

2. Visitation custody privileges with Nathan J. Faust are granted to his paternal aunt and uncle, Harvey and Faye Faust to be exercised at their home, 2004 Philadelphia Avenue, Chambersburg, Pa. from 9:00 a.m. to 7:30 p.m. on November 10, 1985, and on the second Sunday of each month thereafter to permit Nathan to develop a friendly relationship with the paternal side of his family, have telephone and written contact with his father, and become acclimated to the environment in which he will have his first contact with his father outside a prison setting when father is granted either home furloughs or parole.

3. Benjamin H. Roach and Anna L. Roach, maternal grandparents, shall permit Nathan J. Faust to receive mail and presents without limitation from his father.

4. Notwithstanding the understandable feelings of Benjamin H. Roach and Anna L. Roach, they shall not communicate in any way their personal feelings concerning Joseph O. Faust to Nathan J. Faust, and they shall participate with Nathan J. Faust in counseling sessions with either Dr. Stephen T. Overcash or Dr. James W. Nutter or another counselor approved by this Court to assist their grandson in achieving a mature and proper relationship with his father.

Each party to pay his or their costs.

ESTATE OF AMANDA A. ROBINSON, CP., Franklin County Branch,

*Appeal From Probate - Testamentary Capacity - Undue Influence - Confidential Relationship*

1. There is a presumption that a will was made by a person having testamentary capacity and free from undue influence where it was prepared by his lawyer at his request and in accordance with his instructions.
2. Strong, compelling and clear evidence is required to overcome the presumption of testamentary capacity and lack of undue influence.
3. The burden of proving undue influence is on the will contestants in the first instance, and to shift the burden to the will proponents the

contestants must first establish that when the will was executed, testator was of weakened intellect and that the person in a confidential relationship received a substantial benefit.

4. A claim of undue influence is not proven where a son of testator who received a substantial benefit under the will but was not aware testator made a new will until after the fact.

*Sally J. Winder, Esq.*, Counsel for Appellees

*David C. Cleaver, Esq.*, Counsel for Appellants

#### OPINION AND DECREE

KELLER, J., November 4, 1985:

Amanda A. Robinson died April 11, 1982. Her Last Will and Testament dated September 28, 1980 was admitted to probate by the Register of Wills of Franklin County for Franklin County on May 13, 1982. A petition for citation to show cause why appeal from probate should not be sustained was presented on April 22, 1983, and a decree entered on the same date ordering the citation be issued upon George A. Robinson, the sole heir, and Patsy P. Bonanni, executor, to show cause why the appeal should not be sustained, and the decree of probate set aside. The citation was made returnable on July 19, 1983, and hearing was scheduled for July 21, 1983 at 9:30 o'clock a.m. in Courtroom #3. An answer to the petition was filed on May 18, 1983. On petition of the proponents of the Will, an order was entered on February 23, 1984 setting April 2, 1984 at 9:30 o'clock a.m. as the date and time for hearing on the appeal from probate. By stipulation of counsel for the parties an order was entered on April 27, 1984 continuing the hearing to May 8, 1984 at 9:30 a.m. Hearing was held as scheduled but not completed. The final hearing on the matter was held pursuant to petition of the proponents of the Will on August 22, 1985 at 9:30 o'clock a.m. The second hearing was held and the evidence marked closed. Counsel were requested to submit proposed findings of fact, conclusions of law and discussion on or before September 12, 1985, but were granted leave to extend the time for filing until September 25, 1985. The proposed findings of fact, conclusions of law and discussion of counsel for the contestants was not filed until October 2, 1985.

The matter is now ripe for disposition.

## FINDINGS OF FACT

1. Amanda A. Robinson was born May 12, 1886.
2. Amanda A. Robinson died on April 11, 1982 at the age of 95 years and 11 months.
3. The Last Will and Testament of the decedent dated September 28, 1980 was admitted to probate by the Register of Wills for Franklin County, Penna. on May 13, 1982.
4. John C. Letcher had been associated with Amanda Robinson and her sons, George and John Robinson, for a period of 30 years prior to September 28, 1980, and had spent periods of time on the Robinson farm.
5. Mr. Letcher was on September 28, 1980 an attorney engaged in the general practice of law in the District of Columbia.
6. It had been the practice of Mr. Letcher for a substantial number of years to irregularly visit the Robinson farm, and engage in field work on the farm and in the orchard as a form of exercise and relaxation. At times, including in the year 1980, he helped bring fruit from the orchard to Mrs. Robinson to sell from her shed and he heard and observed her making sales, handling money, and having discussions with friends while making such sales in the summer of 1980.
7. Mr. Letcher and a friend and neighbor, Victor M. Olson, came to the Robinson farm on September 27, 1980 to spend several days working on the farm and orchard.
8. At an unknown time on September 28, 1980, George Robinson told Mr. Letcher that his mother wanted to see him. He went to her home alone and she told him that she wanted to write a Will. At that time he asked her whether she had her own counsel and she said that he was unavailable; she couldn't reach him and she wanted to do the Will now.
9. Mr. Letcher had never performed any legal services for for Mrs. Robinson.
10. Mr. Letcher and Mrs. Robinson had a lengthy and detailed conversation concerning her family and her wishes as to the contents of the Will. At Mr. Letcher's request Mrs. Laura Bonanni and Mr. Victor M. Olson were present during part or all of the conversation. At Mr. Letcher's direction Mrs. Bonanni made some



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notes in shorthand of the conversation concerning relatives. According to her notes Mrs. Robinson correctly identified the widow of her deceased son, John, and his two sons and also correctly identified the places where the two grandsons lived.

11. Mrs. Robinson was very specific in that she wished to leave her entire estate to her son, George Albert Robinson, and that she wanted to appoint Patsy P. Bonanni her executor.

12. During the discussion Mrs. Bonanni's notes indicate Mrs. Robinson said, "If I don't do it the way I'm doing it, I would have to cut it into 900 pieces." We find this to be nothing more than an exaggeration demonstrating her lack of inclination to divide up her estate among members of her family.

13. Mr. Letcher dictated Mrs. Robinson's Will to Mrs. Bonanni explaining what he was dictating to Mrs. Robinson as he proceeded.

14. When the dictation was complete Mrs. Bonanni took her young son and her notes to her home, and typed the Will as it had been dictated. When it was completed she returned to Mrs. Robinson's home.

15. At Mrs. Robinson's home Mrs. Bonanni delivered the typed Last Will and Testament to Mr. Letcher who then read it to Mrs. Robinson who was seated in a chair against the wall. After he completed the reading, he handed the Will to Mrs. Robinson who walked from the chair to a table in the center of the room and using a small magnifying glass read the Will for herself. Either while he was reading the Will or after she had completed reading it Mr. Letcher asked her if she was satisfied and whether she understood it, and she signified that she was satisfied and did understand it.

16. All of the foregoing took place in the presence of Mrs. Bonanni and Mr. Olson. Mrs. Robinson then signed the Will and Mr. Olson and Mrs. Bonanni witnessed it.

17. Mr. Letcher then instructed Mrs. Robinson to place the signed original Will in a safe place but not in a safe deposit box. She indicated that she would do that and left the kitchen and went into another room with her Will.

18. There is no indication that Mr. Letcher discussed with Mrs. Robinson the property she owned or the value of the same.

19. Mr. Letcher and the two witnesses to the Will described Mrs. Robinson as appearing to be fully competent; understanding exactly what she was doing and without signs of any mental weakness or impairment.

20. Mr. Letcher did not charge Mrs. Robinson for preparing her Will.

21. Mr. Letcher had over the years answered a few legal questions for George A. Robinson, and discussed some notes issued by Knouse Company to Mrs. Robinson and to George A. Robinson with him, but he did not feel he was George A. Robinson's attorney at any time.

22. Victor M. Olson, one of the witnesses to the Will, is a mechanical and electrical engineer. He had been visiting the Robinson farm for approximately 7 years and enjoyed going to the farm for the exercise.

23. On September 28, 1980, Mr. Olson was called to come to Mrs. Robinson's home. When he arrived Mrs. Bonanni was present and Mr. Letcher was discussing Mrs. Robinson's Will with her. He recalled seeing her read the Will with a reading glass and Mr. Letcher asking her if that was what she wanted, and that she asked him a couple of questions before signing.

24. Mr. Olson described Mrs. Robinson as signing the Will in a very deliberate way, which took her perhaps one-half minute.

25. On September 29, 1980, he went to Mrs. Robinson's home to cut down a tree and she directed him in the cutting so that it would not affect the clothesline attached to it. He then removed a florescent bulb from the electrical fixture in her kitchen and she told him where to find the new ballast, and which box had the new ballast and which had the old ones.

26. Fred Froehlich is a retired managing engineer whose home is in Columbia, Maryland. He owns a farm in Pennsylvania which is in sight of the Robinson farm. He considered Mrs. Robinson to be a good friend and had been acquainted with her for about 14 years.

27. In August or September 1980, Mr. Froehlich recalled visiting her, and that she remembered that his daughter was in college in Massachusetts, has received a letter from her, and wanted to tell him about it.

28. Mr. Froehlich next saw Mrs. Robinson in November of

1980 in the Chambersburg Hospital after an amputation. He described her as being very ill as contrasted to her condition a few months before when she had been so lucid, competent and in command of everything. She did not recognize him when he visited her at that time.

29. Mr. Froehlich described Mrs. Robinson at the time of the August or September 1980 visit as being the same as she had always been - astute, competent and discussing things about the farm. He testified he left her with the impression that she was an elderly person as sharp as anyone on the street.

30. Mrs. Robinson's son, John H. Robinson, died in 1971 leaving to survive him a widow, Pearl Robinson, and two sons, John H. Robinson, Jr. and Charles James Robinson. The widow and both sons were sui juris adults at the date of the hearings in the matter.

31. On March 2, 1964, Mrs. Robinson had executed a Last Will and Testament in which she devised her entire estate to her two sons, George A. Robinson and John H. Robinson.

32. John H. Robinson, Jr., and Charles James Robinson are the petitioners/contestants in this matter, and seek to have the Will dated September 28, 1980 set aside and the March 2, 1964 Will probated so that they each will be entitled to receive an undivided one-quarter of her estate.

33. The testimony of the contestants and their mother that the decedent didn't recognize them, couldn't see or read, wasn't involved at all in the orchard and farm business, and could not take care of herself in the summer of 1980 and through September 28, 1980, was contradicted and effectively rebutted by the testimony of Messrs. Letcher, Olson, Froehlich, Mr. and Mrs. Bonanni, and George A. Robinson.

34. Dr. Lynn I. Adams treated Mrs. Robinson on January 4 and in August 1978. He next saw her on November 6, 1980 when he admitted her to the Chambersburg Hospital with an admitting diagnosis of being mentally confused, very short of breath, and with an injured leg as a result of a fall. After admission to the hospital, she was treated for congestive heart failure and Dr. Rector amputated her left leg. She was discharged on January 12, 1981 with a diagnosis of congestive heart failure, generalized bruising from a fall, chronic brain syndrome, generalized arteriosclerosis, diabetes mylitis, and amputation of left leg above knee.



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**LEGAL NOTICES**

Richard D. Myers and: In the Court of  
 Esta D. Myers, his : Common Pleas of the  
 wife, : 39th Judicial District  
 : of Pennsylvania  
 Plaintiffs : Franklin County  
 : Branch  
 :  
 : Civil Action - Law  
 vs. :  
 : A.D. 1986 - 300  
 The Estate of :  
 Cornelius :  
 Louderbaugh, his :  
 administrators, heirs:  
 and assigns, :  
 Defendants : Action to Quiet Title

11-7-86

TO: The Estate of Cornelius Louderbaugh,  
 his administrators, heirs and assigns,  
 Defendants:

You are notified that an Order has been entered on October 29, 1986, directing that within thirty (30) days after this publication you shall bring an action of ejectment against the Plaintiff to recover the land described in the Plaintiffs' Complaint or be forever barred from asserting any right, lien, title or interest inconsistent with the interest or claim set forth in the Plaintiffs' Complaint to the land here described.

This action concerns lands in the Borough of Mercersburg, Franklin County, Pennsylvania, described as follows:

Real estate lying and being situated on West Fairview Avenue, Borough of Mercersburg, Franklin County, Pennsylvania, consisting of two (2) twelve (12) foot alleys lying adjacent to the west and north boundaries of the Plaintiffs' real estate described in Franklin County Deed Book Vol. 695, page 470.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the Court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

**LEGAL NOTICES, cont.**

Legal Reference Service of  
 Franklin-Fulton Counties  
 Court House  
 Chambersburg, Pennsylvania 17201  
 Telephone No.: Chambersburg  
 1-717-264-4125 Ext. 213

Thomas B. Steiger  
 Attorney for the Plaintiffs  
 56 South Main Street  
 Mercersburg, PA 17236

35. In his deposition, Dr. Adams testified that on admission to the hospital Mrs. Robinson suffered from organic brain syndrome which "is a condition where the mental capacity is impaired due to a chemical, organic substance that is causing a defect in the brain that causes a defect in thinking, such as someone recovering from the DT's from alcohol. Some, they have the symptoms of the DT's and are hallucinating and seeing things that are not there." (Adams' Deposition N.T.9) He further expressed the opinion that chronic brain syndrome "is a progressive disease that occurs over probably years until it gets to the stage where it is diagnosable", (Adams Deposition N.T. 11), and that it "occurs over a period of weeks, months, or years." (Adams Deposition N.T. 11). He opined that she would have been suffering from chronic brain syndrome 38 days prior to November 6, 1980, which would have included the date on which she executed her Will.

36. On cross-examination Dr. Adams conceded that a person suffering from chronic brain syndrome does have periods when they are more lucid and are able to remember things better some days than other days. (Adams Deposition N.T. 16)

37. On cross-examination Dr. Adams was asked whether he had any opinion with reasonable medical certainty whether or not Mrs. Robinson suffered from organic brain syndrome to a degree rendering her incapable of knowing her relatives, knowing who her relatives were or what property she owned. If another witness had testified that in his opinion on September 28, 1980 when he witnessed her Will, and prior to that date when he had visited her, she had no sign of mental weakness or mental impairment, the doctor responded: "I really do not know the answer to the question. Chronic--it is not organic. It is chronic brain syndrome, and chronic brain syndrome is a progressive condition. But it does not start overnight." (Adams Deposition N.T. 22).

38. Dr. Robert E. Rector, a general surgeon, testified by deposition that he had discussed with Mrs. Robinson on several occasions the imminent probability of it becoming necessary to amputate her leg, and it was his impression that she comprehended what he was telling her. These discussions occurred after her admission to the Chambersburg Hospital on November 6, 1980. He did obtain her consent to surgery. He noted that while in the hospital, she had periods of lucidity during her more serious episodes of congestive failure and toxicity, and the record indicates times when she was quite alert and other times when she was totally confused.

39. In response to the question, "Dr. Rector, assuming that a witness has testified that he was satisfied that on the date of the Will

signing Amanda Robinson was aware of what she was doing and understood what property she owned and who her relatives were, do you have an opinion with reasonable medical certainty as to whether or not Amanda Robinson was lucid on September 28, 1980?"

Dr. Rector responded, "I can only say that there is a possibility that she could have been. There is a possibility that she could have been by virtue of the fact that she showed lucid intervals during this hospitalization, but I don't think anyone could say with certainty that they could predict somebody's mental state on a day one month prior to the hospitalization." (Rector Deposition N.T. 10, 11).

40. The testimony of Drs. Adams and Rector did not establish that the decedent suffered from any mental incapacity on September 28, 1980.

41. On the basis of the rebuttal testimony of George A. Robinson, we conclude:

(a) Every morning in the month of July and August 1980, he visited his mother to set out her medication and usually found her eating the breakfast she prepared of toast and egg.

(b) During those visits they talked about the weather and what she had heard on the news the night before.

(c) For 25 years, including in July and August 1980, he ate lunch with his mother at her home and she prepared the meal. During lunch they discussed big items and farm and orchard business.

(d) The decedent used a magnifying glass to read the newspaper and she cut out obituaries of people she knew. She was doing that during the summer of 1980.

(e) In 1980 she was still selling fruit to her regular customers.

(f) Mrs. Robinson never discussed making a new Will with him, but on September 29, 1980 she told him she had made a new Will and that if anything happened to her he was to go to the Bible that there was a paper in it that he was to get. After she went to the hospital he found the Will she had executed on September 28, 1980 in the Bible in an unsealed brown envelope.



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**Donald F. Chlebowski and  
Betty L. Chlebowski  
Atty: Martha B. Walker**

ALL THAT CERTAIN tracts of real estate lying and being situate in Peters Township, Franklin County, Pennsylvania, known as "Camp Parnell", bounded and described as follows:

TRACT NO. 1: BEGINNING at an iron pin at the center line of the Lincoln Highway, being U.S. Route 30, at lands of George R. Reeder and wife; thence along the center line of said highway, South 89 degrees 13 minutes East, 173 feet to an iron pin at Tract No. 2 herein; thence by the same, South 6 degrees West, 220 feet to a post at Tract No. 3 herein; thence by the same, North 87 degrees West, 129 feet to an iron pin; thence by land of George R. Reeder and wife, North 5 degrees 50 minutes West, 212.2 feet to an iron pin in the center line of the aforementioned highway, the place of BEGINNING. CONTAINING 121 perches, neat measure, as shown by draft of John J. Atherton, C.S., dated August 12, 1947.

TRACT NO. 2: BEGINNING at a point on the South side of Lincoln Highway, at lands of John R. Jarrett and wife; thence by same, South 6 degrees West, 200 feet to an iron pin at Tract No. 3 herein; thence by the same, North 89 degrees West, 289.6 feet to an iron pin; thence by Tract No. 1 herein, North 6 degrees East, 200 feet to an iron pin at the South side of said highway; thence along the same, South 89 degrees East, 286.6 feet to a point, the place of BEGINNING. CONTAINING 1.32 acres, more or less.

TRACT NO. 3: BEGINNING at an iron pin at corner of Tract No. 2 herein; thence by the same, South 89 degrees East, 459.0 feet to a post; thence by the same, North 6 degrees East, 4 feet to an iron pin at land of John R. Jarrett and wife; thence by same, North 87 1/4 degrees East, 153 feet to an iron pin; thence by land of John E. Appleby, North 89 degrees East, 219 feet to an iron pin at land of Glenn E. Fisher and wife; thence by the same, South 5 1/2 degrees East, 107 feet to an iron pin; thence by land of Robert H. Anderson and wife; North 89 1/2 degrees West, 900 feet to an iron pin at land of George R. Reeder and wife; thence by the same, North 27 1/2 degrees East, 124 feet to an iron pin, the place of BEGINNING. CONTAINING 2 acres and 40 perches, as shown by draft of John H. Atherton, C.S., dated July 20, 1962.

BEING the same three tracts of real estate which Santo M. Pantano and Judy A. Pantano, his wife, by their Deed Dated \_\_\_\_\_, 1984, and recorded in Franklin Co., PA., Deed Book Volume \_\_\_\_\_, Page \_\_\_\_\_, conveyed to Donald F. Chlebowski and Betty L. Chlebowski, his wife, MORTGAGORS herein.

LESS the following described two tracts of real estate previously conveyed by Santo M. Pantano and Judy A. Pantano, his wife, to John R. Jarrett and Barbara E. Jarrett, his wife, by deed dated December 23, 1983, and recorded in Franklin Co. Deed Book Volume 895, Page 524.

TRACT NO. 1: BEGINNING at a point in the center of U.S. Route 30 at corner common to lands of Santo M. Pantano and Judy A. Pantano, his wife, and other lands of John R. Jarrett and wife; thence by the latter, South 5 degrees 30 minutes East, 237.6 feet to an iron pin at corner common to Tract No. 2 hereinafter described and other lands of Santo M. Pantano and wife; thence by the latter, North 8 degrees 5 minutes West, 43 feet to an iron pin, thence by the same South 85 degrees 45 minutes West 18.6 feet to an iron pin; thence by the same, North 11 degrees 37 minutes West, 113.15 feet to an iron pin; thence by the same, North 18 degrees 18 minutes East, 66.5 feet to the point, the place of BEGINNING. CONTAINING .098 acre and being Parcel A on the subdivision plan prepared for Santo M. Pantano and Judy A. Pantano, his wife, by Richard K. Fisher, R.S., dated September 8, 1983, which was reviewed by the Franklin County Planning Com-

mission on September 13, 1983, reviewed by the Peters Township Planning Commission on September 26, 1983, and approved by the Board of Supervisors of Peters Township on September 30, 1983, a copy of which, with said municipal approvals thereon is recorded in the Office of the Recorder of Deeds of Franklin Co., Pa., in Deed Book Vol. 288C, Page 615.

BEING Part of Tract No. 2 of 3 tracts of real estate which Nellie J. McLaughlin, widow, by her deed dated July 24, 1973, and recorded in the Recorder's Office aforesaid in Deed Book Volume 689, Page 1096, conveyed to Santo M. Pantano and Judy A. Pantano, his wife, GRANTORS.

TRACT NO. 2: BEGINNING at an iron pin at corner common to other lands of Santo M. Pantano and wife, Tract No. 1 above described, and other lands of John R. Jarrett and wife; thence by the latter, North 88 degrees 30 minutes East, 154.44 feet to an iron pin at corner of lands now or formerly of John E. and Delma M. Appleby; thence by the latter, North 89 degrees East, 219 feet to an iron pin at lands now or formerly of Glenn E. and Verda B. Fisher; thence by the latter, South 5 degrees 30 minutes East, 107 feet to an iron pin at corner of lands now or formerly of Robert H. Anderson, thence by the latter, North 89 degrees 30 minutes West, 315 feet to an iron pin at corner of other lands of Santo M. Pantano and wife; thence by the latter, North 35 degrees 35 minutes West, 117.93 feet to the iron pin, the place of BEGINNING. CONTAINING .805 acre and being Parcel B on the above recited subdivision plan.

BEING part of Tract No. 3 of 3 tracts of real estate which Nellie J. McLaughlin, widow, by her deed dated July 24, 1973, and recorded in the Recorder's Office aforesaid in Deed Book Volume 689, Page 1096, conveyed to Santo M. Pantano and Judy A. Pantano, his wife, GRANTORS.

TOGETHER with the buildings and improvements erected thereon, the appurtenances hereunto belonging and the reversions, remainders, rents, issues and profits thereof.

BEING sold as the property of Donald F. Chlebowski and Betty L. Chlebowski Writ No. AD 1986-280.

**TERMS**

**As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.**

**The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 22, 1986 at 4:00 P.M., E.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on Monday, December 29, 1986 at 1:00 P.M., E.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.**

SHERIFF'S SALE

Friday, December 12, 1986

42. Mrs. Robinson owned the family farm upon which her home was located, and she and George A. Robinson acquired an adjoining farm in 1936 in joint name. The orchard was on both farms and both were operated together. In addition to the orchard business there was a regular farming operation with the growing of corn, oats and vegetables.

43. George A Robinson did not know his mother was contemplating the writing of a new Will until after it had occurred and she told him on September 29, 1980.

44. George A. Robinson commenced working on the family farm when he was 17 years old. He was not paid for a number of years and later received \$35.00 or \$50.00 per week for a period of time. In the latter years of his mother's life he generally managed the day-to-day farm operations but he conferred with her regularly.

45. George A. Robinson was the natural object of his mother's bounty.

46. Patsy P. Bonanni had known Mrs. Robinson and George A. Robinson since 1971 when he was a student at Shippensburg University and worked for them during summer vacations.

47. In 1975 or 1976 Mr. Bonanni commenced doing the book work for the orchard and preparing quarterly tax reports and tax information to be delivered to the tax accountant. Mrs. Robinson was aware of the services Mr. Bonanni rendered for the farm operation.

48. In the early summer of 1980, Mrs. Robinson told Mr. Bonanni she was going to make a Will and asked if he would be her executor. When he inquired why she didn't use John Brannon, a friend of hers. She responded that he was too old.

49. John McCrae, III and his father had been the attorneys for Mrs. Robinson. In August 1980 she called John McCrae, III and told him she wanted to make a new Will. Mr. McCrae never met with her to make that Will.

50. On September 28, 1980 Amanda A. Robinson was competent, did have testamentary capacity and was not unduly influenced by anyone.

## DISCUSSION

Contestants claim that the testatrix lacked testamentary capacity and suffered undue influence during the making and execution of her Will dated September 28, 1980. There is a presumption that a will was made by a person having testamentary capacity and free from undue influence where it was prepared by his lawyer at his request and in accordance with his instructions. *In Re: Milleman's Estate*, 415 Pa. 261, 203 A.2d 202 (1964). Strong, compelling and clear evidence is required to overcome the presumption of testamentary capacity and lack of undue influence. *Id.*

Although there was testimony by the contestants and their mother that the testatrix had failed physically and mentally by the summer of 1980, this testimony was effectively rebutted by the testimony of testatrix's son, the witnesses to the Will and several friends. The testimony of the doctors did not establish any lack of capacity on September 28, 1980. She appears instead to have been an alert, strong-willed old lady who enjoyed being involved in the family farm, following current news events and visiting with old friends. Failing to arrange a meeting with her attorney, on September 28, 1980, she summoned Mr. Letcher, an attorney and family friend, to prepare her Will. In the presence of the witnesses, they discussed, and later executed, her Will. During the discussion, she correctly identified her grandsons and their current addresses. Apparently she had little contact with them and no inclination to divide her estate among the family members. She was very specific in her desire to leave her entire estate to her son, George. She left her estate to her closest relative who visited her daily and did the most for her. The testamentary scheme is natural, reasonable and in harmony with the family background. The contestants have failed to cast doubt on the presumption that the testatrix possessed testamentary capacity when the Will was executed.

The contestants fear that the testatrix's son, George, exercised undue influence over his mother in the making of her Will. The burden of proving undue influence is on the will contestants in the first instance, and to shift the burden to the will proponents, the contestants must first establish by clear and convincing evidence that when the Will was executed, testator was of weakened

intellect, and that a person in a confidential relationship with testator received a substantial benefit under the will. *Matter of Estate of Ross*, 316 Pa. Super. 36, 462 A.2d 780 (1983). A confidential relationship exists whenever circumstances make it certain that the parties did not deal on equal terms but that on one side there was an overmastering influence and on the other dependence or trust justifiably reposed. *Id.* In the case at bar, a confidential relationship may have existed between the testatrix and her son. Certainly he is receiving a substantial benefit under the Will. However, the contestants have failed to demonstrate that the testatrix was of weakened mental capacity on September 28, 1980. The testimony of the contestants concerning mental weakness has been rebutted. The doctors who examined the testatrix in November could not testify with any certainty respecting her condition more than a month earlier. The decisive time is that of the actual execution of the Will. The contestants have failed to prove that the testatrix was of weakened intellect when she signed her Will dated September 28, 1980. The burden of proof did not shift to the will proponents but remained with the contestants.

To constitute undue influence sufficient to void a will, there must be imprisonment of the body or mind, 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, destroy his free agency and operate as a present restraint upon him in making a will. *In re Ziel's Estate*, 467 Pa. 531, 359 A.2d 728 (1976). In the case at bar, there is no evidence that the testatrix's son abused his position of trust or attempted to influence his mother in the making of her Will. On the contrary, he wasn't even aware that his mother was planning to make a new will until the day after the will execution. Mere opportunity cannot sustain the contestants' burden of proving undue influence.

## DECREE

NOW, this 4th day of November, 1985, the appeal from probate is dismissed.

Costs to be paid by appellants.



SCHETROMPT v. UNTERMOEHLLEN, C.P. Franklin County  
Branch, No. 16 of 1984-C

*Equity - Specific Performance - Agreement of Sale - Rental Agreement - Reasonable  
Time for Settlement*

1. Where seller agrees to sell real estate, he cannot force rescission on the buyer who does not assent.
2. Where seller does not settle on the property as promised and buyer rents the property after the settlement date, the rent agreement does not terminate the sales agreement unless the parties both intended that.
3. A reasonable time for settlement to take place is a question for the fact finder and is to be determined by considering all the circumstances.
4. Tender of the balance of the purchase price is not necessary where seller delayed settlement and eventually repudiated the agreement.

*Jan G. Sulcove, Esquire, Counsel for Plaintiff*  
*James M. Schall, Esquire, Counsel for Defendants*

#### OPINION AND DECREE NISI

EPPINGER, S.J., November 27, 1985:

Gerald R. Schetrompf (buyer) filed this equity action to compel Frank L. Utermoehlen, Jr. and Janet D. Utermoehlen (owners) to compel specific performance of a contract under which the owners are required to convey a parcel of land in Union Township, Fulton County, to him.

Before the owners bought the tract out of which this parcel is to be divided, the buyer rented it from Isabel Lashley. During this tenancy, the buyer tried to buy the parcel upon which his mobile home is located from Mrs. Lashley. Then when the property was sold by Lashley to the present owner, the buyer started negotiations with the owners to buy it.

The negotiations reached a serious stage and the buyer had a tract of 3.27 acres surveyed at a cost of \$200 and the subdivision was approved by the Fulton County Planning Commission. After that the parties met in a lawyer's office and the owners gave the buyer a receipt in the following form:



13 West Main St.  
P.O. Drawer 391  
717-762-8161



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