

(3) That when an account is stated and approved by the court, that Richard O. Unger shall pay over to Dolores E. Unger the amount found due to the plaintiff by virtue of the constructive trust, together with interest; and

(4) the defendant shall pay the costs of these proceedings.

ESTATE OF EARL R. PATTON, DECEASED, C.P. Franklin County Branch, No. 116 - 1983

Will - Lack of Testamentary Capacity - Undue Influence

1. Every person is presumed to be competent and whether he is competent is determined as of the date a will is executed.
2. The burden is on the person claiming incapacity to show incapacity conclusively.
3. While evidence of capacity distant in time may be considered, evidence closest in time is more persuasive.
4. To show undue influence on a testator, evidence must establish that testator was of weakened intellect at time of executing his will, a confidential relationship existed and that the person exerting undue influence received a substantial benefit.

William C. Cramer, Esq., Counsel for Petitioner

Kenneth F. Lee, Esq., Counsel for Respondent

OPINION AND ORDER

EPPINGER, P.J., January 30, 1985:

Earl R. Patton died leaving a will dated March 29, 1983. Under that will, if Nancy E. Yocum (Nancy) survived the testator, she was to receive his motor vehicle, household furnishings, and his house. Nancy survived him. But if she had not, the motor vehicle and the furnishings would have gone to Marietta R. Brunner, and the house would have lapsed into the residue which testator left to his son, John M. Patton (John).



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



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COMPETENT AND COMPLETE**



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Telephone (717) 762-3121

THREE CONVENIENT LOCATIONS:
Potomac Shopping Center - Center Square - Waynesboro Mall
24 Hour Banking Available at the Waynesboro Mall

LEGAL NOTICES, cont

HESS: First and final account, statement of proposed distribution and notice to the creditors of Mellon Bank (East) N.A. (formerly known as Girard Bank) Trustee for the Trust Agreement of Harold A. Hess, deceased.

George B. Heefter, Acting Clerk of Orphans' Court of Franklin County, Pennsylvania

10-25, 11-1

Pursuant to 24 P.S. 7-707 (3), notice is hereby given that the Waynesboro Area School District has petitioned the Court of Common Pleas of the 39th Judicial District, Pennsylvania, Franklin County Branch, praying for approval of the private sale of real estate situate in Quincy Township, Franklin County, Pennsylvania together with the improvements thereon, more fully described in said petition and commonly known as New Baltimore Elementary School, for \$50,000.00 to Donald E. Stoops and Timothy A. McFarland. The Court has fixed December 5, 1985 at 1:30 p.m. and the designated court room in the Franklin County Court House, Chambersburg, Pennsylvania, as the time and place for hearing thereon.

Ullman, Painter and Misner Solicitors

Waynesboro Area School District

10-25, 11-1, 11-8

NOTICE

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on the 31st day of April, 1985, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364 as amended, is ANTIETAM ABSTRACT CO., 239 East Main Street, Waynesboro, PA 17268.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

STEPHEN E. PATTERSON

Patterson, Kaminski, Keller & Kiersz

239 East Main St.

Waynesboro, PA 17268

11-1-85

LEGAL NOTICES, cont

NOTICE OF FILING ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 10th day of October, 1985, for the purpose of obtaining a certificate of incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is Culp's Office Products Center, Inc.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Law Offices of Glen and Glen

306 Chambersburg Trust Building

Chambersburg, Pennsylvania 17201

11-1-85

The will named Nancy as executrix and Marietta Brunner as substitute executrix in the event Nancy failed to qualify. Nancy applied for probate of the will, and John, claiming to be testator's only legal heir, appealed from the probate and the grant of letters to Nancy.

When testator executed his will, he was a patient at the Veterans Administration Medical Center, Martinsburg, West Virginia, and it is John's contention that (1) the testator was incapable of making a will because of mental and physical illness depriving him of the capacity to do so, and (2) that the will was obtained by Nancy with undue influence and duress. Testator made an earlier will in which his home was left to his son.

Nancy met the testator in 1965, when he was a friend of her parents and when he visited the restaurant where she worked. What has been described as a close "family-type" relationship developed between them. Nancy thought of testator as her father. He referred to her as his "niece". Beginning in 1975 and continuing through the time of testator's death, except for about a year and a half (January, 1980 to July, 1981), Nancy lived in testator's home with her daughter. While there she paid rent, bought groceries, and performed everyday household chores such as laundry and cleaning. She also did chores for the testator during the time she was not living in his house.

Testator was divorced from John's mother in 1963 and had not seen his son since 1970, except for a brief visit in August, 1982, when John and his mother visited the testator at the Veterans Administration facility at Martinsburg, West Virginia.

Beginning in 1982, testator's condition required him to be in and out of the Martinsburg facility. On April 10, 1982, he was transferred to the National Institutes of Health in Washington, D.C., for open-heart valve replacement surgery. While he was hospitalized there, Nancy and her daughter visited with him.

Early in 1983, testator had a conversation with a close friend, Roy Webber, and talked about his will. Testator said to Mr. Webber that he had a will but was going to change it because of his disappointment with his son and former wife for never coming to see him nor doing anything for him. He said he wanted to leave his estate "to one who did for me".

On March 29, 1983, testator called Nancy and asked her if she wanted his home. When she said she did, testator told her to contact the lawyer who drafted his 1980 will and have him draft a new will. Nancy contacted the attorney the same day. The attorney called a counselor, Frank Lowther, at the Martinsburg veterans' center, asking the counselor to confirm testator's desire to change his will. Mr. Lowther spoke with testator on March 29, confirmed that he did intend to leave his house to Nancy, and telephoned the attorney to advise him of testator's intent.

That same day, as directed, the attorney drafted a new will for the testator, and Nancy delivered the will to the veterans' center. Testator signed the will in the Chief Ward Administrator's office and in the presence of two witnesses. Nancy was not there when the will was signed. Testator then gave the document to Nancy in a sealed envelope, and she returned it to the attorney.

We note at the outset, in reviewing John's contention that his father was not of sound mind and not capable of executing a will on March 29, because he lacked testamentary capacity, that the burden is upon John to show conclusively that his father was incompetent. *Estate of Shelly*, 484 Pa. 322, 332, 399 A.2d 98, 103 (1979). Every person is presumed to be competent and whether he is competent is determined as of the date the will was executed. *Estate of Ziel*, 467 Pa. 531, 537, 359 A.2d 728, 732 (1976); *Estate of Kuzma*, 487 Pa. 91, 95, 408 A.2d 1369, 1371 (1979).

In support of his contention that his father was without testamentary capacity on March 29, 1983, John introduced his own testimony and that of his mother, Francis Patton. Francis Patton had been testator's wife until their divorce in 1963. They had separated in 1958. She testified that testator had been hospitalized and treated for some sort of mental illness. Francis did not see testator following their divorce until August 22, 1982, when she visited him in the hospital for several hours with John. Several other brief visits followed in the veterans' hospitals prior to his death.

We may accept all of this testimony as true, but it does not demonstrate that testator was incompetent on March 29, 1983. In *Ziel*, supra, at 537, 731, we are told that we determine testamentary capacity based on whether the testator has an intelligent knowledge regarding the natural objects of his bounty, the composition



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LEGAL NOTICES, cont.

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on October 29, 1985, an application for a certificate for the conducting of a business under the assumed or fictitious name of R & R Country Crafts, with its principal place of business at 11728 Pen Mar Road, Rouzerville, PA 17250. The name and address of the person owning or interested in said business is Mrs. Rhonda Kemper, 11215 Snyder Ave., Waynesboro, PA 17268.

11-8-85

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on October 16, 1985, an application for a certificate for the conducting of a business under the assumed or fictitious name of Appalachian Gardens, with its principal place of business at P.O. Box 87, Westview Ave. off Fairview Ave., Waynesboro, PA 17268. The name and address of the person owning or interested in said business is Appalachian Nurseries, Incorporated, P.O. Box 87, Westview Ave., off of Fairview Ave., Waynesboro, PA 17268.

Maxwell, Maxwell, Dick & Walsh
92 West Main Street
Waynesboro, PA 17268-1591

11-8-85

IN THE COURT OF COMMON PLEAS
OF THE 39TH JUDICIAL DISTRICT
OF FRANKLIN COUNTY,
PENNSYLVANIA —
ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: December 5, 1985.

LEGAL NOTICES, cont.

LESHER: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Administrator of the Estate of John L. Leshar, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

MARTIN: First and final account, statement of proposed distribution and notice to the creditors of Grace M. Hornbaker, Executor of the Estate of Charles R. Martin, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

PARSONS: First and final account, statement of proposed distribution and notice to the creditors of Raymond J. Parsons, Jr., Executor for the Estate of Raymond J. Parsons, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

George B. Heefner
Acting Clerk of Orphans' Court of
Franklin County, Pennsylvania

11-8, 11-15, 11-22, 11-29

of his estate and what he desires done with it. This is true even though testator's memory has been impaired by age or disease. This testimony supports the proposition that testator knew his son was a natural object of his bounty. He had included him in an earlier will, and indeed in the one being contested. So the testimony does not demonstrate that testator was incompetent. From it we cannot conclude testator was of weakened intellect when the will was signed. See *Shelby*, supra, at 332-3, 103. We are led to the conclusion then John has not met his burden.

Beyond that, the testimony of John and his mother speaks about testator's state of mind before and after March 29, 1983. Even if the testimony did demonstrate a weakened intellect at those times, this would not be conclusive that testator was incompetent on the day he executed the will. See *Estate of Ziel*, supra, at 537, 732. While evidence of capacity distant in time may be considered, evidence closest in time is more persuasive. *Estate of Clark*, 461 Pa. 52, 65, 334 A.2d 628, 634 (1975).

The evidence which carries the greater weight and which we accept may be summarized by saying testator knew and appreciated what Nancy had done for him, that he directed the new will to be written because of that, that at the time it was signed at the hospital he was fully competent, that he sealed it in an envelope, and that he directed an appropriate repository for it, the same one he had chosen for his earlier will.

This is supported by the testimony of his friend Roy Webber which we mentioned earlier. We also had several depositions of personnel at the Martinsburg veterans' center. One was from Frank Lowther, social worker and counselor, who verified for testator's attorney that the will was to be changed. Eunice L. White, Chief Ward Administrator, also testified. Both confirmed that there was nothing in testator's behavior that caused them to doubt his competency to execute a will. Lowther deposed that testator said he wanted to leave his house to Nancy Yocum. White state that testator was brought to her office to sign the will and if there had been any question as to his competency his physician would have been contacted.

There is testimony which bears on testator's competency at other times. Linda Hurley, a nurse at the veterans' center, characterized him as being strong-willed and determined to be his

own person. She also noted an episode on March 24 in her records questioning night time mental changes. Testator was found at the foot of his bed, rocking back and forth. John argues that behavior showed mental incompetency, while Nurse Hurley explained that testator said his leg hurt and opined the rocking was probably the result of a leg cramp and that he was trying to restore circulation.

Moreover, not until two weeks after the will was signed did the testator ask Nancy to write nine checks which he signed. That was at a time when he was in the intensive care unit. Before that he had been writing them himself. All of this adds to the presumption that the testator possessed the necessary testamentary capacity to execute a will on March 29. See *Ziel*, supra, at 537, 731-2, and *Kuzma*, supra, at 95, 1371.

There was testimony by Donald Rooney, social worker at the National Institutes of Health, that when the testator arrived there on April 10 he was confused and partially disoriented but that was attributed to exhaustion. By April 14, before surgery, testator was once again alert and not disoriented. His consent for the surgery was acquired by a physician. Nothing the doctor observed at that time caused him to suspect that testator was not competent to sign his own consent, which he did.

John's second argument is that the will was the product of undue influence upon the testator by Nancy Yocum. To establish this contention it must be shown that testator was of weakened intellect when he executed the will, that Nancy Yocum was in a confidential relationship with him and that she received a substantial benefit. *Shelly*, supra, at 332, 103, *Ziel*, supra, at 541, 733. Obviously Nancy received a substantial benefit under the will. But as discussed earlier, the evidence does not show that he was of weakened intellect at the time he executed the will. Neither did a confidential relationship exist whereby Nancy exerted an "overmastering influence" over testator. *Ziel*, 542, 734. Undue influence destroys one's free agency, which results from imprisonment of the body or mind, fraud, threats, misrepresentations, or inordinate flattery. *Id.*, at 541, 733. None of these were present here.

When Nancy acted to contact the attorney for him it was at testator's direction. The attorney checked with the hospital, independent of Nancy, to determine testator's purpose, and the

hospital followed normal procedures to ensure that the will was what testator wanted. When the will was signed, Nancy was not present. Actually, Nancy was in no position to execute undue influence over the testator while he was in the Veterans' Administration facility. All she did was visit him with her daughter from time to time, and no evidence suggests that she even had an opportunity to influence his will. Nor was she conducting his financial affairs which would lead to a conclusion that the parties were no longer dealing on equal terms so that he was dependent on her. *Id.*, at 542, 734. The assistance she rendered was at his request.

So the evidence is not sufficient to conclude that Nancy exerted an undue or overmastering influence over the testator. Accordingly, we dismiss John Michael Patton's appeal from probate of the will of Earl Patton.

ORDER OF COURT

January 30, 1985, the appeal of John Michael Patton from probate of the will of Earl R. Patton is dismissed. The costs shall be paid by the appellant.

DOPUDJA V. GREYHOUND LINES, INC., C.P., Fulton County Branch, No. 231 of 1981-C

Negligence - Automobile Accident - Use of Seat Belts - Damages

1. The plaintiffs' failure to use a seat belt may be considered on the issue of damages only where there is expert testimony that seat belts would have mitigated the plaintiffs' damages.
2. While there is no common law duty in Pennsylvania to wear seat belts, competent evidence of avoidable consequences may be considered by the jury in awarding damages.

F. William Brogun, Jr., Esq., Counsel for Plaintiffs

Stanley J. Kerlin, Esq., Counsel for Plaintiffs

Lawrence J. Newton, Esq., Counsel for Defendants