

IN RE: ESTATE OF CATHARINE A. STICKELL, Deceased  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Orphans' Court Division, No. 194 of 1999

*Will contests; Undue influence*

1. Once a will has been probated, the contestant who claims the will was procured by undue influence has the burden of proof.
2. If a prima facie case of undue influence is established, the burden of proof shifts to the will's proponent.
3. In order to establish undue influence, three elements must be established by a preponderance of the evidence: a) there was a confidential relationship between the proponent and testator; b) the proponent receives a substantial benefit under the will; and c) the testator had a weakened intellect.
4. The existence of a confidential relationship can be proved where a recipient under the will held a power of attorney over the testator's assets for reasons other than convenience for the testator; notwithstanding same, the mere existence of a power of attorney will not raise the inference of a confidential relationship where the decedent sought that aid with his business affairs.
5. Whether the proponent received a substantial benefit or the testator labored under a weakened intellect at the time the will was drafted are factual determinations to be made by the court upon a viewing of all relevant evidence.

Appearances:

Heather J. Vance-Rittman, Esq., *Deputy Attorney General*

Laurence W. Dague, Esq.

Thomas J. Finucane, Esq.

Daniel L. Sullivan, Esq.

OPINION

Walker, P.J., March 1, 2002

Background

This matter comes before the court as a contest to the October 8, 1998 will (hereinafter, "the will") of Catherine A. Stickell ("Cass"), who died on December 3, 1998. The will was admitted to probate on December 4, 1998.

Cass left bequests to friends and family members in the will, but primarily created a charitable trust for the benefit of St. Stephen's United Church of Christ, CBM Ministries, Inc., Upton Community Improvement Club, Conococheague Institute, and Tuscarora Educational Foundation. First National Bank of Greencastle, Pennsylvania (hereinafter, "the bank"), was named as trustee for the charitable trust. At the time of her death, Cass' estate had an approximate value of \$770,000.

On or about December 3, 1999, the petitioner John Shook filed an Appeal from the Decree of the Register of Wills. The petitioner requested that Cass' August 14, 1991 will be admitted to probate. In that will, Cass made some charitable bequests but left the bulk of her estate, in equal shares, to thirteen named grandnieces and her grandnephew, the petitioner.

The petitioner alleges that the October 8, 1998 will was procured by undue influence upon the decedent by Darlene Niswander, acting as an agent of the bank. A non jury trial was held before this court on December 3, 2001. For the reasons stated below, the petitioner's appeal from the Decree of the Register of Wills is denied.

### Discussion

#### **Undue Influence:**

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 Stout, 746 A.2d 645 (Pa.Super.2000). A prima facie case of undue influence is established and the burden of proof is shifted to the will's proponent when three elements are established: 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.

Estate of Angle, 777 A.2d 114, 123 (Pa. Super. 2001).

#### **1. Confidential Relationship:**

A confidential relationship for purposes of undue influence exists "whenever circumstances make it certain that the parties did not deal on equal terms but that on one side there was an over-mastering influence, and on the other, dependence or trust, justifiably reposed." In re Estate of Jakiella, 353 Pa. Super. 581, 510 A.2d 815, 817-818 (1996); see also In re Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975).

The law requires that the influences be control "acquired over another that virtually destroys [that person's] free agency." Id., 467 Pa. at 540, 359 A.2d at 733. Conduct constituting influence must consist of "imprisonment of the body or mind, 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." Id.

Estate of Angle, 777 A.2d 114, 123 (Pa. Super. 2001).

Petitioner avers that Darlene Niswander developed a confidential relationship with Cass through her position as a trust officer at the First National Bank of Greencastle. In support of that contention, the petitioner directs the court's attention to the following allegations: Ms. Niswander was the intermediary between Cass and Attorney Maxwell for the October 8, 1998 will; Ms. Niswander influenced Cass in her decision to move to Menno Haven, completed the application for Cass and advised Menno Haven regarding Cass' wishes; Ms. Niswander made investment decisions and paid expenses on Cass' behalf.

As an initial concern, the petitioner raised the issue of two "peculiar and extraordinary circumstances" regarding the execution of Cass' October 8, 1998 will. First, Ms. Niswander faxed a note to Attorney Maxwell (Cass' long standing attorney), informing him that Cass wanted to revise her will, and the nature of the changes desired. In a second fax to Attorney Maxwell, Ms. Niswander further explained Cass' testamentary intent and included additional information regarding the proposed will. The petitioner asserts that Ms. Niswander's actions were "suspicious" because she did not make an appointment for Cass to speak with Attorney Maxwell in person and that the communications took place on Saturdays. However, the petitioner has not demonstrated to the court that Cass disapproved of this communication process or even sought an appointment with Attorney Maxwell. Furthermore, Attorney Maxwell testified that he discussed the provisions of the will with Cass and was confident that it accurately represented her wishes.

Second, Judith Ell, a subscribing witness, admitted that Cass did not execute the will in her presence. Ms. Ell was an employee of the First National Bank of Greencastle under Ms. Niswander's supervision. Apparently, she signed the will, at the bank, upon Ms. Niswander's request. Ms. Ell was clear in her testimony, however, that she was familiar with Catherine Stickell's signature before she agreed to sign as a witness. In fact, Darlene Niswander, Judith Ell, and Kathryn Straley (Cass' long time friend) each authenticated Cass' signature in their testimony. Additionally, Pennsylvania law does not require a witness to the execution of a will which bears the signature of the testator. 20 Pa.C.S.A. § 2502 (relating to form and execution of a will).

Apparently, both the petitioner and his father, Tom Shook, wanted Cass to move to Ravenwood retirement community in Maryland, where her sister lived. However, Sharon Rowe, a witness for and sister of the petitioner and Cass' grandniece, testified that it was Cass who chose Menno Haven over Ravenwood. This statement was corroborated by Kathryn Straley who testified that she and Cass saw each other about twice a week before Cass moved into assisted living at Menno Haven in August of 1998. Thereafter, she visited Cass about once a week. The court found both of the witnesses on this point to be entirely credible.

The fact that Ms. Niswander assisted Cass in the application process to Menno Haven does not prove that Cass went there at Ms. Niswander's direction or even that Ms. Niswander had an opinion regarding where Cass chose to live. Conversely, the fact that Cass exercised her own free will regarding where she would live demonstrates that there was no "over-mastering" influence by Ms. Niswander and dependence by Cass.

Darlene Niswander testified that she and Cass specifically discussed Cass' wishes regarding the beneficiaries of her annuities. Cass told Ms. Niswander to leave those as they were. As a result, the grandnieces and grandnephew each received \$3,585.73 from the annuities upon Cass' death.

Cass gave the bank a power of attorney but Darlene Niswander, Kathryn Straley and Attorney Maxwell all testified that Cass directed her own affairs. The existence of a confidential relationship can be proved where a recipient under the will held a power of attorney over the testator's assets for reasons other than convenience for the testator. *Estate of Angle*, 47, Pa. D&C. 4th 540, 563 (2000) (affirmed by *Estate of Angle*, 777 A.2d 114, 123 (Pa. Super. 2001)). However, the existence of a power of attorney will not raise the inference of a confidential relationship where the decedent sought that aid with his business affairs. *Angle*, 777 A.2d at 124 (citing *In re Estate of Ziel*, 467 Pa. 531, 359 A.2d 728 (1976)). Neither Darlene Niswander nor the bank are "recipients" under the will, however, even if assuming arguendo that the bank's status as trustee would qualify it as a "recipient," the petitioner produced no evidence that the power of attorney was for any purpose other than Cass' convenience and assistance with her business affairs.

Cass was in possession and control of her own checkbook. As previously stated, she gave a personal check to Tom Shook on the day that she executed the will. In June of 1998 she sent \$2000 checks to all of her grandnieces except for Patty. Sharon Rowe, the grandniece that seems to have been closest to Cass in her final years, received a check for \$5000. However, Cass chose, for specific reasons, not to share her largesse at that time with either the petitioner or his sister Patty. Cass had loaned money to Patty to buy a car, but apparently, Patty purchased a pool instead and did not repay Cass. The petitioner was excluded because Cass had provided him with financial support through college and a trip to the Holy Land. This is known because, at Sharon's request, Cass sent a letter to John and explained her thinking to him. However, in September of 1998, Cass did send John a check for \$500.

All of the above evidence establishes that while Darlene Niswander may have assisted Cass in her financial dealings, she was in no way controlling how Cass chose to spend her money. Clearly, Ms. Niswander did not acquire control over Cass or destroy Cass' free agency as required under *Angle*, supra.

## **2. Substantial Benefit:**

Darlene Niswander was not a beneficiary under the terms of the will. The bank as executor and trustee was entitled to the trustee's fees associated with the charitable trust. The total amount in fees received by the bank between January 1999 through January 2001 was \$3,537.45. That amount of money does not constitute a "substantial benefit" to the bank.

The only discretion, in the distribution of trust funds, that the bank may exercise is in the event that one of the enumerated charities ceases to exist. In that case, the bank may select a qualifying substituted beneficiary. As guidance for the bank, Cass identified her church, community, and the children and young adults in her community as areas of specific interest to her. Otherwise, the bank is required to distribute the trust funds according to the terms of the will. (See petitioner's exhibit #1, the Will of Catherine Stickell, p. 4.)

The petitioner claims that the bank benefited from the fact that Cass' estate owned stock in the bank, which as trustee of the estate, the bank could control. However, Attorney Maxwell testified that he began to liquidate that stock shortly after Cass died. (See petitioner's exhibit # 22.)

## **3. Weakened Intellect:**

Family members Tom Shook and Sharon Rowe testified that Cass had a long term habit of keeping a "black book" which was, in essence, her diary. In it, she wrote down her thoughts, gifts given, expenditures, and debts owed to her. Cass kept the book up to and including her time at Menno Haven.

The book was last seen at Menno Haven but has been missing since Cass' death.

Ms. Niswander testified that Cass discussed all of the provisions of the will with her, prior to its execution, and appeared to have no trouble understanding the document.

Tom Shook, father of the petitioner and nephew of the decedent, testified that he took Cass to Hagerstown for therapy on October 8, 1998, the same day she executed the will. The two spent numerous hours conversing during the round trip between Chambersburg and Hagerstown. Nothing in his testimony suggested that Cass exhibited confusion, weakened intellect, or diminished mental capacity during that trip. In fact, on that same day, Cass gave Tom Shook a personal check to reimburse him for expenditures he previously made on her behalf. This clearly demonstrates that Cass was cognizant of financial affairs and sought to keep them in order.

Kathryn Straley, Mildred Hoffman (a former neighbor), and Clarence Martin (a former neighbor and handyman) each visited Cass in Menno Haven and testified that her mind was sharp during their visits.

Cedric Angle-Duffield testified that he was related to Cass and knew her for fifty to sixty years. He stated that he took her to a Lioness bazaar on November 14, 1998 where she talked with her friends and her mind appeared sharp.

William S. Boyd testified that he and Cass shared an interest in Angle Cemetery since they both had ancestors buried there. According to Mr. Boyd, he talked with Cass in October 1998 and "she was sharp."

Kenneth Shockey is a member, the treasurer, and organist at St. Stephen's Church, one of the beneficiaries of the charitable trust. He testified that Cass attended church regularly in 1998, usually only missing church when she was ill. When they visited at church, Cass expressed concerns about the dwindling number of youth attending church. Mr. Shockey stated that he never detected any changes in her mental status during their discussions. Additionally, he visited her at home for about one-half hour in September 1998. During that visit they talked about the church and Cass said that she was concerned about the church's needs and was setting up "something with First National Bank."

Reverend Douglas Hodges is the minister of St. Stephen's Church. He testified that Cass' attendance was regular, unless she was ill. He also visited Cass about fifteen times between June 1998 and the time of her death on December 3, 1998 with five visits during the time when Cass was in Menno Haven. Cass discussed the "old days" with him, when more youth attended church. During one of the Menno Haven visits, Cass specifically mentioned selling her house, the disparity between the bids for the house, and the fact that everything was "going to charity."

In addition to the above testimony, the court reviewed the medical records of Dr. Jay Bayer, D.O., Cass' long term primary care physician. Dr. Bayer's progress notes for August 1998 through November 4, 1998, the time period just prior to and following the date the will was executed, reflect fluctuations in appetite, weight, and sleep patterns, adjustments in medication, and respiratory problems. During that time, Cass described feeling "discouraged," like her nerves were "bad" and that she had "to (sic) many stresses at a time."

Dr. Bayer testified that he assessed Cass' mental status during her appointments, as he did with all of his elderly patients. (See Deposition of Dr. Bayer, November 29, 2001, p.12.) He stated that Cass responded to questions and commands, asked intelligent questions, and in his medical opinion, she didn't have any mental deficiencies or difficulties. Id. There is no documentation that he observed any confusion, dementia, or changes in Cass' mental acuity. (See petitioner's exhibit #25.)

On August 8, 1998, the progress note states that the "[p]t. needs form filled out for Menno Haven." On the note dated September 1, 1998, Cass is described as "having a positive attitude about being around people" and having questions about whether or not she should transfer to the care of the Menno Haven doctor. These notes inform the court that, in her final months of life, Cass was still engaged in making important decisions affecting her life.

Cass saw Dr. Dwight Wooster on October 8, 1998 for a pulmonary consultation. In his subsequent report to Dr. Bayer, Dr. Wooster stated that he discussed his opinion with Cass. It is important to note that Dr. Wooster made no reference to observing confusion or a weakened intellect in Cass on that day. That is the day that Cass executed her will. The court believes that if Cass was confused in some manner on that day, a doctor, even one that did not have an ongoing relationship with her, would have experienced some difficulty in communicating with her and noted it to her primary physician.

The court recognizes that a significant amount of the testimony heard was given by interested parties as beneficiaries under the will. However, testimony was also given by non-beneficiaries, i.e.,

Clarence Martin, Cedric Angle-Duffield and William S. Boyd. Their testimony was consistent with the testimony of the interested parties. That, along with the medical record, served to convince this court that Catherine Stickell was not suffering from a weakened intellect on October 8, 1998, when she executed her will.

While Cass' last will contained significant changes from her prior wills, her bequests were still consistent with her well known long term interests of church, community, and youth. Cass had no obligation to bequeath anything to her grandnieces and grandnephew.

There was credible testimony that Cass was very disappointed when she did not receive some "thank you" notes after her monetary gifts to her grandnieces. This lack of courtesy appears to have influenced Cass' decision to modify her will. There is no evidence, however, to support the petitioner's allegation of undue influence. Therefore, the petitioner has failed to meet his burden under Angle, supra.

#### ORDER OF COURT

March 1, 2002, the court, after hearing the evidence and reviewing the relevant law, denies the petitioner's challenge to the validity of the October 8, 1998 will of Catherine Stickell.