IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF VIRGINIA ROGERS,	**: No. CP-41-10-0476** **:** **: ORPHANS COURT DIVISION** **: 1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in response to the appeal by Harry L. Rogers, Jr. (hereinafter "Colonel Rogers") and his daughter, Christine Kindon and the cross-appeal by his son, Harry L. Rogers, III (hereinafter "Hal Rogers"). The relevant facts follow.

Colonel Rogers and his wife, Virginia C. Rogers accumulated substantial wealth during their life together. They acquired real estate and grew investments. Throughout their lives they shared their wealth in part with their three children, Christine Kindon, Catherine Laubach, and Hal Rogers.

On June 24, 1991, they executed a Revocable Living Trust Agreement forming the Rogers Family Trust. The trust was funded with their real and personal property as designated in the Trust Agreement.

On February 22, 1999, they executed a First Amendment to the Trust. On June 24, 1999, they executed a Second Amendment to the Trust. The Second Amendment deleted the First Amendment in its entirety. Further, the amendment directed that upon the death of the surviving settlor, the family farm would be distributed to Hal.

Virginia Rogers died on November 12, 2009. The Trust Agreement provided

that upon the death of Virginia Rogers, the trust would be divided into two shares, Trust A and Trust B. The trustee of Trust B was designated as Emerson W. Knyrim and the trustee of Trust A was the surviving settlor, Colonel Rogers, with the first alternate trustee for Trust A being designated as Emerson W. Knyrim and the second alternate being designated as William C. Sherwood.

Issues arose in the summer of 2010 when Colonel Rogers transferred or attempted to transfer the family farm to his daughter, Christine Kindon. The farm was property that had been placed in the Trust and was to pass to Hal pursuant to the provisions of the Second Amendment. Colonel Rogers purported to transfer the farm to Christine Kindon in a deed dated June 9, 2010. The deed and an agreement of sale were prepared by Christine Kindon without the aid of an attorney. Neither the deed nor the agreement of sale was signed by Mr. Knyrim as trustee of Trust Share B. On September 6, 2010, Colonel Rogers signed a power of attorney designating Christine Kindon to act on his behalf.

On September 24 2010, Mr. Knyrim formally renounced his appointment as trustee. Mr. Sherwood renounced his appointment as an alternate trustee on October 7, 2010.

On March 29, 2011, Colonel Rogers, as trustee of Trust A and Settlor, executed a document entitled "Third Amendment Rogers Family Trust" as well as another document exercising his special Power of Appointment under paragraph 6.03 of the Second Trust Agreement.

On April 14, 2011, Colonel Rogers filed a petition to appoint a trustee for Trust Share B because Emerson Kynrim and William Sherwood had renounced their appointments and he was unable to secure either a corporate or an individual trustee who was agreeable to

all of the beneficiaries of the trust. The petition sought the appointment of Christine Kindon. All of the beneficiaries except Hal Rogers agreed to this individual being named trustee of Trust Share B.

In his response to the petition to appoint trustee, Hal Rogers not only opposed the request to appoint his sister as trustee of Trust Share B, but he also requested that the Third Amendment and the exercise of Power of Appointment be set aside due to undue influence on the part of Ms. Kindon and/or a lack of testamentary capacity by Colonel Rogers.

Following the initiation of the litigation, in an Order dated December 5, 2011, the Court appointed Emerson Knyrim and Ann Tyler as interim co-trustees of Trust Share B. Furthermore, by Order of Court dated March 15, 2012, the Court directed that 50% of the trust assets be placed in Trust Share A and the remaining 50% of the trust assets be placed in Trust Share B.

The Third Amendment to the Rogers Family Trust executed by Colonel Rogers on March 29, 2011 ratified, confirmed and republished the original Trust Agreement dated June 24, 1991 but also deleted a successor trustee provision. Ms. Kindon was designated to serve as the successor trustee of Trust Share A, as well as any other trust share by which Colonel Rogers was capable of appointing a trustee.

The Power of Appointment, also executed by Colonel Rogers on March 29, 2011, exercised the power of appointment as set forth in Article 6.03 of the original Trust Agreement and directed that upon the Colonel's death, the trustee of Trust Share B distribute, following a specific devise to his granddaughter, all of the rest, residue and remainder of the trust estate in equal one-third shares to his children. (Petitioner's Exhibit 10).

Hearings were held on this matter on March 16, 2012, March 30, 2012 and July 2, 2012. In an Opinion and Order of September 6, 2012, the court rejected Hal's claims of undue influence and lack of testamentary capacity and permitted the appointment of Christine Kindon as trustee.

Hal filed Exceptions to the court's decision. The court held an argument on these exceptions on December 5, 2012. After reviewing the briefs of the parties, the court granted the Exceptions with respect to his claim of undue influence and his challenge to the appointment of Christine Kindon as trustee, but rejected his Exceptions on the issue of testamentary capacity. The court also reappointed Emerson Kynrim and Ann Tyler as co-trustees.

The Colonel appealed, and Hal cross-appealed.

The first issue asserted on appeal by the Colonel is that the court erred in vacating the prior order which appointed Christine Kindon as trustee when all of the beneficiaries except Hall consented to her appointment. The court cannot agree.

The appointment of a successor trustee is governed by 20 Pa.C.S.A. §7764. Since both Mr. Knyrim and Mr. Sherwood renounced their appointment to the position of trustee and all the beneficiaries could not agree on a trustee,[1] the court was left to fill the vacancy with respect to Trust Share B. See 20 Pa.C.S.A. §7764(c). The comment to this statute states:

> If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the

[1] Although the testimony presented at the hearing was that William Sherwood was an alternate trustee for Trust B, a close reading of section 9.03 of the Trust reveals that Emerson Kynrim was appointed trustee of Trust B and Mr. Kynrim and Mr. Sherwood were the first and second alternate trustees, respectively, for Trust A if Colonel Rogers was unable or unwilling to continue as the trustee of the Share A Trust.

> appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries.

20 Pa.C.S.A. §7764(c), comment.

When the trust was created, it was clear that both settlors desired that Emerson Knyrim be appointed as trustee. Additionally, it was clear through the testimony of numerous credible witnesses that the settlors did not want any of their children to be a trustee. The appointment of Christine as a trustee would be contrary to the terms of the trust document and the clear intentions of both settlors.

While the intentions of Colonel Rogers apparently changed in favor of his daughter, the court must consider the intentions of both settlors as clearly expressed in the documents and through credible witness testimony. Furthermore, the court cannot discount the fact that at the time the Colonel changed his intention, he was suffering from a weakened intellect. Moreover, and as persuasively argued by counsel for Hal Rogers, the Trust could be amended or revoked only while both settlors were living. See Second Amendment, Article 2.01; Trust Agreement, Article 2.04. Virginia Rogers died on November 12, 2009. The Third Amendment was not executed by Colonel Rogers until March 29, 2011. Therefore, although the Third Amendment purports to delete Article 9.03 and replace it with a provision appointing Christine Kindon as successor trustee and declare that the original Trust Agreement and the Third Amendment constitute the entire trust agreement, the Third Amendment is a nullity at least with respect to Trust Share B.

The court also notes that the neither Trust Agreement nor any of the amendments thereto gave Colonel Rogers the power to appoint successor trustees. Article 9 of

the Trust Agreement governs changes of the trustees. Nowhere in Article 9 did the settlors reserve the right to fill any vacancy. Instead, section 9.03 sets forth the applicable provision, which states:

> **9.03 SUCCESOR TRUSTEES AFTER THE DEATH OF ONE OF THE SETTLORS.** Upon the death of one of the Settlors, **EMERSON W. KNYRIM**, … shall be trustee of THE ROGERS FAMILY TRUST SHARE B TRUST, and the surviving Settlor shall be the Trustee of THE ROGERS FAMILY TRUST SHARE A TRUST. If the surviving Settlor should be unable or unwilling to act or to continue as trustee of the Share A Trust for any reason whatsoever, a successor trustee shall be appointed in the following order of priority:
>
> **1st Alternate: EMERSON W. KNYRIM….**
> **2nd Alternate: WILLIAM C. SHERWOOD….**[2]

The court also could not conclude that the appointment of Ms. Kindon would best promote the proper administration of the trust. The court agreed with Hal's argument that an irreconcilable conflict of interest would arise if Ms. Kindon served as trustee. The unfettered power as trustee for a trust which she is a named beneficiary clearly puts her in a compromising position and calls into question her ability to properly administer the trust. As the Court noted in Sutliff v. Sutliff, 515 Pa. 393, 528 A.2d 1318, 1323 (1987) a trustee owes a fiduciary duty to the beneficiary and he violates that duty when he has a personal interest in trust dealings that might affect his judgment. Similarly, a trustee has a fiduciary duty to act for the benefit of all the beneficiaries, not just the settlor or some of the beneficiaries. Holmes Trust, 392 Pa. 17, 139 A.2d 548, 552 (1958)(the trustees' obligation and concern must reach all of the beneficiaries and the showing of favoritism to one or more beneficiaries is grounds for removal of the trustee).

The court also was concerned with the manner in which the deed and

agreement of sale purporting to transfer the family farm were accomplished. At that point, Virginia Rogers had passed away and Emerson Knyrim was the trustee for Trust Share B. Although the Colonel and Christine took Mr. Knyrim with them when they went to an attorney's office about transferring the farm, they did not obtain Mr. Knyrim's approval of or signature on the deed or agreement of sale when they decided to draft and execute these documents on their own. Although the court did not wish to discuss this issue in its previous opinions, there are significant problems with the purported transfer of the farm to Ms. Kindon that can only be corrected, one way or another, through the action of the trustees. Mr. Malee acknowledged these problems and issues in his testimony. Absent the consent of all the beneficiaries, Ms. Kindon could not act as the trustee of either Share A or Share B to correct those problems related to the transfer of the farm, because it would amount to self-dealing. As the Court noted in Banes Estate, 452 Pa. 388, 305 A.2d 723 (1973),

> Where there is self-dealing on the part of a fiduciary, it is immaterial to the question of his liability in the premises whether he acted with fraudulent intent or whether the price received for his sale of trust property was fair and adequate…The rule [forbidding self-dealing] is not intended to be remedial of actual wrong, but preventative of the possibility of it.

305 A.2d at 727 (citations omitted).

The third factor the court must consider is the interests and wishes of the beneficiaries. Unfortunately, the relationship between Hal and his sisters is most likely irretrievably broken. The acrimony is palpable.

Clearly, Hal does not wish for his sister to be appointed as the trustee and while not certain, his interests might be adversely affected by such an appointment. His

[2] For privacy purposes, ellipses were inserted in place of Mr. Knyrim and Mr. Sherwood's home addresses.

financial interests have been adversely affected by his sister's exercise of authority to this point. As the court noted in its prior Opinion, Ms. Kindon not only received a greater portion of her father's assets but more importantly, was appointed in control of her father's estate, had unfettered control of the trust assets, had extensive powers with respect to the assets, had absolute discretion over the trust and estate, and could be designated by herself as the residuary beneficiary of the whole estate.

It begs logic to suggest that in the future, even the most basic level of communication and cooperation could take place between Hal and his sisters. Permitting any of the siblings to act as a trustee under these circumstances would be improper.

For these reasons, the court appointed Emerson Knyrim and Ann Tyler as co-trustees of Trust B.

The Colonel next asserts that the court erred in finding that he suffered from a weakened intellect at the time the documents were executed. Again, the court cannot agree.

While there is no bright line test to identify a weakened intellect, it is typically accompanied by persistent confusion, forgetfulness or disorientation. In re Estate of Fritts, 906 A.2d 601, 607 (Pa. Super. 2006). The "weakened intellect" that must be shown to establish undue influence "need not amount to testamentary incapacity." Burns v. Kabboul, 407 Pa. Super. 289, 595 A.2d 1153, 1163 (1991). While "the testator may dispose of his property as he sees fit, the law is rigid in its insistence that one of weak mind, whether from inherent cause or by reason of illness, shall not be imposed upon by the art and craft of designing persons." Id.

Ample evidence was presented to show that the Colonel was suffering from

some physical and mental impairment when the documents were executed on March 29, 2011. In or about early May 2009, the Colonel suffered a cerebral event (a stroke or a mini-stroke), which was confirmed through an MRI and CT scan. The testimony of virtually every witness confirmed that, following this event and clearly after his wife's death, his mind became at least somewhat inferior in reasoning power, factual knowledge and orientation. He exhibited varying degrees of confusion and forgetfulness. During the time between his cerebral event and the execution of the Third Amendment and Power of Appointment, the tasks that the Colonel performed on his own diminished. The testimony from all of his children, as well as from friends and neighbors, established that the Colonel is not left home alone for any significant amount of time. Following his wife's death through March 2010, Christine and Hal brought the Colonel to their respective homes to take care of him. When the Colonel began to complain about wanting to be at his home on the farm, Christine began spending the nights there instead of bringing him to her house. Around March 2010, Catherine moved into the "cottage" or "little house" on the farm. Since that time, she has predominantly cared for the Colonel, with her brother or sister filling in when she has to babysit. In fact, friends and neighbors complained that Catherine was always present when they tried to visit the Colonel. Catherine would dominate the conversation and answer for her father; the Colonel frequently would be quiet or confused.

In the summer of 2010, Dr. Finch referred the Colonel to Dr. Wilson, because one or more of the children thought it was no longer safe for their father to be driving.

Since at least 2010, the Colonel has had assistance attending to his financial matters. Initially, Hal's wife, Diane, was the Colonel's power of attorney. She made sure that

the bills got paid. She would prepare the checks, and the Colonel would sign them. She also helped the Colonel with his other banking and financial needs such as certificates of deposit. Following a dispute between her and Christine, however, Diane resigned as the power of attorney. On September 6, 2010, the Colonel executed a document naming Christine as his power of attorney. Shortly thereafter, Christine was handling all, or nearly all, of the Colonel's personal and business affairs.

Even Petitioner's expert, Dr. Dowell, who testified that the Colonel was competent and had testamentary capacity, stated that the Colonel had some difficulties in the area of focal impairment that affected his ability to learn new information and recall it. Partial Transcript, March 16, 2012, pp. 12-13.

Under all the facts and circumstances of this case, the court did not err in concluding that the Colonel suffered from a weakened intellect.

The Colonel next avers that the court erred in finding that Christine Kindon received a substantial benefit under the challenged documents. The court cannot agree.

Ms. Kindon benefits substantially from the Third Amendment, Power of Appointment, and the transfer of the farm which prompted the execution of these documents. By her own testimony, Ms. Kindon purchased the farm for at least $34,000 less than the assessed value and the monies she paid were not placed into the Trust, but into a money market account in the Colonel's name. Hal asserted that the farm was worth much more than the assessed value. In addition, under the agreement of sale, Ms. Kindon receives 50% of any gas rights or royalties and her siblings split the other 50%.

Under the Second Amendment, Hal was to receive the farm and 5% of the

remainder of the estate after a specific bequest to the Colonel's granddaughter. In contrast, as a result of the transfer of the farm and the execution of the Third Amendment and Power of Appointment, Ms. Kindon would receive the farm at a discounted price as well as one-third of the trust assets remaining after the specific bequest to the Colonel's granddaughter. More importantly, Ms. Kindon was appointed in control of her father's entire estate, had unfettered control of the trust assets, had extensive powers with respect to the assets, had absolute discretion over the trust and estate, and could be designated by herself as the residuary beneficiary of the whole estate. Estate of Stout, 746 A.2d 645 (Pa. Super. 2000); Estate of Levin, 615 A.2d 38 (Pa. Super. 1992).

The Colonel also contends that the court erred in finding that there was a confidential relationship between him and Christine Kindon.

"The concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line. The essence of such a relationship is trust and reliance on one side and a corresponding opportunity to abuse that trust for personal gain on the other." Scott Estate, 455 Pa. 429, 432, 316 A.2d 883, 885 (1974). A confidential relationship appears "when the circumstances make it certain that the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust; in both an unfair advantage is possible." Frowen v. Blank, 493 Pa. 137, 425 A.2d 412, 416-17 (1981)(citations omitted).

While the court initially found that there was not a confidential relationship, it reconsidered that decision and realized that it erred in not fully considering the impact of the power of attorney and the extent of Ms. Kindon's assistance to the Colonel and the Colonel's

reliance upon Ms. Kindon.

The Colonel suffered a cerebral event in May 2009 and his wife died on November 12, 2009. Following his wife's death, the Colonel sought increased assistance from Ms. Kindon. The Colonel stayed with her for a period of time, as he did with his other children, until his daughter Catherine moved into the cottage in March 2010. Thereafter, Catherine primarily cared for the Colonel with Ms. Kindon taking over those responsibilities when Catherine had to babysit. The testimony of the Colonel's children, as well as the testimony from friends and neighbors, established that, since his wife's death, the Colonel has not been left alone for any significant periods of time.

The Colonel also utilized Ms. Kindon to provide assistance and advice on his legal and financial matters. When the subject of transferring the farm to Ms. Kindon came up in March 2010, there were questions about whether the farm was "all tied up with the Trust." Ms. Kindon contacted the attorney's office, made the appointment, and drove the Colonel, Emerson Kynrim, and her sister to the appointment.[3] No one was happy with the fees the attorney was charging, so Ms. Kindon and the Colonel prepared the deed and the agreement of sale on their own. Despite the fact that Mr. Kynrim was a former bank president, neither the Colonel nor Ms. Kindon sought his assistance or advice in drafting these documents. The documents were executed and filed in June 2010. Furthermore, this transaction was cloaked in secrecy. Neither Ms. Kindon nor the Colonel wanted Hal to find out about the transfer. In fact, the Colonel went so far as to put a note on the documents, asking the individual at the courthouse not to publish the transaction.

[3] The attorney told Ms. Kindon to bring the trustee.

The power of attorney was executed on September 6, 2010. Shortly thereafter, Ms. Kindon administered virtually all of the Colonel's personal and business affairs.

Between his wife's death on November 12, 2009 and the time the Third Amendment to the Rogers Family Trust and the Power of Appointment were executed by the Colonel on March 29, 2011, the Colonel was unable to fully care for himself and he was growing mentally weaker. As time went on, he relied more and more heavily on Ms. Kindon. It started with her assisting in his physical care after his wife's death, continued with her preparing legal documents to transfer the farm, and increased to the point where, by the fall of 2010, he executed a power of attorney on behalf of Ms. Kindon and she was handling virtually all of his personal and business affairs. The combination of these facts and circumstances show a confidential relationship. See Foster v. Schmitt, 429 Pa. 102, 239 A.2d 471, 474 (1978); Hera v. McCormick, 425 Pa. Super. 432, 625 A.2d 682, 691 (1993); Estate of Keiper, 308 Pa. Super. 82, 454 A.2d 31, 33 (1982).

The Colonel next contends the court erred in finding that there was undue influence while at the same time finding that the Colonel was not "overtly dominated or manipulated by anyone." The court cannot agree.

The court's comment was taken out of context. The court's full statement was, "While the Colonel was not overtly dominated or manipulated by anyone, the subversive effect of the confidential relationship in light of all the circumstances cannot be ignored." Opinion and Order dated January 16, 2013, p. 9.

There also is no requirement that a finding of undue influence must be based on "overt" domination or manipulation. In In Re Estate of Clark, 461 Pa. 52, 334 A.2d

628, 634 (1975), the Pennsylvania Supreme Court stated: "Undue influence is generally accomplished by gradual, progressive inculcation of a receptive mind. The 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon."

In order to establish undue influence, the following elements must be established by clear and convincing evidence: (1) that the Petitioner suffered from a weakened intellect at the time the documents were executed; (2) there was a confidential relationship between the proponent of the documents and the Petitioner; and (3) the person in the confidential relationship received a substantial benefit under the challenged documents. In re Bosely, 26 A.3d 1104, 1108 (Pa. Super. 2011), citing Estate of Reichel, 400 A.2d 1268, 1270 (Pa. 1979). "Once these three elements are established by the contestant, the burden shifts back to the proponent to prove the absence of undue influence by clear and convincing evidence." Bosely, supra, citing Estate of Clark, 334 A.2d 628, 631-32 (Pa. 1975).

As previously discussed in this opinion, the contestant presented clear and convincing evidence that: the Colonel suffered from a weakened intellect; there was a confidential relationship between the Colonel and Christine Kindon; and Christine Kindon received a substantial benefit under the challenged documents. Therefore, Hal met his burden of proof to show undue influence. It then was incumbent on Ms. Kindon to prove the absence of undue influence by clear and convincing evidence, which the court was not satisfied that she did.

The next appeal issue is the court erred in finding that the "transactions at issue stripped the Colonel of all of his available property…" The court agrees that this statement is not entirely correct. The transactions at issue stripped the Colonel of his remaining real

property, and substantially altered the estate plan that had been established while his wife was alive. Moreover, the designation of Ms. Kindon as successor trustee of Share A, the petition to appoint her as trustee of Share B, and the confidential relationship between Ms. Kindon and the Colonel gave Ms. Kindon control over all of the remaining trust assets.

The Colonel next alleges that the court erred in assigning a standard of proof which required a showing that all the decisions at issue be entirely removed from "any taint of undue influence." The court cannot agree.

The court is bound to follow the decisions of the Pennsylvania appellate courts. The phrase at issue came from the case of Hera v. McCormick, 425 Pa. Super. 432, 625 A.2d 682 (1993). In discussing the influence of a confidential relationship, albeit in the context of a gift of property instead of the sale of property for less than the assessed value or the execution of trust documents, the Court in Hera stated: "If it is established that a confidential relationship existed at the time the alleged gift was made, the burden shifts to the done to show that the alleged gift was free of any taint of undue influence or deception." 625 A.2d at 690; see also Banko v. Malanecki, 499 Pa. 92, 97, 451 A.2d 1008, 1010 (1982); In re Estate of Clark, 467 Pa. 628, 634, 359 A.2d 777, 781 (1976).

The Colonel's last issue is that the court erred in appointing Emerson Knyrim as a co-trustee after he renounced and quit that position as soon as controversial issues surfaced. The court cannot agree.

Mr. Knyrim was the individual designated as the trustee for Share B in the trust documents. He formerly was an employee, officer and then president of a local bank. He was and is an appropriate individual to serve in the position of trustee.

Mr. Knyrim credibly testified that the first he heard anything about transferring the farm was after he, the Colonel, Christine and Catherine met with the attorney on May 13, 2010. Either that evening or within a day or two thereafter, the Colonel said maybe he should consider selling the farm. Then Catherine said "Christine will buy it" ten to twenty times. Mr. Knyrim was concerned about the Colonel's reasoning abilities due to some comments he made about spreading corn for the farm animals when he had not owned such animals for years. Nevertheless, Mr. Knyrim thought the Colonel was not going to take any action on this discussion, because the Colonel said he would not sign anything without Mr. Knyrim's okay. About three weeks later, however, Ms. Kindon came to Mr. Knyrim's residence, handed the deed and agreement of sale to him and said, "Here, this will solve your problems about the farm." Mr. Knyrim astutely realized the documents contained serious errors and needed the attention of a lawyer. Transcript, July 12, 2012, at pp. 192-202. It is readily apparent from this testimony that the only reason Mr. Knyrim resigned as trustee was because he had legitimate concerns about the manner in which the transfer of the farm to Ms. Kindon occurred.

The first issue raised in Hal's cross-appeal is that the court erred in finding that the Colonel had testamentary capacity at the time he executed the documents at issue.

"Testamentary capacity exists when the testator has general knowledge of the natural objects of his bounty, the general composition of his estate, and what he wants done with it, even if his memory is impaired by age or disease." Estate of Reichel, 484 Pa. 610, 400 A.2d 1268, 1270 (1979). "Neither old age, nor its infirmities, including … partial loss of memory, inability to recognize acquaintances, and incoherent speech, will deprive a person of

the right to dispose of his own property." In re: Bosley, 26 A.3d 1104 (Pa. Super. 2011), citing Estate of Hastings, 387 A.2d 865, 868 (Pa. 1978).

Hal had the burden to prove the Colonel's lack of testamentary capacity by clear and compelling evidence. See Estate of Vanoni, 798 A.2d 203, 207 (Pa. Super. 2002). Clear and compelling evidence is "testimony that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Matter of Sylvester, 501 Pa. 300, 555 A.2d 1202, 1203-04 (1989). While the court had some concerns, it could not conclude that Hal had carried his burden of proof.

The court was convinced that following his cerebral event (stroke or mini stroke), the Colonel suffered impairments. As many of his long time close friends and relatives testified, the Colonel became forgetful, introverted, far less talkative, appeared lost and just not the same. Following the unexpected loss of his wife shortly thereafter, he not surprisingly went into a state of depression. His personality changed and his apparent cognitive difficulties worsened.

On the other hand, there was credible testimony that when the Colonel was involved in his estate planning matters, whether it be in numerous discussions with Mr. Malee over several months, meetings with his family members, separate discussions with his daughters and even during his assessment by Dr. Dowell, he generally knew his assets, specifically knew his heirs and knew how he wanted to dispose of his assets.

There also were valid reasons to support the Colonel's change of estate plan. He was greatly concerned that his daughter Catherine would not have a place to live in light

of Hal's statements that he would evict her, once he got the farm. He was not happy with his son and was convinced that his daughter Christine would take care of matters pursuant to his wishes. He was dissatisfied by the treatment he received from Hal, and he had faith in Christine. His behaviors and statements reflected a clear desire to vest Christine with the authority to protect him, as well as Catherine. The Colonel further made in kind changes to his plan both prior to and after his stroke and wife's death, such as the sale of the Shrewsbury Township property, the deed of the farm to his daughter and the gifting of the Canadian Property.

The court also found the testimony of the Colonel, Mr. Malee, and Dr. Dowell to be credible, persuasive and ultimately determinative. The court gave great weight to the testimony of Dr. Dowell, who observed the Colonel shortly before these documents were executed. See Brantlinger Will, 418 Pa. 236, 210 A.2d 246, 253 (1965). The court gave less weight to the testimony of Dr. Greevy, because he never observed or spoke to the Colonel; his opinion was based solely on a review of documents and records.

Hal also avers that the court erred in finding that transactions of property in the hunting club in Shrewsbury Township and acreage in Canada, occurred "shortly before" the transactions at issue when the evidence established that the transfer of the these properties occurred at the direction of Virginia Rogers, prior to her death and years prior to the stroke suffered by the Colonel. The court agrees in part with Hal's assertions, but it does not in any way alter the court's decision regarding testamentary capacity or undue influence.

There were three previous transfers of real estate from the trust. Two of the transfers occurred prior to the Colonel's stroke in April or early May 2009. In or around the

year 2000, the Colonel and his wife transferred the acreage in Canada to Christine and Hal, because Catherine lost her residence and they wanted to make sure the land in Canada stayed in the family. Twenty-two acres in Shrewsbury Township were conveyed to Hal in 2005. Partial Transcript, March 16, 2012, pp. 94-95; Transcript, March 30, 2012, at pp. 4, 7; Transcript July 2, 2012, pp. 45, 49-50, 163.

The Colonel had a three-fifths interest in the hunting club. He transferred one-fifth to Hal for Christmas in 1994 or 1995. The other two-fifths were formally transferred on November 30, 2009, about six months after the Colonel suffered his stroke and about 2 ½ weeks after his wife's death. According to Hal, however, the Colonel and his wife had discussed and agreed upon the transfer prior to her death. Partial Transcript, March 16, 2012, pp. 91-92; Transcript, March 30, 2012, pp. 10-11; Transcript, July 2, 2012, pp. 46-47.

The purported transfer of the farm to Christine occurred in early June 2010. The Third Amendment and the Power of Appointment were executed on March 29, 2011.

From these facts, the transfer of the Colonel's two-fifths interest in the hunting club occurred after his stroke and shortly before the purported transfer of the farm to Christine. The other transactions occurred years before the Colonel's stroke and the challenged transactions.

Hal's final assertion is the court erred in failing to appoint an independent expert to examine the Colonel's capacity and provide a report to the court. This issue lacks merit.

None of the parties asked the court to appoint an independent expert to evaluate the Colonel's capacity. It is not the court's obligation to provide the medical

testimony to support or refute the parties' contentions. There were ample avenues for the parties to present this information during the various hearings in this case. Dr. Finch examined and evaluated the Colonel in 2009 in connection with his cerebral event. In 2010, Dr. Finch referred the Colonel to Dr. Wilson at Geisinger Medical Center. Dr. Wilson performed a neuropsychological evaluation on the Colonel in September 2010. These doctors were the Colonel's treating physicians, but neither party called either of them to testify about the Colonel's capacity.

Mr. Malee arranged for Dr. Dowell to evaluate the Colonel's capacity in late January 2011, before the Third Amendment and the Power of Appointment were drafted and executed. Although Dr. Greevy disagreed with Dr. Dowell's opinion, he never even met the Colonel before he came to court to testify. Hal's attorneys could have asked the court to require the Colonel to speak with his expert so he could conduct a full evaluation, but they did not. Furthermore, Dr. Greevy testified that he didn't think there needed to be any additional psychological testing, because the Colonel already had two neuropsychological evaluations. Transcript of Dr. Greevy's Testimony, March 30, 2012, p. 29.

Hal did not file any motion, pleading or other legal document even mentioning an independent evaluation until after the court ruled against him on the issue of testamentary capacity and he filed his exceptions, in which he claimed the court erred in failing to appoint an independent expert. Somewhat surprisingly, it was Dr. Greevy who first mentioned the phrase "independent evaluation" during his testimony. Hal's attorneys asked Dr. Greevy if he would be willing to interview the Colonel to make Dr. Greevy more comfortable with his opinions. Dr. Greevy replied:

> If the court would appoint me to do that, but really only under those circumstances at this point. I mean, you know, the Colonel's already had two neuropsychological evaluations, he's had multiple tests, you know, it's – it's really the court's decision and opinion about whether or not that's – that's necessary, I don't think it's unreasonable to ask for a court appointed independent evaluation. I think Dr. Wilson's report comes, you know, very close to providing that in and of itself.

Transcript of Dr. Greevy's Testimony, March 30, 2012, pp. 28-29. Neither Hal nor his attorney followed up this testimony by asking the court to appoint Dr. Greevy to interview the Colonel or to appoint anyone else to conduct any further evaluation or testing. The court also notes by that point it would not have considered Dr. Greevy an independent expert when he already had provided testimony as Hal's expert witness.

Finally, the court questions the utility of ordering an independent evaluation in 2012 or 2013 when the challenged transactions occurred in June 2010 and March 2011 and other doctors had previously evaluated the Colonel in that time frame.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: J. Howard Langdon, Esquire
C. Edward S. Mitchell, Esquire
Norman M. Lubin, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)