

We conclude that we cannot sustain the demurrer; that the defendants are entitled to their day in court and we will not dismiss the counterclaim. We believe that landlords' counterclaim in assumpsit could not be dismissed under any event. The Landlord and Tenant Act of 1951, Sec. 250.512 (b), supra, states only that a landlord who fails to provide a tenant with a list of damages forfeits his rights to damages to withhold the sum held in escrow or sue for damages to the leasehold premises.

ORDER OF COURT

October 16, 1981, Plaintiff's preliminary objection in the nature of a demurrer is overruled. The plaintiff is granted twenty (20) days from this date to file a responsive pleading.

BRINDLE ESTATE, C.P. Franklin County Branch, No. 142 of 1980

Orphans' Court - Appeal from Probate - Undue Influence - Confidential Relationship

1. Opponents attacking a will on the grounds of undue influence must show by clear and convincing evidence that the testator was of weakened intellect when the will was executed and that a person in a confidential relationship to the testatrix received a substantial benefit under the will.
2. Dependence does not always produce a confidential relationship.
3. The fact that a wills proponent performed business services for the decedent does not in itself establish a confidential relationship.
4. Care and attention do not amount to undue influence.
5. Old age and its attendant physical infirmities do not alone establish weakened intellect.
6. The fact that the children were not treated equally does not establish or raise presumption of undue influence.

Thomas H. Humelsine, Esq., Attorney for Respondent

Richard S. Wilt, Esq., Attorney for Exceptants

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LEGAL NOTICES, cont.

statement of proposed distribution and notice to the creditors of Marvin H. Horst, executor of the last Will and Testament of Eva M. Wentling late of Guilford Township, Franklin County, Pennsylvania, deceased.

ZULLINGER First and final account, statement of proposed distribution and notice to the creditors of the

LEGAL NOTICES, cont.

Farmers & Merchants Trust Company of Chambersburg, executor of the estate of Marion H. Zullinger late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

Glenn E. Shade
Clerk of Orphans' Court of
Franklin County, Pa.
11-6-81, 11-13-81, 11-20-81, 11-27-81

OPINION AND ORDER

EPPINGER, P.J., September 21, 1981:

Before Ruth Ellen Brindle died, she signed a will naming her daughter, Dorothy Winn, as Executrix and dividing her estate equally among three of her 11 children, including Mrs. Winn and two sons, Chester and George. The will was witnessed by another daughter, Hilda Brindle and by Mrs. Winn's daughter, Brenda. Mrs. Brindle died more than a year after the will was executed and it was probated March 11, 1980.

Four of the children filed an Appeal from the Probate of the will claiming that the testatrix was subject to undue influence and that persons in a confidential relationship, who also received all of the estate, exercised this influence when the testatrix was in a weakened condition.

The major portion of the estate was a 112 acre farm appraised for Pennsylvania Inheritance Tax purposes at \$80,000. Mrs. Winn filed her account and distributed this to herself and her brothers. About ten days before the account was to be presented to the Court for confirmation, this appeal from Probate was filed.

Though there was an allegation in the appeal that the testatrix suffered from mental incapacity, at the opening of the hearing on the appeal, counsel for appellants announced that issue had been abandoned.

At the conclusion of the appellants' case the proponents moved to dismiss, saying the appellants had not met the burden of rebutting the presumption that there was no undue influence in the making of the will. We granted the motion and the appeal was dismissed. The appellants filed exceptions which were argued before the court and we now overrule those exceptions.

Opponents attacking a will on the grounds of undue influence must show by clear and convincing evidence that the testator was of weakened intellect when the will was executed and that a person in a confidential relationship to the testatrix received a substantial benefit under the will. *Estate of Reichel*, 484 Pa. 610, 400 A.2d 1268 (1979); *Estate of Shelly*, 484 Pa. 322, 399 A.2d 98 (1979). If this is shown, the burden of proof shifts to the proponents to show that the devise or bequest was not the product of undue influence. *Reichel, supra*.

The Orphans' Court of Northumberland County defined undue influence in the case of *In re: Estate of Mary Davis*, 39 Northumb. 55, 66 (1967):

"By undue influence is not meant that the testator has given undue weight to an influence, but rather that the testator's capacity to weigh open mindedly the various influences pressed upon him has been destroyed and that his will is in reality the will of another person:" 50 Mich. L.R. 748, 749. "Undue influence of the kind which will affect the provisions of a will must be such as subjugates the mind of a testator to the will of the person operating upon it. . . ." *King Will*, 369 Pa. 523, 530. "The word "influence" does not refer to any and every line of conduct capable of disposing in one's favor a fully and self-directing mind, but to a control acquired over another which virtually destroys his free agency," (*Thompson Will*, 387 Pa. 82, 88) or a control such 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:" *Ash Will*, 351 Pa. 317, 322.

Mrs. Winn, Chester and George did receive substantial benefits under the will. The remaining issues are whether a confidential relationship existed between them and their mother and whether she was of weakened intellect when she executed the will.

Of the three, Mrs. Winn was the closest. She had been instrumental in building the house in which they lived on land which her parents gave her,¹ paying for most of it. She had received some help from her brothers and her father put in some of the money too. It was understood her parents would have a place to live for the rest of their lives. During his lifetime her father handled the money, but after his death, her mother started to give Mrs. Winn money to get medicine, she wrote checks for her mother which the testatrix signed, and she was given a power of attorney about the time the will was prepared. She also gave her mother medications, took her places, and generally looked after and assisted her. During this time her mother's income consisted of social security payments and the proceeds of the sale of hogs and pigs. She had this latter income because the two boys kept running the farm part time.

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¹Apparently all of the children were given building lots some time ago.

The testatrix had formed a plan to subdivide the farm and convey portions to Mrs. Winn and her two brothers. Anticipating this, she asked Mrs. Winn to go to an attorney to get a will signed to protect the three of them until the land was surveyed and divided. Mrs. Winn did, brought it home where the testatrix read it and then signed it, and it was witnessed.

To effectuate this plan, a surveyor was hired. In the testatrix' presence, he said he was told by Mrs. Winn how the land was to be divided between the three of them. The testatrix signed a work order. She never interposed an objection to what was said. He did come surveying and discussed the matter further with the three children involved but the land was not conveyed prior to testatrix' death.

A confidential relationship exists "when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed." *Leedom v. Palmer*, 274 Pa. 22, 25, 117 A. 410 (1922).

Dependence does not always produce a confidential relationship. In *King Will*, 369 Pa. 523, 87 A.2d 469 (1952), a niece who was her aunt's sole beneficiary wrote checks for her, had a power of attorney for her safety deposit box, and contacted the attorney to write her aunt's will. But the court found that no confidential relationship existed between the two.

Wetzel v. Edwards, 340 Pa. 121, 124, 16 A.2d 441 (1940), found that the fact that a will's proponent performed business services for the decedent did not establish a confidential relationship, nor was one found in *Llewellyn's Estate*, 296 Pa. 74, 145 A. 810 (1929), where the beneficiary drew checks, paid bills for and lived in the same room with the decedent to take care of him. We conclude therefore that proof of the care and assistance given by Mrs. Winn to her mother did not establish a confidential relationship.

Care and attention do not amount to undue influence. Legitimate family and social relations are not prohibited though provisions of a will are thereby influenced and affected. *Olshefski's Estate*, 337 Pa. 420, 11 A.2d 487 (1940). There is nothing unnatural or unusual about a testatrix wanting to benefit those who have helped her the most. *King Will, supra*.

But even if care and attention do amount to undue influence, appellants must show that the testatrix was of weakened

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TO: Members of Franklin County Bar Association

RE: Economic Recovery Tax Act of 1981, Statewide Institute

On Thursday, December 10, 1981, in the Jury Assembly Room, Franklin County Court House, your Bar Association is sponsoring a Pennsylvania Bar Institute Program on the Economic Recovery Tax Act of 1981, which seminar is scheduled from 9:00 A.M. to 5:00 P.M. The topics include, the individual income tax rate reductions, savings incentive provisions, business tax incentives, administrative and miscellaneous provisions, and estate and gift tax provisions.

This will be a video presentation and the faculty will include Robert E. McQuiston, Esquire, Philadelphia; Arthur L. Berger, Esquire, Harrisburg; Christopher M. Cicconi, Esquire, Harrisburg; Edward J. Greene, Esquire, Rittsburgh; Thomas M. Levine, Esquire, Pittsburgh; and Gerald K. Morrison, Esquire, Harrisburg.

The tuition is \$55.00 (\$44.00 for attorneys admitted to practice after 1/1/77); (\$27.50 for Judges and their law clerks). All registrants will receive a course manual.

As I stated before, in the event we have any more than 30 registrants I will have to consider making provisions for an additional TV set and therefore, I'll need to know whether or not you will be attending just as soon as possible. To reserve your admission, please make your check payable for your tuition to the Pennsylvania Bar Institute and enclose it directly to me. In the event that you registered directly with the Pennsylvania Bar Institute in Harrisburg, you must notify me of your registration.

Please register now to reserve your admission.

Respectfully,

Richard K. Hoskinson, Chairman
Continuing Legal Education Committee
Franklin County Bar Association

intellect when she executed the will in order to shift the burden to the proponents to show the absence undue influence. What was shown in this connection was that she was 76 years old, suffered from arthritis in her legs, was diabetic, took heart, blood pressure and occasionally pain pills. These were all physical problems and we believe that old age and its attendant physical infirmities do not alone establish weakened intellect. *King Will, supra.*

About the only factor that in any way suggests mental changes was that testatrix was grief-stricken by her husband's death. Unlike appellants, we do not label her as "abnormally disturbed" for this behavior. The two had been together for many years, had reared 11 children and decedent was bound to miss her life's partner.

We conclude therefore that the record simply does not contain clear and convincing evidence that the decedent was of weakened intellect. It appears on the contrary that she had a well-thought-out plan for the disposition of her estate. Though most of the testimony was centered on Mrs. Winn's relationship with her mother, the fact is that the farm was distributed equally to three children. The will was made to assure that her desire to divide the farm among them would be carried out. The fact that the children were not treated equally does not establish or raise a presumption of undue influence. *In re DeMaio's Estate*, 363 Pa. 559, 70 A.2d 339 (1950); *Hook's Estate*, 207 Pa. 203, 56 A. 428 (1903).

Mrs. Winn alone went to the attorney's office, told him what her mother wanted to say in the will, picked it up and was present when her mother signed it. The attorney never spoke to the decedent but knew of her as his son-in-law's grandmother. This factor, that Mrs. Winn made all the arrangements for the will, must be considered. But unlike the circumstances existing in *Estate of Clark*, 461 Pa. 42, 334 A.2d 628 (1975), where decedent dictated the will to the proponent, who then had it typed, signed by decedent and then had two others affix their signatures without having seen the decedent sign it or knowing that it was a will they were witnessing, here the will was prepared by an attorney and taken to the testatrix to be signed in the presence of two witnesses, one of whom was a daughter who did not benefit under the will. We do not consider these circumstances to be suspect in and of themselves and appellants have not come forward with sufficient evidence to make them so.

There were exceptions to the transcript of the testimony

also. We have reviewed the notes made by the reporter with her and find that only argument on the proponent's motion to dismiss was not transcribed. Counsel for the exceptants believed that an amendment to a stipulation had not been included in the record. It was however. We therefore will overrule the exceptions to the transcript of the testimony.

ORDER OF COURT

September 21, 1981, the exceptions filed by the Appellants to the Court's order dismissing the appeal are overruled. The costs shall be paid by the Appellants.

CHAPPELL v. CHAPPELL, C.P. Franklin County Branch, No. F.R. 1980 - 966

Divorce - No-Fault Act - Section 201(c) - Death of Defendant

1. The fact the Defendant in a divorce action died after a motion requesting a divorce decree was filed and all pleadings were delivered to the judge's chambers, but death occurred before the decree with signed, does not require the Court to sign the divorce decree after death of defendant.
2. The granting of a divorce decree under Pennsylvania R.C.P. 1920.42 (a) (1) is not a ministerial act in that the Rule requires that "The Court ... shall review the complaint and affidavits."
3. The Court could not, as a matter of law, have entered a final decree in divorce.

Kenneth F. Lee, Esquire, Counsel for Plaintiff

Jerry A. Weigle, Esquire, Counsel for Respondents

OPINION AND ORDER

KELLER, J., November 9, 1981:

Diane L. Chappell, Plaintiff, filed her Complaint in Divorce under Section 201(c) and 201(d) of the Divorce Code in the

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