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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

In re: Mary E. Spencer, Deceased
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Orphans' Court Division No. 113-OC-2014

HEADNOTES

Orphans' Court; Undue Influence Affecting the Validity of a Will

Orphans' Court; Burden of Proof of Undue Influence

1. The party claiming that the will is subject to Undue Influence has the initial burden of proof and can bring such a claim after the will has been probated. In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) (citing In re Estate of Stout, 746 A.2d 645 (Pa. Super. Ct. 2000)).

2. For a will contestant to meet the *prima facie* case of Undue Influence and shift the burden of proof the contestant must prove the following: "1) there was a confidential relationship between the proponent and testator; 2) the proponent receives a substantial benefit under the will; 3) the testator had a weakened intellect." In re Estate of Fritts, 906 A.2d 601, 606-07 (Pa. Super. Ct. 2006) (citing In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001)).

3. The will contestant must show each of the three elements by clear and convincing evidence. In re Bosley, 26 A.3d 1104, 1108 (Pa. Super. Ct. 2011) (citing In re Estate of Reichel, 400 A.2d 1268, 1269-70 (Pa. 1979)).

4. If the will contestant shows all three elements by clear and convincing evidence, then the burden shifts to the will proponent to show that there was an absence of Undue Influence by clear and convincing evidence. In re Bosley, 26 A.3d 1104, 1108 (Pa. Super. Ct. 2011) (citing In re Estate of Clark, 334 A.2d 628 (Pa. 1975)).

Orphans' Court; Undue Influence-Generally

1. "[U]ndue influence is a subtle, intangible and illusive thing, generally accomplished by a gradual, progressive inculcation of a receptive mind. Consequently, its manifestation may not appear until long after the weakened intellect has been played upon." Owens v. Mazzei, 847 A.2d 700, 706 (Pa. Super. Ct. 2004).

2. "Conduct constituting influence must consist of 'imprisonment of the body or mind, or fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of a will.'" In re Estate of Luongo, 823 A.2d 942, 964 (Pa. Super. Ct. 2003), appeal denied, 847 A.2d 1287 (Pa. 2003) (quoting In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001)).

3. Pennsylvania case law has not outlined a clear test for Undue Influence but cases have found that Undue Influence is usually "accompanied by persistent confusion, forgetfulness and disorientation." In re Estate of Fritts, 906 A.2d 601, 607 (Pa. Super. Ct. 2006) (quoting Owens v. Mazzei, 847 A.2d 700, 707 (Pa. Super. Ct. 2004)).

Orphans' Court; Compulsory Non-suit

1. "A nonsuit may be entered against a contestant in a will contest whenever the contestant has the burden of overcoming the presumption of validity arising from due proof of execution as required by law and the contestant has failed to satisfy that burden." 20 Pa. C.S. §779(b).

2. A Court may only enter a compulsory nonsuit in a clear case where the facts and

circumstances lead to one conclusion. Speicher v. Reda, 434 A.2d 183, 185 (Pa. Super. Ct. 1981) (citing Paul v. Hess Bros., 312 A.2d 65, 66 (Pa. Super. Ct. 1973)).

Orphans' Court; Confidential Relationship Prong of the Undue Influence Test

1. A confidential relationship occurs when it is clear by looking at the facts surrounding the relationship that the parties do not deal on equal terms but, instead, one side has "an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." In re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (quoting Owens v. Mazzei, 847A.2d 700, 709 (Pa. Super. Ct. 2004) (internal quotations omitted))

2. A confidential relationship evidences such a disparity in power that the inferior party places all of his or her trust in the superior party's advice and does not seek the advice of another, which causes the potential for abuse of power. In re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (quoting eToll Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 23 (Pa. Super. Ct. 2002)).

3. The Superior Court has found that the clearest indication of a confidential relationship is when one party gives another party power of attorney over all of his or her entire life savings and finances. In re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (citing In re Lakatosh, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995)); Foster v. Schmitt, 239 A.2d 471, 474 (Pa. 1968).

4. The mere presence of a parent-child relationship does not establish a confidential relationship. In re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (citing In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001)).

5. The mere fact that the will proponent acts as a power of attorney when the decedent wanted the proponent to act as an attorney-in-fact does not establish the existence of a confidential relationship. In re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. Ct. 2006) (citing In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001)).

6. If a child is acting as attorney-in-fact merely out of convenience for the testator there is no Undue Influence present even if said child lived with the testator for four years prior to the testator's death and the testator's other children saw the testator infrequently. In re Ziel's Estate, 359 A.2d 728, 734 (Pa. 1976).

Orphans' Court; Substantial Benefit Prong of the Undue Influence Test

1. The Pennsylvania Supreme Court has stated that, in regards to the substantial benefit prong of the Undue Influence Test, it has never "define[d] the character of benefit or the extent of interest the confidential adviser must receive in order to shift the burden of proof, and, indeed, it may be said no hard and fast rule can be laid down." In re Estate of LeVin, 615 A.2d 38, 41-42 (Pa. Super. Ct. 1992) (quoting In re Adams' Estate, 69 A. 989, 990 (Pa. 1908) (citations omitted)).

2. The law merely requires that the one who allegedly received a substantial benefit and was a confidential adviser to a "mentally weak" and "bodily infirm" testator "act[ed] in the utmost good faith and if he is benefited in a legal sense by the will procured by him, he must assume the burden of showing deliberation, volition, and understanding on the part of the maker of the will." In re Estate of Stout, 746 A.2d 645, 648 (Pa. Super. Ct. 2000).

3. There is likely no substantial benefit if an executor is not given wide discretion is distributing the assets of a decedent's estate. In re Bosley, 26 A.3d 1104, 1110 (Pa. Super. Ct. 2011).

4. In deciding whether a confidential relationship is present, courts will look to see whether there is a "sufficient, independent basis" for the bequest at issue. In re Estate of Simpson,

595 A.2d 94, 98 (Pa. Super. Ct. 1991).

5. A blood relationship between a beneficiary and the testator is a "sufficient, independent basis" for a bequest. In re Estate of Stout, 746 A.2d 645, 649 (Pa. Super. Ct. 2000)

6. When a will proponent's son is also the decedent's grandson, the proponent's son's inheritance will not be imputed to the will proponent because a "sufficient, independent basis for the bequest" to the proponent's son is evidenced. In re Estate of Simpson, 595 A.2d 94, 98 (Pa. Super. Ct. 1991).

7. The Pennsylvania Superior Court has held that cases where a substantial benefit has been found involve relationships where the confidential advisor "had unfettered control, extensive powers, absolute discretion or extensive decision-making powers over the testator's estate." In re Estate of Stout, 746 A.2d 645, 648 (Pa. Super. Ct. 2000).

8. The cases where a substantial benefit was found all had circumstances where an executor or trustee had unrestrained discretion to act on an estate's behalf and did not have to follow wishes of a testator. In re Estate of Stout, 746 A.2d 645, 649 (Pa. Super. Ct. 2000) (citing In re Estate of LeVin, 615 A.2d 38, 42 (Pa. Super. Ct. 1992)).

9. Merely being appointed as an executor is not enough to evidence a substantial benefit. In re Estate of Stout, 746 A.2d 645, 649 (Pa. Super. Ct. 2000) (citing In re Estate of LeVin, 615 A.2d 38, 44 (Pa. Super. Ct. 1992)).

10. Merely receiving executor's commissions for work performed on an estate does not, in itself, provide a basis to establish the presence of a substantial benefit. In re Estate of Stout, 746 A.2d 645, 649 (Pa. Super. Ct. 2000) (citing In re Estate of LeVin, 615 A.2d 38, 44 (Pa. Super. Ct. 1992)).

11. A substantial benefit is present for an executor/testamentary trustee who has power to choose beneficiaries; alter the terms of a testamentary trust; invest, sell, or destroy testamentary trust assets for income or gain; and determine if and when a testamentary trust becomes too unrealistic to administer. In re Estate of LeVin, 615 A.2d 38, 42-44 (Pa. Super. Ct. 1992).

12. A substantial benefit is evidenced when an executor is appointed as trustee of the full amount of an approximately $75,000 estate and is a possible residuary beneficiary of the entire estate. In re Adams' Estate, 69 A. 989, 989- 990 (Pa. 1908).

Orphans' Court; Weakened Intellect Prong of the Undue Influence Test

1. In Pennsylvania, there is no clear test used to determine the weakened intellect prong of the Undue Influence test. In re Estate of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996).

2. While there is no clear test for weakened intellect, courts usually find weakened intellect present where the contestant provides evidence "the testator/testatrix was in ill-health and [was] suffering from confusion, forgetfulness and disorientation." In re Estate of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996) (quoting In re Estate of Koltowich, 457 A.2d 1302, 1305 (Pa. Super. Ct. 1983)).

3. The weakened mental condition which must be proved does not have to rise to the level of testamentary incapacity. In re Estate of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996) (quoting In re Ziel's Estate, 359 A.2d 728, 734 (Pa. 1976)).

4. The mere fact that a testator was hospitalized for dehydration and stroke, without more, is not enough to show weakened intellect. In re Estate of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996).

5. Evidence of physical infirmities is not enough, in itself, to show weakened intellect. In re Estaste of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996).

6. Pennsylvania's high court has held that as "long as the mind, like the captain of a stricken ship, is free to dictate direction and course, its decision will not be questioned in law even though the body be crippled with pain and the spirit awry with torment." In re King's Estate, 87 A.2d 469, 473 (Pa. 1952).

7. The Pennsylvania Supreme Court has continuously held that, in determining weakened intellect, it is important to determine the testator's mental capacity as closely as possible to the time the contested instrument was executed. In re Ziel's Estate, 359 A.2d 728, 732 (Pa. 1976); (citing In re Estate of Clark, 334 A.2d 628, 634 (Pa. 1975); Brantlinger Will, 210 A.2d 246, 253 (Pa. 1965)).

8. If medical testimony that is relevant to the weakened intellect prong is describing periods that are not close to the critical stages of the execution of the contested instrument then that testimony should be afforded little weight. In re Ziel's Estate, 359 A.2d 728, 732 (Pa. 1976).

Appearances:

Mary Beth Shank, Esq., *Counsel for Respondent*

Shawn M. Stottlemyer, Esq., *Counsel for Petitioner*

OPINION

Before Meyers, J.

Before this Court is Respondent Patricia L. Morris' *Motion for Compulsory Nonsuit*.

Facts and Procedural History

Petitioner is Rodney N. Spencer, the son of the Decedent, Mary Spencer. Respondent is Patricia L. Morris, the only other child of Mary Spencer and the Executrix of the Estate of Mary E. Spencer.

On December 23, 2013, Mary Spencer executed a certain writing that was intended to be her will. The writing provided for a five-hundred dollar charitable bequest to the Cumberland County Animal Shelter, a thirty-thousand dollar bequest to her granddaughter, Meredith L. Morris, and the residual estate is split eighty percent to Patricia Morris and twenty percent to Rodney Spencer. Mary Spencer was hospitalized for several days in October of 2013 and again in January 2014 leading up to her passing. Rodney Spencer was once named as alternate on Mary Spencer's power of attorney. However, Mary Spencer revoked that writing. Patricia Morris was named as Mary Spencer's agent in the revoked power of attorney and was her agent at the time of passing. On January 23, 2014, Mary Spencer passed away and shortly thereafter testamentary letters were granted to Patricia Morris.

On July 30, 2014, this Court awarded a citation directed to Patricia Morris to show cause why Mary Spencer's appeal from the decree of the Register of Wills admitting to probate the December 23, 2013 writing should not be sustained. After a joint motion for continuance by both parties, a hearing was scheduled for January 15, 2015. The hearing was to be utilized to determine whether Mary Spencer's will was the product of Patricia Morris' undue influence. At the hearing, Rodney Spencer and his wife testified. Following the close of Rodney Spencer's case, Patricia Morris motioned for Compulsory Nonsuit.

Legal Analysis

"Once a will has been probated, the contestant who claims that the will was procured by undue influence has the burden of proof." In re Estate of Angle, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) (citing In re Estate of Stout, 746 A.2d 645 (Pa. Super. Ct. 2000)). To meet the *prima facie* case of undue influence and shift the burden of proof to the will's proponent three elements must be met: "1) there was a confidential relationship between the proponent and testator; 2) the proponent receives a substantial benefit under the will; 3) the testator had a weakened intellect." In re Estate of Fritts, 906 A.2d 601, 606-07 (Pa. Super. Ct. 2006) (citing Angle, 777 A.2d at 123). All elements must be met by clear and convincing evidence. In re Bosley, 26 A.3d 1104, 1108 (Pa. Super. Ct. 2011) (citing In re Estate of Reichel, 400 A.2d 1268, 1269-70 (Pa. 1979)). If the contestant meets all three elements, "the burden shifts back to the proponent to prove the absence of undue influence by clear and convincing evidence." Id. at 1108 (citing In re Estate of Clark, 334 A.2d 628 (Pa. 1975)).

"[U]ndue influence is a subtle, intangible and illusive thing, generally accomplished by a gradual, progressive inculcation of a receptive mind. Consequently, its manifestation may not appear until long after the weakened intellect has been played upon." Owens v. Mazzei, 847 A.2d 700, 706 (Pa. Super. Ct. 2004). "Conduct constituting influence must consist of 'imprisonment of the body or mind, or fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of a will.'" In re Estate of Luongo, 823 A.2d 942, 964 (Pa. Super. Ct. 2003), appeal denied, 847 A.2d 1287 (Pa. 2003) (quoting Angle, 777 A.2d at 123). Pennsylvania case law has not established a clear test that outlines undue influence to a legal certainty. Fritts, 906 A.2d at 607 (quoting Owens, 847 A.2d at 707). However, Pennsylvania case law has "recognized that [undue influence] is typically accompanied by persistent

confusion, forgetfulness and disorientation." Id. (quoting Owens, 847 A.2d at 707).

According to 20 Pa. C.S. § 779(b), "[a] nonsuit may be entered against a contestant in a will contest whenever the contestant has the burden of overcoming the presumption of validity arising from due proof of execution as required by law and the contestant has failed to satisfy that burden." 20 Pa. C.S. §779(b). "A compulsory nonsuit may be entered only in a clear case where the facts and circumstances lead unerringly to but one conclusion." Speicher v. Reda, 434 A.2d 183, 185 (Pa. Super. Ct. 1981) (citing Paul v. Hess Bros., 312 A.2d 65, 66 (Pa. Super. Ct. 1973)).

This Court will now discuss each of the three factors in turn.

Confidential Relationship

First, Rodney Spencer must establish the existence of a confidential relationship. The Superior Court of Pennsylvania has held that a confidential relationship is present "when 'the circumstances make it certain 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.'" Fritts, 906 A.2d at 608 (quoting Owens, 847 A.2d at 709 (internal quotations omitted)). A confidential relationship evidences "such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." Id. (quoting eToll Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 23 (Pa. Super. Ct. 2002)). The Superior Court has held that "[t]he clearest indication of a confidential relationship is that an individual has given power of attorney over her savings and finances to another party." Id. (citing In re Lakatosh, 656 A.2d 1378, 1383 (Pa. Super. Ct. 1995)). "[I] f there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia." Foster v. Schmitt, 239 A.2d 471, 474 (Pa. 1968). On its own, a mere "parent-child relationship does not establish the existence of a confidential relationship nor does the fact that the proponent has a power of attorney where the decedent wanted the proponent to act as attorney-in-fact." Fritts, 906 A.2d at 608 (citing Angle, 777 A.2d at 123).

Rodney Spencer alleges that Patricia Morris' confidential relationship allowed her to alienate him from Mary Spencer. Rodney Spencer further asserts that the confidential relationship is evidenced by how Mary Spencer used to treat both himself and Patricia Morris equally but then, after Patricia Morris established a confidential relationship, she

received more expensive gifts. For example, Rodney Spencer alleges that "[a]t the same time Mrs. Spencer was telling [Rodney Spencer] that she intended to treat both of her children in an equal manner she was gifting Patricia Morris' husband an amount four times of what she was giving her own son." Petitioner's Brief in Support of Appeal, P. 4. Rodney Spencer also notes that Patricia Morris was appointed as Mrs. Spencer's power of attorney.

Patricia Morris asserts that Rodney Spencer could not testify at trial to one occasion he or his wife visited with Mary Spencer after August 2012. Rodney Spencer states that the last contact he had with Patricia Morris was approximately ten years before August 2012 at his niece's wedding. Moreover, Rodney Spencer only recalled having one telephone call with Mary Spencer approximately seven months before the execution of her will. Patricia Morris, therefore, alleges that neither of Rodney Spencer's witnesses could have witnessed the relationship between Mary Spencer and Patricia Morris.

The Court finds that Rodney Spencer has not met his burden of proof in establishing that a confidential relationship was present. First, Rodney Spencer admitted at trial that he only had contact with Mary Spencer on holidays or special occasions. Patricia Morris, on the other hand, seemed to have much more contact with Mary Spencer during the final years before her death.

Since Rodney Spencer and his wife had such limited contact with Mary Spencer after his niece's wedding, Patricia Morris is correct in stating that Rodney Spencer and his wife do not have enough information or knowledge to adequately detail the relationship between Patricia Morris and Mary Spencer. Moreover, Rodney Spencer did not call any third-party witnesses to offer testimony substantiating his claim that the relationship was a confidential relationship and was something more than the typical mother and daughter relationship. There is also little evidence that Rodney Spencer or his wife attempted to correct the troubled relationship with Mary Spencer. Since there was a parting relationship between Rodney Spencer and Mary Spencer and since Mary Spencer and Patricia Morris had a stronger relationship, this could explain why Patricia Morris received more valuable gifts than Rodney Spencer when Mary Spencer was nearing the end of her life and under her will.

Rodney Spencer states that, during her life, Mary Spencer originally gave equal gifts to himself and Patricia Morris, including the proceeds from a car and cash gifts. Rodney Spencer also states that Mary Spencer voiced her intent to divide the estate equally. However, at trial, Patricia Morris submitted checks that show she was receiving greater gifts. Patricia

Morris' husband and children received "gifts in an amount four times that of [Rodney Spencer]." Id. Rodney Spencer alleges that this unequal gifting was the result of Patricia Morris' confidential relationship.

However, this Court is not able to find by clear and convincing evidence that a confidential relationship existed. Rodney Spencer has not submitted enough evidence that this unequal treatment was the result of "imprisonment of the body or mind, or fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy h[er] free agency and to operate as a present restraint upon h[er] in the making of a will." Luongo, 823 A.2d at 964. If the Court held otherwise, this Court would create the precedent that a confidential relationship exists in most cases where two children did not receive equally under their parent's will and one child had a stronger relationship with the parent prior to death. Mary Spencer may have given Patricia Morris more gifts near the end of her life and more of the estate under her will because of the stronger relationship Patricia Morris had with her; however, this is not enough to show that a confidential relationship existed by clear and convincing evidence. Rodney Spencer even admits that he and his wife did not often see Mary Spencer following his niece's wedding. Moreover, Mary Spencer may have felt that Patricia Morris should receive more under the will and more gifts because Patricia Morris was more available than Rodney Spencer during the end of her life. These are all possibilities but this Court must look to the evidence produced by Rodney Spencer. There is no evidence in the record that Patricia Morris had her will overborne by a confidential relationship or that she was clueless regarding the extent of her property or where it would be going under her will. See In re Ziel's Estate, 359 A.2d 728, 734 (Pa. 1976). Thus, this Court cannot find that Rodney Spencer has met his burden in establishing that a confidential relationship was present.

Further, Rodney Spencer states, and Patricia Morris acknowledges, that Patricia Morris was Mary Spencer's power of attorney. Rodney Spencer states that Mary Spencer "had a relatively sizeable bank account." Petitioner's Brief in Support of Appeal, Page 5. Rodney Spencer further alleges that Mary Spencer "was able to leave her granddaughter $30,000.00 under the will and was able to give large gifts of cash to her children and their spouses as evidenced by the [checks entered as] exhibits entered by [Patricia Morris]." Id. Rodney Spencer asserts that because Patricia Morris has the ability to present copies of several checks written by Mary Spencer at trial it is evidence of her control over Mary Spencer's finances and Decedent herself.

Patricia Morris counters that Rodney Spencer has failed to produce

any evidence that she has ever acted as agent under Mary Spencer's power of attorney. Patricia Morris also states that Mary Spencer signed the checks that she gave to herself and Rodney Spencer before her death. Patricia Morris further claims that "[Rodney Spencer] ignores the fact that [Patricia Morris] is the Executrix of her mother's estate and would have full authority in her position to request any needed financial documents." Respondent's Brief in Support of its Motion for Compulsory Nonsuit, Page 3.

Moreover, Rodney Spencer did not provide clear and convincing evidence to show that Patricia Morris has ever acted as agent over Mary Spencer's sizable bank account. Patricia Morris is also correct in asserting that Rodney Spencer simply alleges facts in his brief without support in the record; he did not submit any evidence regarding the size of Mary Spencer's accounts. Even if Patricia Morris was in control of a sizeable account that was in Mary Spencer's name and even though the Supreme Court has held that there is no clearer indication of a confidential relationship than giving another person a power of attorney over one's entire life savings, See Foster, 239 A.2d at 474, there is no evidence to dispute the fact that Mary Spencer was anything other than well aware of the extent of her property and was anything other than active in handling her business affairs. See Ziel's Estate, 359 A.2d at 734 (finding no confidential relationship even though testator lived with daughter for almost four years prior to his death, son (contestant) saw testator (his father) infrequently during the time leading up to testator's death, and daughter acted as attorney-in-fact because testator wanted uniformity in check signatures and testator knew of others who had made similar arrangements; the Court found the daughter's appointment was merely made out of his convenience). Indeed, there is no proof that Mary Spencer's will was overborne, especially in light of the fact that she wrote the checks in question. Even if this Court were to find that Patricia Morris was granted power of attorney over Decedent's sizeable checking account or over an account that had Decedent's life savings in it this, in and of itself, does not rise to the level of proof required to find a confidential relationship by clear and convincing evidence. See Foster, 239 A.2d at 474. In light of the above, Rodney Spencer has not met his burden of proving a confidential relationship between his mother and sister by clear and convincing evidence.

Substantial Benefit

The Pennsylvania Supreme Court, in explaining the substantial benefit prong, has stated that it has not "define[d] the character of benefit or the extent of interest the confidential adviser must receive in order to shift the burden of proof, and, indeed, it may be said no hard and fast rule can be

laid down." In re Estate of LeVin, 615 A.2d 38, 41-42 (Pa. Super. Ct. 1992) (quoting In re Adams' Estate, 69 A. 989, 990 (Pa. 1908) (citations omitted)). "What the law requires is that a person acting as confidential adviser to a testator, bodily infirm and mentally weak, must act in the utmost good faith, and if he is benefited in a legal sense by the will procured by him, he must assume the burden of showing deliberation, volition, and understanding on the part of the maker of the will." Stout, 746 A.2d at 648. Further, if an executor is "not given significant latitude or discretion in distributing [a d] ecedent's assets, there is likely no substantial benefit." Bosley, 26 A.3d at 1110.

Rodney Spencer alleges that, if not for the will, the estate would have been split evenly between himself and Patricia Morris. Furthermore, "[u]nder the will [Patricia Morris'] daughter was bequeathed the sum of $30,000.00 and [Patricia Morris] was granted an 80 percent share of the [remainder.]" Petitioner's Brief in Support of Appeal, Page 6. Patricia Morris counters that "[t]he mere fact that the laws of intestacy would yield a different result is insufficient evidence to support [Rodney Spencer's] claim that [Patricia Morris] received a substantial benefit." Respondent's Brief in Support of its Motion for Compulsory Nonsuit, Page 5. In addition, Patricia Morris states that Rodney Spencer did not introduce the will into evidence.

This Court finds that Rodney Spencer has not shown that Patricia Morris has received a substantial benefit. There is a "dearth of cases in this Commonwealth" that shed light on the substantial benefit prong. LeVin, 615 A.2d at 95. However, this Court finds language in In re Estate of Simpson, 595 A.2d 94 (Pa. Super. Ct. 1991) to be instructive.

The Superior Court in Simpson found that there was no substantial benefit where a will proponent received a quarter of a decedent's estate. The will's proponent assisted testatrix with her daily affairs and became her "de facto power of attorney by signing [the] testatrix's name to her checks." Id. at 98. The will's proponent was also the testatrix's companion after the testatrix's husband's death. Id.

The Court held that the orphans' court did not err in holding that proponent's son's inheritance would not be imputed to proponent as proponent's son was also decedent's grandson. Id. Thus, there was "a sufficient, independent basis for the bequest to" decedent's grandson. Id.

In Stout, a contestant of a will alleged that his aunt's will was the result of undue influence. 746 A.2d at 646. The aunt was the decedent and the aunt's brother-in-law was the proponent of the will. Id. The proponent was executor of the will in question, which disinherited the contestant and gave the majority of the aunt's estate to the proponent's son and that son's

daughter. Id. at 646- 647.

In finding that that proponent did not receive a substantial benefit under the will, the Superior Court found that "[c]ases that have found a substantial benefit accruing to a testator's confidant via collateral benefits include factual circumstances where the confidant had unfettered control, extensive powers, absolute discretion or extensive decision-making powers over the testator's estate." Id. at 648. The Superior Court noted that "[t]he common element of these cases is that the executor/trustee has control, discretion, or authority to dispose or act on behalf of the estate, rather than merely complying with the testator's directions." Id. at 649 (citing LeVin, 615 A.2d at 42). Moreover, "[m]erely being named an executor is not enough to establish [a] substantial benefit." Id. (citing LeVin, 615 A.2d at 44). In addition, "receipt of commissions received for the executor's service to the estate is not enough to establish [a] substantial benefit." Id. (citing LeVin, 615 A.2d at 44).

The 1996 Stout will, according to the Superior Court, did not grant the proponent any powers over the decedent's estate, except for routine executorship powers. Id. In addition, proponent did not have unfettered or absolute discretionary powers as the will was clear in its directives. Id. The Court noted that although proponent was permitted to borrow money and hold proceeds for investment purposes, the "powers [were] vitiated by the specific bequests made by decedent, which completely dispose of the estate." Id.

The Superior Court also reiterated past holdings that state that a blood relationship between the testator and beneficiaries of the estate is "a sufficient, independent basis" for the bequest. Id. Thus, the court did not consider bequests made to the proponent's son in its substantial benefit analysis because of the blood relationship between testator and the proponent's son. Id. Therefore, the Superior Court found that contestant failed to show a substantial benefit was present. Id.

In comparison, the Superior Court in LeVin, found a substantial benefit for an executor/testamentary trustee as he had the power to choose beneficiaries for the $1.5 million estate; alter the terms of the testamentary trust; invest, sell, or destroy testamentary trust assets for income or gain; and determine if and when the testamentary trust became too "impracticable to administer." LeVin, 615 A.2d at 42, 44. Moreover, in Adams, the Pennsylvania Supreme Court found that there was enough evidence of a substantial benefit for a burden shift to occur where a doctor and confidential adviser, who was an executor but otherwise not a beneficiary of the will, was also appointed as trustee of the full amount of an approximately $75,000 estate and was a possible residuary beneficiary of the whole estate. Adams,

69 A. at 989-990.

Here, this Court is not satisfied that Patricia Morris has received a substantial benefit under the will. This Court finds that, like Stout, there was no evidence presented that Patricia Morris can do anything more than comply with Mary Spencer's directives. Patricia Morris does not have unfettered control over the estate. The will is clear in its directives. Cumberland County Animal Shelter is to receive $500.00; Mary Spencer's granddaughter (Patricia Morris' daughter) is to receive $30,000 and the rest, residue, and remainder is to be split with Rodney Spencer receiving 20 percent and Patricia Morris receiving 80 percent.

Moreover, while Patricia Morris was bequeathed a larger percentage of the estate than the proponent in Simpson, there is no evidence that she was exercising her power of attorney and writing checks on Mary Spencer's behalf unlike the proponent in Simpson. Patricia Morris also was not a trustee with broad powers like the executors in LeVin and Adams. The confidential adviser in Adams was a doctor who did not have a blood relationship with the decedent and obtained a substantial interest in the estate that was enough to shift the burden to the will proponent. In addition, this Court does not find that the $30,000 given to Patricia Morris' daughter is relevant to the substantial benefit inquiry as Patricia Morris' daughter has a blood relationship with Mary Spencer. See Stout, 746 at 646. Therefore, this Court finds that Rodney Spencer has not met his burden of proof by clear and convincing evidence to establish that Patricia Morris received a substantial benefit under the will at issue.

Weakened Intellect

There is no bright line test to establish weakened intellect. In re Estate of Glover, 669 A.2d 1011, 1015 (Pa. Super. Ct. 1996). While Pennsylvania appellate courts have not clearly outlined what constitutes a weakened intellect, courts tend to find a weakened intellect is present where "the testator/testatrix was in ill-health and suffering from confusion, forgetfulness and disorientation." Id. (quoting In re Estate of Koltowich, 457 A.2d 1302, 1305 (Pa. Super. Ct. 1983)). Further, "it is clear that the 'weakened mental condition which must be shown does not rise to the level of testamentary incapacity.'" Id. (quoting Ziel's Estate, 359 A.2d at 734 (Pa. 1976)).

Rodney Spencer testified at trial that Mary Spencer was hospitalized in October 2013 and January 2014 when she suffered a stroke. At trial, Rodney Spencer stated that his mother was "not the same" and that "she had changed." Rodney Spencer cites the fact that Mary Spencer was admitted

twice to the hospital in the months leading to her passing as evidence of a weakened intellect. According to Rodney Spencer, Mary Spencer "had changed as she contemplated her fate, she wasn't truthful with [Rodney Spencer] in her representation of the gifts she made to her family, and due to [a] disagreement at [his niece's] wedding[,] was alienated from her son who in turn was 'cut off' from the rest of his family." Petitioner's Brief in Support of Appeal, P. 7. Rodney Spencer alleges that Patricia Morris "was able to alienate Mrs. Spencer from her son, . . . secure large gifts for her family, and secure a power of attorney over the entirety of her mother's financial affairs." Id. In sum, Rodney Spencer states that "[t]he totality of [Mary Spencer's] physical infirmities combined with her changing personality and the uncharacteristic actions of treating her children unequally evidence a weakened intellect." Id.

Patricia Morris answers that while Rodney Spencer's brief states that "the totality of evidence shows a weakened intellect[,]" he failed to provide "any evidence to show weakened intellect, let alone claim that there is a 'totality of evidence' for the Court to consider." Respondent's Brief in Support of its Motion for Compulsory Nonsuit, P. 6. Patricia Morris also states that Rodney Spencer is not able to testify about his mother's weakened intellect as he admitted at trial that he could not recall visits with her after August 2012 and that no phone calls occurred between him and his mother in the last six months prior to her death. Id. Patricia Morris notes that Rodney Spencer only remembers one phone call, which took place on Mother's Day, which was approximately 7 months prior to the execution of Mary Spencer's will. Similarly, Rodney Spencer's wife also testified that she had no contact with Mary Spencer after August 2012. Patricia Morris thus claims that details collected from "[a] single phone call cannot establish weakened intellect, especially when [Rodney Spencer] did not identify any concrete indicia of a weakened intellect." Id. Patricia Morris states that Rodney Spencer did not visit his mother when she was in the hospital for dehydration or following her stroke and he "offered no testimony or evidence from any person, medical or lay, who had contact with Mrs. Spencer during the time she executed her will." Id.

Rodney Spencer acknowledges that he cannot produce medical evidence or testimony regarding Mary Spencer's weakened intellect, but states that such a showing is not required to show a weakened intellect. Patricia Morris states, and this Court agrees, that Rodney Spencer offered no "witness who had any contact with decedent during the time leading up to the execution of her will." Id. Patricia Morris also correctly states that Rodney Spencer "failed to produce any credible evidence, let alone clear and convincing evidence, that [Mary Spencer] suffered from a weakened mental intellect during the relevant time period." Id. at 6-7.

This Court holds that the mere fact that Mary Spencer was hospitalized for dehydration and a stroke without more is not enough to show that a weakened intellect is present. See Glover, 669 A.2d at 1015 ("[e]vidence of physical infirmities . . . is not enough, alone, to establish weakened intellect."). Indeed, as "long as the mind, like the captain of a stricken ship, is free to dictate direction and course, its decision will not be questioned in law even though the body be crippled with pain and the spirit awry with torment." In re King's Estate, 87 A.2d 469, 473 (Pa. 1952).

This Court finds that the Superior Court's opinion in Glover is instructive in this matter. The Decedent in Glover died on June 7, 1991 and was survived by her husband, brother, brother's children and her husband's nieces and nephew. Glover, 669 A.2d at 1013. The will, which was dated June 29, 1989, was admitted to probate on June 7, 1991. Id. Decedent's brother and her brother's children filed a Caveat with the Register on December 2, 1992, alleging that the will was invalid as a result of undue influence. Id. The Register granted a nonsuit against the will contestants and the will was admitted to probate again. Id. The Register granted Letters Testamentary to Lynn Hurley. Id. The contestants then subsequently appealed the probate to the orphans' court. Id. During the appeal process, the court removed Hurley as Executrix and appointed Kevin Holleran, Esq. and Wilmington Trust Company as Administrators Pro Tem. Id. The orphans' court issued an Opinion and Decree Nisi dismissing their appeal. Id. The contestants filed exceptions and the Court en banc entered an order making the Decree Nisi final. Id.

The Court stated that Hurley acted "unscrupulous[ly]." Id. Hurley assisted Decedent in sorting mail and preparing checks for her (Decedent's) signature. Id. Hurley eventually was able to secure signature authority over some of the Decedent's bank accounts. Id. at 1013-14. Hurley then subsequently took some funds out of these accounts without Decedent's approval. Id. at 1014.

In 1980, Decedent employed Richard Ross as a financial advisor. Id. Decedent suffered a stroke in 1984 and entrusted Ross and Hurley with her finances. Id. Ross and Hurley misappropriated $1,600,000 from Decedent between 1987 and 1991. Id.

In finding that there was no weakened intellect, the Court found that the contestants "failed to offer any evidence that [the testator] suffered from spells of confusion, forgetfulness, or disorientation." Id. at 1015. Moreover, "[a]lmost every witness testified that [testator] was extremely strong-willed, lucid and sharp. There [was] absolutely no indication that she possessed a weakened intellect." Id. (citing orphans' court opinion). Therefore, the Superior Court found that the contestants did not prove that

testator suffered from a weakened intellect by clear and convincing evidence. Id.

This Court also finds that a Pennsylvania Supreme Court opinion in Ziel's Estate sufficiently outlines the weakened intellect prong of the undue influence test. The issue in Ziel's Estate was whether a will and two documents, which were admitted by the Allegheny County Register of Wills as the Last Will and Testament of testator, should be held to be invalid because of alleged undue influence exerted on decedent by Lucy Ziel, his sister and co-executrix of the estate. 359 A.2d at 730. Testator had been living with his sister for approximately four years prior to his death on June 24, 1972. Id. One of the testator's two sons appealed the admission of the will and two codicils to probate. Id. at 731. The orphans' court found that the will was not the product of undue influence. Id. The contestant filed exceptions, which the court overruled en banc. Id.

The Supreme Court of Pennsylvania found that the trial court relied primarily on testimony of the scrivener of the will and codicils. Id. at 732. The scrivener "testified unequivocally that [the testator] was mentally competent at the times the documents were executed and indeed, was active in their preparation and revision." Id. The attorney's testimony was that the testator knew exactly what he wanted to do with the property and he even suggested revisions in the documents in order to ensure that the goals of his estate were met. Id. In addition, three witnesses to the will stated that testator was alert on the dates of the will and codicils. Id.

The contestant claimed that the orphans' court did not properly consider other evidence. Id. A doctor, who examined testator for a urological disorder, stated that he was "confused and disoriented, suffering from organic brain syndrome secondary to cardiovascular disease." Id. He stated his opinion that testator was incapable of acting with care toward his property at that time and his status would progressively get worse. Id. In not affording this testimony great weight, the Supreme Court noted that the Court has "frequently stressed the importance of determining capacity as nearly as possible to the time of execution of the contested instruments." Id. (citing Clark, 334 A.2d at 634; Brantlinger Will, 210 A.2d 246, 253 (Pa. 1965)). The Court noted that this "opinion testimony was based on observations quite remote in time from the critical dates of execution" and should be afforded little weight. Id.

Another medical witness, called by contestant, stated that he treated testator for "minor ailments." Id. The witness testified that during these treatments one could determine that testator was "not himself." Id. However, the witness asserted that there was "a fluctuation in the testator's condition, saying there were times 'when he was not so much (confused)

and time[s] when he was quite cooperative.'" Id. The witness claimed that even though there were times when the testator "was uncooperative and disoriented[,]" the testator would be responsive and ask about his current medical situation. Id.

Contestant's wife also testified that the testator had not recognized her on three separate occasions. Id. Contestant saw testator infrequently during the time periods at issue in the case. Id. Contestant asserted that testator's mental condition became so bad that "he was completely incapable of handling his own affairs." Id. Contestant also claimed that testator failed to recognize him on a few occasions. Id. Contestant still accepted $16,700 in gifts despite the claims he made concerning the condition of testator. Id. at 732-33.

The Pennsylvania Supreme Court found that "the scheme of disposition of testator's estate . . . is . . . natural and reasonable." Id. at 733. In addition, the Supreme Court found "that the contradicted testimony of occasional confusion or lapses of memory here is insufficient to demonstrate clearly and convincingly a lack of testamentary capacity." Id. The contestant claimed that since he submitted evidence of testamentary incapacity, he has also shown clear and convincing evidence of testator's weakened intellect. Id. at 734. However, the Court found no basis for disrupting the lower court and upheld the orphans' court's finding that there was no clear and convincing evidence of weakened intellect. Id.

Here, like the contestant in Ziel, Rodney Spencer saw Mary Spencer infrequently and did not submit clear and convincing evidence of weakened intellect. Moreover, like the contestant in Glover, Rodney Spencer has failed to offer any evidence that the testator suffered from spells of confusion, forgetfulness, or disorientation. See Glover, 669 A.2d at 1015. In addition, the testator in Glover was a victim of similar medical issues as Mary Spencer and, like the testator in Glover, Mary Spencer was not proven to suffer from a weakened intellect. Thus, the Petitioner Rodney Spencer has failed to prove the weakened intellect prong of the undue influence test by clear and convincing evidence.

CONCLUSION

In light of the above, Respondent Patricia Morris' Motion for Compulsory Nonsuit is granted and Petitioner Rodney Spencer's appeal is dismissed pursuant to the attached Order.

ORDER OF COURT

AND NOW THIS 2nd day of March 2015, upon review and consideration of the entire record;

THE COURT HEREBY ORDERS that Respondent's Motion for Compulsory Nonsuit is **GRANTED** and Petitioner's appeal is **DISMISSED**.

Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Clerk of Courts shall immediately give written notice of the entry of this Order, including a copy of this Order to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.