court abused its discretion by declining to grant Appellant's request for a continuance. With the exception of the lack of testamentary capacity and undue influence claims, Appellant's other claims violate Rule 302 since she raises them for the first time on appeal. Consequently, Appellant has waived these additional issues, leaving only the issues of lack of testamentary capacity and undue influence. However, even these issues have been waived since Appellant's 1925(b) statement fails to conform to the requirements of Rule 1925.

B. Failure to conform to Rule 1925

Assuming Appellant had properly raised with the Court all the issues mentioned in her 1925(b) statement, thus preserving them for appeal, the form and content of Appellant's 1925(b) statement still constitutes a waiver of *all* issues on appeal due to her failure to comply with the basic requirements of Rule 1925.

Rule 1925 requires the statement of matters complained of on appeal to "*concisely* identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa. R. App. P. 1925(b)(4)(ii) (emphasis added). Further, appellant's statement "*should not be redundant or provide lengthy explanations* as to any error." *Id.* 1925(b)(4)(iv) (emphasis added). "Issues not . . . raised in accordance with the provisions of this paragraph (b)(4) are waived." *Id.* 1925(b)(4)(vii); *see also Tucker v. R.M. Tours*, 939 A.2d 343, 346–47 (Pa. Super Ct. 2007) (holding 1925(b) statement consisting of sixteen pages and seventy-six paragraph statements constituted waiver of all issues on appeal); *Jones v. Jones*, 878 A.2d 86, 89 (Pa. Super. Ct. 2005) (holding 1925(b) statement consisting of seven pages, including twenty-nine issues presented in narrative form, constituted waiver of all issues on appeal).

Rule 1925 is a "crucial component of the appellate process, because it allows the trial court to identify and focus on those issues the parties plan to raise on appeal." *Kanter v. Epstein*, 866 A.2d 394, 400 (Pa. Super. Ct. 2004). Whenever an appellant strays from the requirements of Rule 1925 and fails to adequately identify in a concise manner the issues on appeal, "the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." *Lineberger*, 894 A.2d at 148 (quotations omitted). Thus, "failure to comply with the minimal requirements of Pa.R.A.P. 1925(b) will result in *automatic waiver* of the issues raised." *Commonwealth v. Schofield*, 888 A.2d 771, 774 (Pa. 2005) (emphasis added).

Here, Appellant's 1925(b) statement is the antithesis of concise. It totals thirty-two pages featuring fourteen numbered paragraphs and many more subparagraphs. Sometimes the 1925(b) statement is in narrative form, sometimes not. It is a discursive, argumentative, and incoherent

rant peppered with non-sequiturs, asides, and innuendo. In short, Appellant's 1925(b) statement circumvents the letter and spirit of Rule 1925. It lacks clarity, concision, and organization.

Furthermore, while Appellant's regrettable failure to conform to the rules of procedure and the law is most likely due to her status as a pro se litigant, pro se litigants are not entitled to any advantage because of their lack of legal training. *Triffen v. Janssen*, 626 A.2d 571, 573 (Pa. Super. Ct. 1993); *see also First Union Mortg. Corp. v. Frempong*, 744 A.2d 327, 337 (Pa. Super. Ct. 1999) ("Any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing."). As with anyone who fails to abide by Rule 1925, Appellant has waived all issues on appeal, precluding appellate review.

Notwithstanding Appellant's waiver, the Court has prepared an Opinion. The Opinion is not comprehensive as it does not address every issue raised in Appellant's so-called 1925(b) statement. Instead, the Opinion focuses on the issues of lack of testamentary capacity and undue influence—the substantive issues at play in the underlying will contest.

III. Discussion

Will contests center on shifting burdens of proof. To start, the proponent of a challenged will bears the burden of establishing the will was properly executed. Proper execution may be proved by "offer[ing] the register's record of probate, including the will; thereupon the burden of proof shifts to the contestants." *In re Estate of Ash*, 41 A.2d 620, 622 (Pa. 1945). Here, the proponent introduced the probated will thereby proving proper execution of the will. Therefore, the proponent met their initial burden, shifting the burden of proof to the contestant—i.e., Appellant.

A contestant seeking to invalidate a probated will on the grounds of either lack of testamentary capacity or undue influence—or both—bears the burden of proof by clear and convincing evidence. *In re Estate of Angle*, 777 A.2d 114, 123 (Pa. Super. Ct. 2001). Here, Appellant argued both lack of testamentary capacity and undue influence. Thus, Appellant had to prove both claims by clear and convincing evidence in order to invalidate Decedent's probated will.

Clear and convincing evidence is the highest evidentiary burden in civil trials. The standard requires witnesses to be credible, the facts distinctly remembered, the details narrated exactly and in due order so as to be clear, direct, and convincing, enabling a fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue. *In re LaRocca Trust*, 192 A.2d 409, 413 (Pa. 1963). For the reasons below, the Court concluded Appellant did not meet this burden on either issue. Hence, the non-suit.

A. Lack of testamentary capacity

Appellant failed to offer clear and convincing evidence Decedent lacked testamentary capacity at the time he executed the probated will. "Testamentary capacity is determined by soundness of mind and not body, and is always presumed." *In re Paolini Will*, 13 Fid. Rep. 2d 185, 189 (O.C. Mont. Cty. 1993). The test for testamentary capacity 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." *In re Cohen Will*, 284 A.2d 754, 755 n.1 (Pa. 1971).

Decedent may have been afflicted with cancer which, in part, had spread to his brain, but none of the testimony at the hearing suggested the cancer had impaired Decedent's mind at the

time he executed the will. Of the four witnesses called by Appellant, three were not physically present when Decedent executed the probated will—i.e., Martia Fluellen, Ronald R. Fluellen, Jr., and Saul Langsam. Mr. Langsam, however, did speak on the phone with Decedent the day he executed the will and described his conversation with Decedent as follows:

> [Decedent] was always focused. He was never—never gave me a sense that he was confused. He was rather emphatic, and when I saw him or even when I spoke with him, I was always left impressed with the fact that here is somebody that has been diagnosed with brain cancer and they're very, very focused.

Hr'g Tr. 78:9–14. Further, the testimony of Ms. Overby-Blackston, the only testifying witness who was in the room when Decedent executed the probated will, directly undermined Appellant's claim Decedent lacked testamentary capacity. She never believed Decedent to be impaired in anyway. *Id.* 22:23–23:1. While Ms. Overby-Blackston's testimony must be viewed in light of her direct interest in Decedent's estate, the Court found her credible nonetheless.

In any event, Appellant's evidence fell far short of the exacting clear and convincing standard required to prove lack of testamentary capacity. None of the four witnesses called by Appellant testified to Decedent's lack of capacity and in fact stated he never lost his mental capacity. Therefore, Appellant did not meet her burden and failed to prove Decedent lacked testamentary capacity when he executed the probated will.

B. Undue influence

Appellant failed to offer clear and convincing evidence Respondent and Ms. Overby-Blackston exerted undue influence on Decedent. Undue influence can be proven directly or indirectly, although indirect evidence is more common. Direct evidence of undue influence requires the contestant prove "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." *In re Estate of Olshefski*, 11 A.2d 487, 489 (Pa. 1940) (quotations omitted). None of Appellant's witnesses offered any testimony suggesting either Respondent or Ms. Overby-Blackston engaged in the sorts of overt manipulation and trickery described in *Olshefski*.

Then again, undue influence rarely parades in full view. As the Pennsylvania Supreme Court noted, "Undue influence may be, and often can only be, proved by circumstantial evidence." *In re Estate of Ziel*, 359 A.2d 728, 734 (Pa. 1976). A presumption of undue influence arises if the contestant proves by clear and convincing evidence three things: first, the testator suffered from a weakened intellect at the time the will was executed; second, there was a person in a confidential relationship with the testator; and third, the person in the confidential relationship received a substantial benefit under the challenged will. *In re Estate of Clark*, 334 A.2d 628, 633 (Pa. 1975). If even one element of the three is lacking, the contestant fails to meet their burden. *In re Estate of Simpson*, 595 A.2d 94, 98 (Pa. Super. Ct. 1991).

Beginning with the last element of undue influence, Respondent in this case did not receive a substantial benefit under the disputed will. Respondent was named executor of Decedent's estate, but that in itself is no benefit. *See In re Estate of Adams*, 69 A. 989, 990 (Pa. 1908) (stating "appointment as executor with the right to receive the usual commissions d[oes] not constitute such an interest"). Conversely, Ms. Overby-Blackston received a substantial benefit under the will as she is the sole beneficiary of Decedent's estate. However, the other two elements of undue influence—confidential relationship and weakened intellect—were not established by clear and convincing evidence.

"Confidential relationship" has no precise definition. Familial bonds such as those between a grandfather and grandchild, for example, do not automatically create a confidential

relationship, but it is a fact to consider. *See In re Estate of Keiper*, 454 A.2d 31, 34 (Pa. Super. Ct. 1983). Broadly construed, 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." *In re Estate of Lakatosh*, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995) (quotations omitted).

The sort of gross power imbalance delineated in *Lakatosh* is missing here. None of the testimony elicited at the hearing established a domineering relationship between Ms. Overby-Blackston and Decedent. Neither did any of the testimony suggest Decedent was overly weak, dependent, or trusting of his granddaughter. Other than a few scant details about errands, thwarted plans to move to Maryland, and Ms. Overby-Blackston acting as courier the day the probated will was executed, the Court found no evidence, let alone clear and convincing evidence, of a confidential relationship between Decedent and Ms. Overby-Blackston.

Furthermore, Appellant failed to establish by clear and convincing evidence the final element of undue influence: weakened intellect. Whereas testamentary capacity refers to the testator's mental state at the moment the will was executed, a claim of weakened intellect typically surveys a much longer period of time. *Id.* at 1384. Here, however, Appellant seemingly contends Decedent's intellect weakened sometime between September 6, 2018, and October 9, 2018—a very short period of time indeed.

As with the term "confidential relationship," there is no bright-line rule for what is and is not "weakened intellect." Weakened intellect need not rise to level of incapacity but is "typically accompanied by persistent confusion, forgetfulness and disorientation." *In re Estate of Nalaschi*, 90 A.3d 8 (Pa. Super. Ct. 2014). On this score, the Court again turned to Mr. Langsam whose

testimony proved highly probative of Decedent's strong intellect. As the Pennsylvania Supreme Court observed, "The draftsman of a will, especially if a lawyer . . . , is always an important, and usually the most important, witness in the case; and where, as here, he had known the testator well for a long time, and shows such circumstances of voluntary and intelligent action by testator at the time, his testimony makes a prima facie case that requires very strong evidence to offset." *In re Estate of Kane*, 55 A. 917, 918 (Pa. 1903).

As the scrivener of the probated will, Mr. Langsam had multiple contacts with Decedent—both in-person and on the phone—over a period of several weeks. Through these contacts Mr. Langsam was able to get a sense of Decedent's mental state. Mr. Langsam summed up his encounters with Decedent as follows:

> Very focused. There was nothing about his demeanor that caused me to question [his mental state], and the one thought that did enter my mind was I am looking at somebody who has been diagnosed with brain cancer and just does not look the part or act the part.

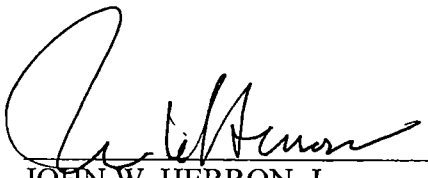
Hr'g Tr. 72:13–17; *see also id.* 76:6–9 (stating Decedent exhibited no confusion whatsoever). Despite beating on about Decedent's brain cancer, Appellant failed to offer the kind of "very strong evidence" needed to offset Mr. Langsam's testimony that Decedent, at all times, retained his critical faculties and understood exactly what he was doing when planning his estate.

Therefore, Appellant failed to offer clear and convincing evidence Decedent's will was procured through undue influence on the part of either Respondent or Ms. Overby-Blackston.

Conclusion

For all the reasons stated herein, including waiver, the Court's Decree dated October 31, 2018, dismissing Appellant's appeal from the Register of Wills should be AFFIRMED.

BY THE COURT:



JOHN W. HERRON, J.

Dated this 22nd day of January 2019

LaCretia Fluellen, *pro se*, Appellant
Robert S. Nix, Esquire, counsel for Respondent