

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Michael Marinucci, Appeal from Register
O.C. No. 1239 AP of 2017
Control No. 173325

OPINION

Introduction

The will contest of Susan Marinucci, the sister of decedent Michael Marinucci, never reached the ultimate issues of whether the decedent had testamentary capacity or whether his will had been procured by undue influence because the contestant failed to present any evidence to support either claim. In contrast, the proponent of the will met his initial burden of proof by introducing decedent's self-proving will that had been admitted to probate by the Philadelphia Register of Will on July 5, 2017. That will was signed by the decedent, by two witnesses and was supported by the Affidavit of Witnesses. See generally 20 Pa.C.S. § 3132.1. For these reasons, proponent's motion for a nonsuit was properly granted.

Factual Background

Michael Marinucci, a resident of Philadelphia, died on June 24, 2017. The Philadelphia Register of Wills on July 5, 2017 admitted to probate a typewritten document dated June 19, 2017 as the last will of Michael S. Marinucci. Letters Testamentary were granted to John Slinger, who was named as executor in Article FOURTH of this will.

This probated June 19, 2017 will was signed by Michael Marinucci as well as by two witnesses: C. Decker and Jameson Lynch. It was supported by an Affidavit of Witnesses. In this Affidavit, the witnesses C. Decker and Jameson Lynch affirmed that the "foregoing last will and testament was subscribed in our presence and sight by Michael Marinucci." This Affidavit was notarized and signed by a Notary Public. See Ex. R-1.

On September 11, 2107, Susan Marinucci, the decedent's sister and sole intestate heir, filed an appeal of the decree of the Register of Wills asserting that her brother's will was invalid on two grounds. First, she asserted that her brother lacked testamentary capacity to execute the will as of June 19, 2017. Second, she claimed that the will had been procured by the undue influence of John Schonewolf on her brother.



In contesting her brother's will, Susan Marinucci, who was then represented by counsel, objected in particular to the provision in Article THREE that the decedent's property located at 2433 Brown Street in Philadelphia should be sold to John Schonewolf for \$250,000. The will provided that once all decedent's debts had been paid, the proceeds from this sale should be given to Susan Marinucci's two children: Sarah and Gwen Topio. John Schonewolf filed vigorous objections to Susan Marinucci's appeal.

By a scheduling decree dated January 23, 2018, the parties were granted a period of discovery through April 24, 2018. Both parties were required to submit a complete list of witnesses by May 21, 2018. Finally, a trial of all contested matters was scheduled for June 4, 2018. A telephone conference call requested by counsel was held on May 16, 2018. In response, this court granted the request of Ms. Marinucci's attorney for a continuance of the hearing so that he could discuss discovery issues and medical records with his client.¹ By decree dated May 29, 2018, a continuance of this hearing was granted and the hearing was rescheduled for July 18, 2018. Meanwhile, Susan Marinucci's attorney filed a petition to withdraw on May 29, 2018. He stated in his petition that after a meeting with his client on May 18, 2018, "it became clear that the undersigned counsel and Client have a fundamental disagreement about how to proceed with this matter." Moreover, following this meeting the "Client orally advised the undersigned counsel that she did not wish to be represented by the undersigned counsel."² The unopposed petition to withdraw was granted on June 20, 2018.

Prior to the hearing, Susan Marinucci inundated the court's staff with telephone calls seeking to speak ex parte with the Judge as well as with ex parte emails that did not copy opposing counsel. With these improper contacts with the court, Ms. Marinucci sought a continuance as well as other requests.³ Opposing counsel by letter opposed any continuance of the hearing.⁴ When the July 18 hearing began, the court gave copies of the four ex parte emails to opposing counsel. Susan Marinucci appeared at the hearing without counsel. In the course of the hearing, counsel for respondent introduced the self-proving will that was admitted to probate by the Register of Wills to establish that Micheal Marinucci's will had been properly executed.⁵

¹ 7/18/2018 N.T. at 8.

² 5/29/2018 Petition to Withdraw as Counsel, paragraphs 12 & 13.

³ 7/18/2018 N.T. at 4.

⁴ 7/18/2018 N.T. at 9.

⁵ 1/18/2018 N.T. at 28.

With the shift in the burden of proof to the contestant, however, Ms. Marinucci admitted that she had no witnesses to establish her claim that the decedent had lacked testamentary capacity or that his will had been procured by undue influence.⁶ Ms. Marinucci nonetheless sought to introduce certain medical documents into evidence without any proof of certification or supporting testimony by witnesses. Opposing counsel objected to the introduction of these hospital records on two grounds: he had never been given copies of these records and there was no authentication of the documents.⁷ The objection was sustained. Respondent moved for a nonsuit, which was granted.

Legal Analysis

In the trial of a will contest, the shifting burdens of proof play a key role.⁸ The proponent of the challenged will's validity has the initial burden of establishing that the will was properly executed. Once proper execution through the formality of probate is established, the presumption of lack of undue influence arises. The burden then shifts to the party contesting the will to present evidence that the will was procured by undue influence or that the testator lacked testamentary capacity. See Estate of Clark, 461 Pa. 52, 59, 334 A.2d 628, 631 (Pa. 1975); Estate of Cohen, 445 Pa. 549, 551, 284 A.2d 754, 755 (Pa. 1971) ("once the execution of a will is established by the required two witnesses, as it was here, a 'presumption of testamentary capacity' arises which can only be overcome by 'clear, strong and compelling evidence'"); Estate of Luongo, 2003 Pa. Super. 171, 823 A.2d 942, 963 (Pa. Super. 2003) ("A presumption of validity arises once a will is probated and the burden shifts to the contestant to prove undue influence").

To establish the proponent's initial burden that a will has been properly executed, Pennsylvania courts have concluded that "it is sufficient for the proponents in the first instance to offer the register's record of probate, including the will; thereupon the burden of proof shifts to the contestants." In re Ash's Estate, 351 Pa. 317, 320, 41 A.2d 620, 622 (Pa. 1945).

⁶ 1/18/2018 N.T. at 29-31.

THE COURT: Do you have anyone in the courtroom who can testify to your brother's state of mind as of June 2017?

Ms. Marinucci: No. I do not.

Id. at 30.

⁷ 1/18/2018 N.T. at 33.

⁸ For a classic discussion of this issue, see the article by the Honorable Robert W. Tredinnick, Judge of the Montgomery County Orphans' Court "Presumptions and the Burden of Proof in Orphans' Court Litigation," 7 Fid. Rep. 2d 102 (1986).

As proof of this proper execution, Pennsylvania has adopted the two witness rule which helps “to establish that the testator actually executed the will, thereby insuring against the disposition of his property by means of a forged instrument introduced under circumstances in which decedent is unable to protect his own interests.” Estate of Brantlinger, 418 Pa 236, 243, 210 A.2d 246, 250 (Pa. 1965)

In the present case, the proponent of the will, John Schonewolf, introduced the probated will signed by two witnesses and accompanied by an Affidavit of Witnesses. This will, therefore, constituted a “self-proved” will within the general scope of the PEF Code, 20 Pa.C.S.A. § 3132.1. As the Pennsylvania Supreme Court recently explained:

Under that provision (i.e. §3132.1), an attested will is made self-proved through the attachment of a testator’s acknowledgement and witness affidavits confirming that each witness signed the will freely and voluntarily. *See* 20 Pa.C.S. §3132.1(b). As explained, these witnesses are not assumed to know anything about the will’s terms. That their affidavits can nonetheless render a will ‘self-proved’ thus supports the concept that the General Assembly did not contemplate the *contents* of a will when it set out requirements for ‘proving’ a will within Section 3132.

Estate of Wilner, 636 Pa. 277, 291, 142 A.3d 796, 805 (Pa. 2016).

Consequently, by introducing the probated will and the accompanying Affidavit of Witnesses, the proponent met his burden of proving its execution.⁹

Because the proponent met his burden of proof by introducing into evidence the self-proved will, the burden shifted to the contestant of proving her claim that the will was invalid due to lack of testamentary capacity or undue influence. In this case, however, the contestant admitted that she had no witnesses to establish either claim. Moreover, although she sought to introduce certain medical records, she likewise failed to satisfy the threshold requirement that the medical records had been properly certified to authenticate them.¹⁰ Likewise, she offered no witnesses to support or interpret these records.

⁹ The Affidavit attached to Michael Marinucci’s will goes beyond the requirements of §3132.1 because the witnesses make affirmations as to the testator’s mental competence. This affirmation is irrelevant to the primary purpose of establishing merely that the testator signed the will.

¹⁰ As a general rule, hospital records are considered business records. See generally 42 Pa.C.S.A. § 6108. As such they are generally admissible as evidence within the business exception to the hearsay rule to show the facts of hospitalization, prescribed treatment and symptoms. They are not admissible as to medical opinions, diagnoses and conclusions. See generally Pa.R.Evidence 803(4) (Statement made for medical diagnosis or treatment); Williams v. McClain, 513 Pa. 300, 305-306 , 520 A.2d 1374 (1987); Com. v. Garcia, 478 Pa. 406, 427, 387 A.2d 46 (1978). There are, however, threshold requirements for the admissibility of hospital records. Specifically, hospital records must be certified before they can be admitted to evidence. See 42 Pa.C.S.A. § 6108; J.K. v. Dept. of Public Welfare, 721 A.2d 1127, 1133 (Pa. Com. 1998)(medical records were not admissible because they were not properly

The only excuse for this failure to present evidence to support her will contest is that contestant had belatedly on the eve of the hearing sought a continuance to obtain representation by counsel after her attorney withdrew from this case. The decision to grant a continuance of a scheduled trial or hearing falls within the sound discretion of the court. In re Interest of D.F., a Minor, 2017 Pa.Super. 177, 165 A.3d 960, 964 (Pa. Super. 2017) (“The matter of granting or denying a continuance is within the discretion of the trial court”). The Orphans’ Court rules do not specifically address grounds for granting a continuance. Pennsylvania Rule of Civil Procedure 216 is therefore relevant. This rule governing the granting of continuances provides:

Rule 216. Grounds for Continuance

- (A) The following are grounds for a continuance:
- (1) Agreement of all parties or their attorneys, if approved by the Court;
 - (2) Illness of counsel of record, a material witness, or a party. If requested a certificate of a physician shall be furnished, stating that such illness will probably be of sufficient duration to prevent the ill person from participating in the trial;
 - (3) Inability to subpoena or to take testimony by deposition, commission, or letters rogatory, of any material witness, shown by affidavit which shall state:
 - (a) The facts to which the witness would testify if present or if deposed;
 - (b) The grounds for believing that the absent witness would so testify;
 - (c) The efforts made to procure the attendance or deposition of such absent witness, and
 - (d) The reasons for believing that the witness will attend the trial at a subsequent date, or that the deposition of the witness can and will be obtained;
 - (4) Such special ground as may be allowed in the discretion of the court;
 - (5) The scheduling of counsel to appear at any proceeding under the Pennsylvania Rules of Disciplinary Enforcement whether....

Pa.R.C.P. 216

authenticated by the custodian or other qualified witness). They “may be proved as to foundation, identity and authenticity without any preliminary testimony provided” if “the copies are certified by the custodian of the originals” Estate of Pew, 409 Pa. Super. 417, 426, 598 A.2d 65 (Pa. Super 1991); 42 Pa.C.S.A. § 6151(Copies of hospital medical charts or records “may be proved as to foundation, identity and authenticity without any preliminary testimony by use of legible and durable copies certified in the manner provided in this subchapter by the employee of the health care facility charged with the responsibility of being custodian of the originals thereof”). It is not, however, necessary for the custodian to testify at a hearing as to the authenticity of medical records because the relevant statute provides for certification of these records before a notary public:

The certification shall be signed before a notary public by the employee of the health care facility charged with the responsibility of being custodian of the records and shall include the full name of the patient, the patient’s medical record number, the number of pages in the medical records.... 42 Pa.C.S.A. § 6152(d).

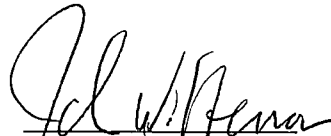
In the present case, respondent's attorney opposed the contestant's request for a continuance. The contestant made no claim that her counsel of record or a material witness was ill. She merely failed to present any witness whatsoever. Her sole excuse for requesting a continuance was to obtain an attorney to represent her after the withdrawal of her original counsel. According to the petition to withdraw filed by contestant's counsel, she had told him following a meeting held on May 18, 2018 that she no longer wanted him to represent her. This court by decree dated May 29, 2018 granted a continuance of the hearing scheduled for June 4, 2018 for the new date of July 18, 2018. This would have given the contestant nearly two months to obtain new representation, more than a reasonable time to do so.

Conclusion

The will contest was properly dismissed in this case after the proponent met his burden of proving the proper execution of Michael Marinucci's will by introducing the record presented to the Register of Wills and the contestant presented no evidence whatsoever to support her claims that the decedent had lacked testamentary capacity or that the will had been procured by undue influence.

BY THE COURT:

DATE: August 28, 2018


John W. Herron

David V. Bogdan, Esquire
Susan Marinucci, pro se

LAST WILL AND TESTAMENT OF

Michael Marinucci

I, Michael Marinucci, a resident of the State of Pennsylvania, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me.

FIRST: I direct that the expenses of my last illness and funeral, the expenses of the administration of my estate, and all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be paid out of my residuary estate, without apportionment and with no right of reimbursement from any recipient of any such.

SECOND: All tangible personal property owned by me at the time of my death and not specifically devised, is given as hereafter as provided with respect to my residuary estate.

THIRD: I make the following specific gifts of property:

I agree to sell my property located at 2433 Brown St, Philadelphia, Pennsylvania 19130 to John Schonewolf for \$250,000.00. The proceeds to be given to Sarah & Gwen Tropio once all debts have been paid.

Any specific gift made in this will to two or more beneficiaries shall be shared equally among them, unless unequal shares are specifically indicated. All shared gifts must be sold, and the net proceeds distributed as the will directs, unless all beneficiaries for that gift agree in writing, after my death, that the gift need not be sold.

If I name two or more primary beneficiaries to receive a specific gift of property and any of them do not survive me, all surviving primary beneficiaries shall equally divide the deceased primary beneficiary's share unless I have specifically provided otherwise. If I name two or more alternate beneficiaries to receive a specific gift of property and any of them do not survive me, all surviving alternate beneficiaries shall equally divide the deceased alternate beneficiary's share.

I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) to Susan Marinucci.

(b) If none of the named residual beneficiaries described in clause (a) above shall survive me, decline the gift or are no longer in existence, (together referred to as "pre-deceased"), then to the surviving children of the pre-deceased beneficiary, if any, and if he or she has no surviving children, then equally to the other beneficiaries shown above.

(c) If none of the beneficiaries described in clauses (a) and (b) above shall survive me, decline the gift or are no longer in existence (together referred to as "pre-deceased"), then I give my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of the State of Pennsylvania.

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FOURTH: I appoint John Slinger to be my executor. If John Slinger does not survive me, or shall fail to qualify for any reason as my personal representative, or having qualified shall die, resign or cease to act for any reason as my executor, I appoint John Schonewolf as my executor. To the extent permitted by the laws of the State of Pennsylvania, this will is intended as and shall be construed to be a nonintervention will and, after the probate of this will, no further proceedings in court shall be necessary other than to comply with the statutes relating to the handling of estates under nonintervention wills. No bond or surety or other security shall be required of any Personal Representative serving hereunder. The decision to administer my estate independently or under court supervision shall be made solely by my personal representative.

FIFTH: Whenever any beneficiary of my estate is under a legal disability or, in the judgment of my Personal Representative, is for any reason unable to apply any distribution to the beneficiary's own best advantage, my Personal Representative may nevertheless make the distribution directly to the beneficiary or to the conservator of the beneficiary's property or to a person with whom the beneficiary resides at the time of the distribution in whatever manner my Personal Representative shall deem best. In the alternative and if the beneficiary is under twenty-one years of age, my Personal Representative may, in the discretion of my Personal Representative, distribute the property to a custodian for the beneficiary under a Uniform Transfer or Gift to Minors Act. The receipt by the beneficiary, conservator, custodian or other person of any distribution so made shall be a complete discharge to my Personal Representative regarding the distribution.

SIXTH: I grant to my personal representative all powers conferred on personal representatives and executors wherever my personal representative may act. I also grant to my personal representative power to retain, sell at public or private sale, exchange, grant options on, invest and reinvest, and otherwise deal with any kind of property, real or personal, for cash or on credit; to borrow money and encumber or pledge any property to secure loans; to hold property in bearer form or in the name of a nominee; to divide and distribute property in cash or in kind; to exercise all powers of an absolute owner of property; to compromise and release claims with or without consideration; to execute and deliver deeds and other instruments, including releases; and to employ attorneys, accountants and other persons for services or advice.

The term "executor" wherever used herein shall mean the personal representatives, executors, executor, executrix or administrator in office from time to time. The term "trustee" wherever used herein shall mean the trustees or trustee in office from time to time. Each personal representative and trustee shall have the same rights, powers, duties, authority and privileges, whether or not discretionary, as if originally appointed hereunder.

SEVENTH: Each beneficiary shall be deemed not to have survived me unless the beneficiary is living on the thirtieth day after the date of my death.

EIGHTH: I direct that my bodily remains be cremated and the ashes be returned to my family. I would like my family to decide on the type of ceremony. I direct that any outstanding costs associated with my final arrangements shall be paid out of my estate by my executor.

IN WITNESS WHEREOF, I, Michael Marinucci, sign my name and publish and declare this instrument as my last will and testament this 19th day of JUNE, 2017. I also have affixed my initials on the bottom of each of the preceding pages hereof.

Michael S. Marinucci
Michael Marinucci

We, the witnesses, at the Testator's request, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the Testator signs and executes this instrument as the Testator's will and that the Testator signs it willingly, and that each of us, in the presence and hearing of the Testator, hereby signs this will as witness to the Testator's signing, and that to the best of our knowledge the Testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

C. Decker, RN
First Witness Signature
C. DECKER, RN
First Witness Printed Name
6-7-17
Date

James S. Lynch, CCT
Second Witness Signature
S. Lynch, CCT
Second Witness Printed Name
6-7-17
Date

111 So. 112th St - Phila PA 19107
First Witness Address
Phila. del. phia, PA 19107
First Witness City, State, Zip

111 So 112th St.
Second Witness Address
Philadelphia, PA 19107
Second Witness City, State, Zip

Affidavit of Witnesses

STATE OF Pennsylvania, COUNTY OF Philadelphia, ss.

Before me the undersigned authority, on this day personally appeared:

the Testator,

Michael Marinucci having an address at, 2433 Brown St., Philadelphia, Pennsylvania 19130,

and each of the undersigned witnesses,

C. Decker, RN having an address at, 111 So 11th St Philadelphia Pa
19107

and

Jameson Lynch, COT having an address at, 111 So 11th St Philadelphia Pa
19107

respectively, being individually and severally duly sworn, did depose and say that:

The foregoing last will and testament was subscribed in our presence and sight by Michael Marinucci, the Testator named therein. The undersigned witnessed the execution of said will of Michael Marinucci on this day.

At the time the instrument was so subscribed, the Testator declared said instrument to be their last will and testament. The undersigned thereupon signed their names as witnesses at the end of said will at the request of the Testator, in the presence of the Testator and each other. At the time of so executing said will, in our respective opinions, the Testator was at least eighteen years of age, and was of sound mind, memory and understanding, under no constraint, duress, fraud or undue influence, and in no respect incompetent to make a valid will. In our respective opinions, the Testator was able to read, write and converse in the English language, and was not suffering from any defect of sight, hearing or speech, or from any other physical or mental impairment which would affect their capacity to make a valid will. Each of us was acquainted with the Testator, and we make this affidavit at their request. Said will was shown to us at the time this affidavit was made, and we examined it as to the signature of the Testator and our signatures. Said will was executed as a single, original instrument, and not in counterparts.

Michael S Marinucci
Testator Signature

C. Decker, RN
First Witness Signature

Jameson Lynch
Second Witness Signature

Subscribed, sworn to and acknowledged before me by Michael Marinucci, the Testator, and subscribed and sworn to before me by the said C. Decker RN, and JAMESON LYNCH, COT, as witnesses, this 19th day of June, 2017


Notary Public

My commission expires on: October 31, 2017

LAST WILL AND TESTAMENT OF MICHAEL MARINUCCI
Dated: JUNE 13, 2014.

(Seal)

