IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: ESTATE OF VIRGINIA ROGERS, Deceased	:	**ORPHAN'S COURT DIVISION**
	:	
	:	**No. 41-10-0476**
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OPINION AND ORDER

Before the Court are the Exceptions of Harry L. Rogers, III (Hal Rogers) to the Opinion and Order of the Court dated September 6, 2012.

Said Opinion, following extensive hearings, granted the Petition of Harry L. Rogers, Jr. (Colonel Rogers) to appoint his daughter, Christine Kindon as Trustee of Trust Share B of the Rogers Family Trust and also confirmed both the Third Amendment to the Family Trust and the Power of Appointment under said Trust.

The Exceptions contend that the Court erred in the appointment of Ms. Kindon, erred in not concluding that there was undue influence in connection with the Third Amendment and Power of Appointment, and lastly that the Court erred in finding that Colonel Rogers possessed the requisite testamentary capacity in connection with said testamentary documents.

Following an oral argument on the Exceptions and the submission of a Brief, as well as a review of the testimony and controlling legal authority, this matter is now ripe for a decision.

The Court will first address the appointment of Christine Kindon, as Trustee.

The Court agrees that it erred in appointing her as Trustee of Trust Share B of the Rogers Family Trust. More specifically, the Court erroneously based its decision on solely the "counseled designation" of Colonel Rogers and did not consider the other required factors.

As set forth in the Court's September 6, 2012 Opinion and Order, a vacancy occurred with Trust Share B of the Rogers Family Trust as a result of the primary and alternate Trustees renouncing, and the inability of the beneficiaries of the Trust to agree upon either a corporate or an individual Trustee.

As Hal Rogers correctly notes, the appointment of a successor Trustee is governed by 20 Pa. C.S.A. § 7764 (c). Where it is left to the Court to determine a vacancy, it should consider not only the objectives and probable intention of the settlor but also the promotion of the proper administration of the trust and the interests and wishes of the beneficiaries. 20 Pa. C.S.A. § 7764 (comment). In considering all of these factors, which the Court initially failed to do, a trustee other than Ms. Kindon should be appointed.

When the trust was created, it was clear that both settlors desired that Emerson Knyrim be appointed as the 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. Moreover, and as persuasively argued by counsel for Hal Rogers, the Second Amendment specifically stated that the Trust could be amended or revoked only while both settlors were living. 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 as set forth in the Court's original Opinion and Order.

The Court must next consider the promotion of the proper administration of the trust. While Ms. Kindon has the aptitude to administer the trust and while she clearly documented her activities on behalf of her father, the Court cannot conclude that her appointment would best promote the proper administration of the trust. Indeed, the Court agrees with Hal's argument that an irreconcilable conflict of interest would arise if Ms. Kindon serves as a trustee. Without commenting on the actions Ms. Kindon has taken to date, her unfettered power as a 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.

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 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.

The Court will continue the appointment of Emerson Knyrim and Ann Tyler, who are acting as interim trustees. A copy of this Opinion and Order shall be served on said individuals. Of course, they may renounce their appointment. If so, they are directed to notify the Court in writing, whereupon the Court will request from the parties names of prospective substitutes. The Court will hold a conference to determine if an agreement can be reached with respect to a substitute. If no agreement can be reached, the Court will designate an appropriate substitute.

Hal further submits that the Court erred in finding that the evidence was insufficient to establish a confidential relationship. More specifically, in his Brief and during oral argument, he argued that the Power of Attorney given to Ms. Kindon by the Colonel was determinative to the issue.

As the Court noted in its prior Opinion and Order, it was previously established by clear and convincing evidence that: (1) the Colonel suffered from a weakened intellect at the time the documents were executed, and (2) Ms. Kindon received a substantial benefit under the challenged documents. At issue is whether there was a confidential

relationship between the Colonel and Ms. Kindon.

Hal bases his argument on the Supreme Court's decision in Foster v. Smith, 429 Pa. 102, 239 A.2d 471 (1968). The case concerned a dispute between two individuals over approximately $9,000.00. Prior to her death, Ella Conway executed a Power of Attorney to her close friend Margaret Schmitt. Approximately three and-a-half (3 ½) years later, Ms. Schmitt, pursuant to the Power of Attorney, withdrew Ms. Conway's entire account balance and re-deposited it in a new account titled in her name only. Approximately three (3) years later, Ms. Schmitt withdrew the money. Ms. Conway's niece discovered the alleged misappropriation and filed an action in equity. Following the trial in equity, the Court directed that the monies with interest be returned.

The Supreme Court reasoned that when the money was withdrawn and re-deposited in Ms. Schmitt's account, she had been named the sole beneficiary under decedent's Will. The Will was subsequently revoked, and a new Will, naming Ms. Foster as the sole beneficiary was executed after the money was withdrawn by Ms. Schmitt.

Even though the transfer of the monies was absolute, the Supreme Court did not hesitate in affirming the Equity Court's imposition of a constructive trust.

The Court concluded that there was "no doubt" that a confidential relationship existed. The factors upon which the Court based this decision included Ms. Schmitt being a constant companion of the decedent for decades, Ms. Schimitt's testimony that she administered all of the decedent's personal and business affairs during the waning years of decedent's life, and the giving of a power of attorney from the decedent to Ms. Schmitt.

The Supreme Court noted that there was "no precise formula" to ascertain the existence of a confidential relationship but that "given the circumstances" of the case, there was no "clearer indicia of a confidential relationship then the giving" of the power of attorney. Foster, 239 A.2d at 474.

Hal also points this Court to the Supreme Court's decision in In Re Estate of Ziel, 467 Pa. 531, 359 A.2d 728 (1976). In determining whether a confidential relationship exists, the Ziel decision mandates that the trial court review all of the circumstances to determine if the parties did not deal on equal terms and on one side there was an overmastering influence and on the other, weakness, dependence, or trust justifiably reposed such that an unfair advantage was possible. Id. at 542, 359 A.2d at 734, citing In Re Estate of Button, 459 Pa. 234, 239, 328 A.2d 480, 483 (1974). In addressing the impact of a power of attorney, the Court cited Foster and confirmed that no clearer indication of a confidential relationship could exist in giving another person a Power of Attorney over one's entire life savings. Ziel, 359 A.2d at 732.

Of further guidance to the Court is the Superior Court's decision in Hera v. McCormick, 425 Pa. Super. 432, 449, 625 A.2d 682, 691 (1993), which held that a confidential relationship may be established by proof that the alleged donee possessed the power of attorney over a decedent's assets. It further noted that the existence of a confidential relationship would be "particularly true" where the alleged donee is shown to have spent a great deal of time with the decedent or assisted with the decedent's care. Id. ; see also Estate of Keiper, 308 Pa. Super. 82, 454 A.2d 31 (1982) (confidential relationship

was established where the son-in-law had been given a power of attorney over decedent's assets, decedent had recently lost his wife, was terminally ill from cancer and unable to care for himself, and was growing mentally weaker).

The Court agrees that it erred in not fully considering the impact of the power of attorney, in its determination as to whether a confidential relationship existed between the Colonel and Ms. Kindon.

After reviewing all of the evidence in light of the aforementioned legal authorities, the Court concludes that a confidential relationship did exist between the Colonel and Ms. Kindon. It is undisputed that Ms. Kindon occupied a position of advisor or counsel for her father. It is clear as well that this relationship was such that the Colonel was confident that she would act in good faith and in his best interests.

Mrs. Rogers died on November 12, 2009. Following his wife's death, the Colonel sought increased companionship and 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 on the Colonel's property.

The Colonel utilized Ms. Kindon to provide advice on all of his significant legal matters including meeting with attorneys and disposing of property. Within four (4) months of his wife's death, the Colonel began discussions with Ms. Kindon regarding transferring the farm property to her. According to Ms. Kindon, the Colonel "bugged her" for months. He insisted that she purchase the property and he confided in her as to his reasons which included protecting his other daughter. Further, once the transaction was

consummated, he cloaked it in secrecy evidencing complete trust and confidence in Ms. Kindon.

The power of attorney was executed on September 6, 2010. Shortly thereafter, within approximately one (1) month, Ms. Kindon began exercising her powers under said power of attorney. Practically speaking, she administered virtually all of the Colonel's personal and business affairs.

While, as the Court noted in its original Opinion that the relationship between the Colonel and Ms. Kindon was nothing more than a caring, loving relationship between a father and daughter, this does not negate the existence of a confidential relationship under the circumstances. At the time the Third Amendment to the Rogers Family Trust and Trust Power of Appointment were executed by the Colonel on March 29, 2011, the Colonel had previously executed a power of attorney on behalf of Ms. Kindon, Ms. Kindon was acting under that power of attorney, the Petitioner had lost his wife sixteen (16) months earlier, the Colonel was unable to fully care for himself, the Colonel was growing mentally weaker on a daily basis and had developed a relationship with his daughter such that he relied upon her to act in his best interest.

It being evident to the Court that a confidential relationship existed between the Colonel and Ms. Kindon, undue influence has been established. The burden would thus shift to Ms. Kindon to show that the transactions were free of any taint of undue influence. Hera, 425 Pa. Super. at 447, 625 A.2d at 690, citing Banko v. Malanecki, 499 Pa. 92, 451 A.2d 1008 (1982).

While the Court maintains that the Colonel was independent, strong-willed and knowledgeable enough to seek the counsel of others, it cannot conclude that the transactions at issue were free of any taint of undue influence. While the Colonel was not overtly dominated or manipulated by anyone, the subversive effect of the confidential relationship in light of all of the circumstances cannot be ignored.

In reconsidering all of the circumstances and in considering the arguments by Hal, the Court must agree that the Third Amendment and Power of Appointment must be set aside. "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 Re Estate of Clark, 461 Pa. 52, 65, 334 A.2d 628, 634 (1975). Moreover, in that the transactions at issue stripped the Colonel of all of his available property and clearly changed his estate plan that existed while his wife was alive and as credibly testified to by numerous witnesses, it must be regarded with suspicion and scrutinized "with a keen and somewhat incredulous eye." See Estate of Keiper, 308 Pa. Super. 82, 87-88, 454 A.2d 31, 34 (1982).

In the final analysis, the Court concedes that it erred. While the Court has no doubt that the Colonel made counseled decisions for which he was then certain and had reasons to support, it cannot conclude that those decisions were entirely removed from the taint of a confidential relationship established through a set of circumstances which included the power of attorney, the recent loss of his wife, the inability of the Colonel to care for himself, and the Colonel's decreasing mental stability.

Hal further argues that the Court erred in concluding that his father possessed the requisite testamentary capacity. The Court disagrees and relies on its original Opinion and Order. The Court concludes as it did previously that Hal failed to carry his burden of proving by clear and compelling evidence that the Colonel failed to have the required testamentary capacity at the time he executed the relevant documents.

ORDER

AND NOW, this ___ day of January 2013, the Court grants in part and denies in part the Exceptions of Harry L. Rogers, III to the Court's Opinion and Order dated September 6, 2012. The Court's September 6, 2012 Order is **VACATED.** Emerson Knyrim and Ann Taylor are appointed Co-Trustees of Trust Share B of the Rogers Family Trust. The Third Amendment to the Rogers Family Trust as well as the Power of Appointment under said trust are declared void and of no legal effect in that said documents were executed as a result of undue influence.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: J. Howard Langdon, Esquire
Norman L. Lubin, Esquire
James Malee, Esquire
C. Edward S. Mitchell, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File