

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Marie Lista
O.C. No. 1474 AP of 2003
Control No. 031873

OPINION

Introduction

The contest over Marie Lista's June 12, 2001 Will pits the children of her brother Dominic Sassa against the children of her brother Augustus Sassa. The contestant Dennis Sassa asserts that Marie's 2001 will was invalid due to the undue influence his cousin, Francis Sassa, exerted over her or due to Marie's lack of testamentary capacity. The contestant, however, fails to meet his burden as to either of these arguments. Ironically, his own testimony and evidence create the strong impression that it was the contestant who attempted to exert undue influence over his Aunt, by ignoring her request that he contact an attorney for her and by constantly badgering her about her will, even going so far as reading her prior 1988 Will without permission and then removing it from her residence.

The proponents' appeal from the decree of the Register of Wills dated July 15, 2003 admitting the prior October 10, 1988 will to probate instead of the June 12, 2001 Will is therefore sustained. This court concludes Marie Lista's June 12, 2001 will was not the result of undue influence and that the contestant failed to establish that Marie lacked testamentary capacity when she executed that will.

Procedural Background

Marie Lista, a widow without children, died on June 26, 2001 at the age of 92. She had executed a will in 1988, but on June 12, 2001, just a few weeks before her death, she executed a new will. After Marie's death, a dispute arose among her nephews over whether her 1988 will or the 2001 will was valid.

The June 12, 2001 Will was contested by Dennis and Lawrence Sassa,¹ the two sons of her deceased brother Augustus. These contestants filed a caveat with the Philadelphia Register of Wills contesting the June 12, 2001 Will on the grounds of lack of testamentary capacity and undue influence.² They offered instead Marie's October 10, 1988 Will for probate.³ After a caveat conference and several days of formal hearings, the Register of Wills issued the following decree:

AND NOW, this 15th day of July 2003, in consideration of the Caveat filed in the estate of Marie Lista, the Caveat Conference on August 29, 2001, the Formal Hearings of June 20, 2002, September 18, 2002 and March 20, 2003, it is hereby ORDERED and DECREED, the Caveat is hereby SUSTAINED and the Last Will and Testament of MARIE LISTA, dated October 10, 1988, shall be admitted to Probate, upon otherwise complying with the requirements of the Probate Code.⁴

¹ Lawrence Sassa died in February 2002. 11/9/2004 N.T. at 87 (Dennis Sassa). Dennis Sassa will be referred to throughout as the contestant of the June 12, 2001 will though he might also be characterized as the proponent of the October 10, 1988 will.

² Contestants' Memorandum at 1.

³ Petition for Citation filed by Francis Sassa, Vincent Sassa and Richard Sassa (hereinafter petition for citation), ¶ 3 and Contestant's Answer thereto.

⁴ Petition for Citation filed by Francis Sassa, Vincent Sassa and Richard Sassa (hereinafter "Petition for Citation"), July 15, 2003 Decree of the Register of Wills of Philadelphia County. The Decree of the Register would have been clearer if it had explicitly set forth that it sustained the caveat to the June 12, 2001 will but the parties are clear that this occurred. Section 908 of the PEF code provides for review of this decree since it states that "[a]ny party in interest who is aggrieved by a decree of the register" may file a timely appeal. Unfortunately, it is not uncommon for a court to be confronted by a vague decree from the Register. See, e.g., Estate of Luongo, 2003 Pa. Super. 171, 823 A.2d 942, 961 (2003)(noting that "the certified record in the present case is vague as to the procedural vehicle by which the Register dismissed the Appellant's caveat" but nonetheless in this case "absent any agreement to the contrary, Appellant's de novo appeal to the Orphans' Court effectively eliminated from consideration the record of the caveat proceedings before the Register of Wills save for the fact of probate itself"). In this de novo proceeding,

This decree of the Register of Wills was appealed by the three sons of Marie's other brother Dominic Sassa: Francis Sassa, Richard Sassa and Vincent Sassa by filing with the Orphans' Court a Petition for Citation for a Rule to Show Cause Why an Appeal from a Decree of the Register of Wills Should Not be Sustained. Copies of both the 1988 and 2001 wills were attached to the petition. The petitioners note that the Register sustained the caveat to the 2001 will and allowed for the probate of the 1988 Will, but in appealing the Register's Decree their focus is solely on the validity of the 2001 Will. They maintain that at the time of its execution, Marie was of sound mind and free from any undue influence.⁵

In response to this petition, a citation was issued to all the parties in interest designated by the petitioners. An answer was filed by Dennis Sassa, who asserts that the Appeal should not be sustained. Dennis likewise focuses solely on the validity of the June 12, 2001 Will, emphasizing that the Register of Wills after its numerous hearings had concluded that it was not valid due to lack of testamentary capacity and undue influence.⁶

A conference was subsequently held and discovery was scheduled to conclude by August 2004. When the parties were unable to resolve their dispute, three days of hearings were held beginning November 8, 2004. The parties were thereafter given an opportunity to file memoranda of law.

therefore, this court can consider the issues raised on appeal. As one commentator observed, "[t]he hearing before the orphans' court division is de novo whether or not the appeal follows a prior hearing before the register on caveat." J. Brooke Aker, Thomas Boulden, Law of Wills in Pennsylvania, 2d Ed. (Bisel Co. Philadelphia) § 9.2 at 9-9 (citing Probate, Estate and Fiduciaries Code § 776). The parties may raise issues before the orphans' court division not raised before the register, and they must raise all issues anew without relying on the fact that the issue was raised before the Register; "the scope and matter to be considered on the hearing of the appeal depend upon what is set forth in the petition which must be filed." Id. (citation omitted).

⁵ Petition for a Citation, ¶ 2-8.

⁶ Answer of Dennis Sassa to Petition for Citation.

Factual Background

At the beginning of the hearing, the parties stipulated as to the execution of the June 12, 2001 Will and that the burden of moving forward rested with the contestant of the June 12, 2001 Will.⁷ The contestant presented the following witnesses:

Daniel Zaborowski, a witness to the execution of the will as on cross;
Robert Costigan, the scrivener of the will, as on cross;
Francis Sassa, a proponent of the will, as on cross;
Carole Steep, a Home Health Aid;
Dennis Sassa, the contestant;
Denise Dinger, Marie's niece through her brother Augustus;
Dominic Sassa, Marie's brother, by deposition.

The petitioners or proponents of the Will presented the following witnesses:

Michele McNamee, a physical therapist;
Carol Liberi, a registered nurse;
Elaine Weinstein, an occupational therapist
Dolores Rogers, a longtime friend of Francis Sassa, who visited Marie on Sundays after Mass;
Patricia Stewart, a notary employed by the scrivener;
Vincent Sassa, Marie's nephew through her brother Dominic;
Francis or Frank Sassa, Marie's nephew through her brother Dominic.

The contestant thereafter presented testimony as rebuttal by Robert Costigan, the scrivener. The testimony by these witnesses focused on two broad themes: the genesis of Marie's June 12, 2001 Will and the status of her health and mental acuity. Though intimately related, these two themes emerge more clearly when presented separately.

The Genesis of Marie's June 12, 2001 Will

According to the testimony at the hearing, Marie Lista had a close relationship with her brothers and their children. In fact, she helped raise her nephews Dennis,

⁷ 11/8/2004 N.T. at 6.

Lawrence and Gus Sassa (the children of her brother Augustus) when their mother died.⁸ After the death of her brother's wife, Marie and her husband moved in with Augustus to care for his children.⁹ As a consequence, Dennis testified that he considered Marie his "psychological mother."¹⁰

Throughout the 1990's after her husband died, Marie lived independently; she was able to cook and clean for herself.¹¹ Around 1990, her twin brother Dominic Sassa moved two doors from Marie together with his son Frank (or "Francis") and Richard Sassa. The family members saw each other often.¹² Marie was generally regarded as a loving Aunt who treated all her nephews equally.¹³

In late 2000 or early 2001, however, Marie became less independent and needed help with everyday activities such as shopping and cleaning.¹⁴ Long before then in 1970, Dennis had moved to New Jersey and, he conceded, Marie's nephew Francis Sassa began to help her out more and more with her daily activities.¹⁵ In April 1999, Frank became power of attorney of Marie's PNC checking account. At some later point, he began preparing checks for her signature. He also prepared her income tax returns.¹⁶

On March 12, 2001, Marie was hospitalized for congestive heart failure. She was released on April 3, 2001, and taken to her home by Francis and Larry.¹⁷ After her

⁸ 11/9/2004 N.T. at 87-90,121-122 (Dennis Sassa). Marie had little if any contact with Gus "from about 1970 on."

⁹ 10/17/2002 Depo. of Dominic Sassa at 5-7.

¹⁰ 11/9/2004 N.T. at 87 & 90 (Dennis Sassa).

¹¹ 11/8/2004 N.T. at 90-91 (Dennis Sassa); 11/8/2004 N.T. at 77 (Francis Sassa).

¹² 10/17/2002 Deposition of Dominic Sassa at 5 & 12-13.

¹³ 10/17/2002 Deposition of Dominic Sassa at 65; 11/9/2004 N.T. at 49(Carole Steep, "Marie told me she never favored any of her family").

¹⁴ 11/8/2004 N.T. at 77 (Frank Sassa); 11/9/2004 N.T. at 92 (Dennis Sassa).

¹⁵ 11/9/2004 N.T. at 122 & 94. Dennis has resided in Englishtown, New Jersey since 1970.

¹⁶ 11/8/2004 N.T. at 77-78 (Frank Sassa).

¹⁷ 11/8/2004 N.T. at 79-80 (Frank Sassa); 11/9/2004 N.T. at 127 (Dennis Sassa).

release from the hospital, Marie was on oxygen and visited by home health care aids.¹⁸ The nephews subsequently held a meeting on April 9 or 10, 2001 to discuss Marie's health and care. The meeting was attended by nephews Frank, Vincent, Larry and Dennis Sassa. They agreed on a plan to take turns sleeping over at her home to evaluate Marie's condition and whether the services of the home health aids should be continued. After making their observations, they planned to meet again on April 23.¹⁹

Both the April 9th and April 23rd meetings were held in Marie's home. The participants' recollections of these meetings agree on certain key points, but differ as to implied motives and concerns. Dennis insinuated that Frank was opposed to paying for the aids, which he and his brother Larry supported.²⁰ Consequently, it was Larry who assumed responsibility for paying the aids.²¹ According to Vincent Sassa, Dennis and Larry suggested placing Marie in a nursing home, but Vincent and Frank objected.²² Their first April meeting with Marie was disrupted, Vincent suggested, when his father, Dominic, burst in and informed Marie of the proposal to place her in a nursing home. The nephews then reconvened to the basement, but Dennis soon left to retrieve Marie's 1988 Will.²³

Dennis agreed that the two meetings took place, but he does not always agree as to which events took place on the 9th or the 10th and which occurred on the 23.^{rd24} He generally agrees, however, that certain key events occurred. One of the issues discussed at the first April meeting was Marie's need for a living will. According to Dennis, he and

¹⁸ 11/8/2004 N.T. at 85 (Frank Sassa); 11/9/2004 N.T. at 93 (Dennis Sassa).

¹⁹ 11/8/2004 N.T. at 93 (Frank Sassa); 11/9/2004 N.T. at 95-98 (Dennis Sassa).

²⁰ 11/9/2004 N.T. at 97 (Dennis Sassa).

²¹ 11/9/2004 N.T. at 7-8 (Francis Sassa).

²² 11/10/2004 N.T. at 115-119 (Vincent Sassa).

²³ 11/10/2004 N.T. at 117-122 (Vincent Sassa).

²⁴ Dennis, for instance, testified that Dominic or "Uncle Darney" burst into the April 23 meeting rather than the April 9th meeting. 11/9/2004 N.T. at 117. See also Ex. C-9.

Frank went upstairs to Marie's bedroom to search for a living will. After determining that she did not have one, Dennis found Marie's 1988 will.²⁵ Without asking Marie's permission, Dennis read her 1988 will and then took it to his home in New Jersey.²⁶ His reason for taking the will, Dennis maintains, was his desire to talk with Marie about the need to update it.²⁷ He testified that his first conversation with Marie about her Will occurred during the second night that he slept over her house after the nephews' first April meeting. According to Dennis's testimony, on that occasion he "pulled out the will. I said, Aunt Marie there's some things in your will that need to be changed."²⁸ Dennis testified at length about his proposed changes to the 1998 Will and his various discussions about them with Marie, noting "[t]hen it came down to how are we going to do it. I was the one offering the how-tos."²⁹

The topic of Marie's will came up in the second meeting of the nephews on April 23, 2001. According to Frank, Marie brought the issue up and expressed a desire to change her 1988 will;³⁰ Dennis, in contrast, maintains that Frank brought up the issue of Marie's will.³¹ Nonetheless, both Frank and Dennis agree that Marie's general intent at this time was to achieve a 50/50 division of assets between the families of the two brothers (Dominic and Augustus).³² Dennis conceded that at this point, Marie intended to increase Frank's share of the assets from the 6% that he had been bequeathed in her 1988 will. As a consequence, Frank would receive approximately 13% of the assets.³³ In

²⁵ 11/9/2004 N.T. at 130-132 (Dennis Sassa).

²⁶ 11/9/2004 N.T. at 133 & 137(Dennis Sassa).

²⁷ 11/9/2004 N.T. at 104 & 137 (Dennis Sassa).

²⁸ 11/9/2004 N.T. at 140 (Dennis Sassa).

²⁹ 11/9/2004 N.T. at 144 (Dennis Sassa).

³⁰ 11/8/2004 N.T. at 95-96 (Frank Sassa).

³¹ 11/9/2004 N.T. at 104 (Dennis Sassa).

³² 11/8/2004 N.T. at 96-97 (Frank Sassa); 11/9/2004 N.T. at 106 (Dennis Sassa).

³³ 11/9/2004 N.T. at 104 & 107 (Dennis Sassa).

cold, calculating percentages, Dennis outlined his understanding of his Aunt's intentions regarding her new will:

My understanding was that the allocation between my family and my Uncle Dominic's family were (sic) roughly about 50/50. My brother Larry and I were to be reduced to from 16 percent of the '88 Will, to 13 percent. However, we were to split the inheritance of my father, which was 21 percent. Which then allocated the 13 or 13 and a half for both my brother and I. Frank was going to be increased from six to thirteen percent which made him, when we excluded my father's inheritance, equal to Larry and I.³⁴

Dennis prepared detailed notes of these discussions and impressions which were admitted as Ex. C-9.³⁵ In these notes, Dennis compares the percentages allocated to each relative under the 1988 Will and under his proposed "new" Will.³⁶ The notes also contain a list of all of Marie's assets based on a list that had been supplied to Dennis by Frank.³⁷

Marie was present during these discussions of her will.³⁸ According to Dennis, in the midst of these discussions, Aunt Marie began to "tear" and she "made a comment that she didn't want to see us arguing. And she wanted us to be happy."³⁹ More explicitly, he conceded that toward the end of the discussion, "when it got hostile, she was withdrawing" and she was upset by the disagreements among the nephews.⁴⁰ When questioned about the effect of his calculations on his Aunt, Dennis responded as follows:

Q: You proceeded to continue the discussion concerning the will even though your Aunt Marie was upset about the discussion?

A: Yes.

Q: And proceeded to calculate the numbers even though she was upset about the discussion?

³⁴ 11/9/2004 N.T. at 106 (Dennis Sassa).

³⁵ The notes in Ex. C-9 suggest that this meeting was disrupted by Uncle Dominic's appearance to warn Marie of the nursing home plan. In these notes, Dennis observes that "A.M. is very upset -- her eyes begin to tear" but "L & I agree to reduce our share by 3% each & the kids 1% to get Frank to 13% just like L & I." Ex. C-9.

³⁶ See Ex. C-9.

³⁷ 11/9/2004 N.T. at 110 (Dennis Sassa).

³⁸ 11/9/2004 N.T. at 154 (Dennis Sassa); 11/8/2004 N.T. at 95-96 (Frank Sassa).

³⁹ 11/9/2004 N.T. at 108-09 (Dennis Sassa).

⁴⁰ 11/9/2004 N.T. at 154.

A: Yes.

Q: Is there any reason your Aunt Marie simply wouldn't have been put in touch with a lawyer so that she could get the will that she wanted?

A: No.

11/9/2004 N.T. at 155.

At the conclusion of the April 23 meeting, the parties generally agree, Dennis was charged with contacting an attorney so that Marie could draft a new will.⁴¹ Dennis specifically testified that this had been Marie's wish.⁴²

But instead of contacting an attorney, Dennis persisted in his separate discussions with Marie of her Will. On a Sunday on May 5 at the confirmation of a grandnephew, Dennis brought a "computer generated list that showed what I understood what we had talked about at the 23rd meeting with one exception. I said, Aunt Marie, I'm still confused on an allocation."⁴³ He asked her to explain her intent as to the grandnieces before calling a lawyer. At this point, according to Dennis, Aunt Marie questioned why Frank, Vincent and Richard were in the will, since they would get Dominic's share. Dennis asserted that Marie wanted those nephews "taken out of the will."⁴⁴ Based on these conversations with Marie, Dennis prepared another "note" for Frank, but rather than giving it to him directly, he placed it in a "common" drawer in Marie's house.⁴⁵ Frank testified⁴⁶ that he received the following note from Dennis in his mailbox regarding his discussions with Aunt Marie after the nephews' April 23rd meeting:

5/9/01

Frank,

This is the latest will input I got from Aunt Marie. It's different from what we all discussed on 4/23/01.

⁴¹ 11/9/2004 N.T. at 111 & 116 (Dennis Sassa).

⁴² 11/9/2004 N.T. at 155-156 (Dennis Sassa).

⁴³ 11/9/2004 N.T. at 110 (Dennis Sassa).

⁴⁴ 11/9/2004 N.T. at 112 (Dennis Sassa).

⁴⁵ 11/9/2004 N.T. at 113. Dennis at this point in his testimony did not identify the note by exhibit number.

⁴⁶ 11/8/2004 at 98-99 (Frank Sassa).

Aunt Marie says you are aware of these changes. Any questions, give me a call and/or discuss with Aunt Marie.

Denny

P.S. I would like to make arrangements to finalize to will ASAP.

Ex. C-5.

Dennis testified that he thereafter concluded that “Aunt Marie was all over the map with her wills that she was talking to people about it” and that “she was at a point where she was no longer able to make decisions concerning her life.”⁴⁷ For Dennis, this “point” was May 18, the “day that she ended up going to the hospital for her blood transfusion.”⁴⁸ When Dennis called Frank to express this opinion, he recalled Frank stating that Aunt Marie wanted Dennis to return her will.⁴⁹ On May 18, Dennis nonetheless visited Marie “with the proposed will down that excluded Frank, Vincent and Richard, included me and Larry.”⁵⁰

Between May 18 through May 24, Marie was once again hospitalized, this time for a blood transfusion. As was the case with the earlier April hospitalization, Frank was there to sign the consent and discharge forms for her treatment.⁵¹ Throughout the period after her April hospitalizations, Frank ordered Marie’s prescriptions.⁵² He shopped for her food every Friday.⁵³

Frank testified that after Dennis told him that he was uncomfortable calling an attorney to draft a new will for Marie, Frank contacted an attorney, Robert Costigan,⁵⁴

⁴⁷ 11/9/2004 N.T. at 115 (Dennis Sassa).

⁴⁸ 11/9/2004 N.T. at 115 (Dennis Sassa).

⁴⁹ 11/9/2004 N.T. at 116 (Dennis Sassa).

⁵⁰ 11/9/2004 N.T. at 117 (Dennis Sassa).

⁵¹ 11/8/2004 N.T. at 80-82, Ex. C-3a and Ex. C-4.

⁵² 11/8/2004 N.T. at 93.

⁵³ 11/8/2004 N.T. at 107.

⁵⁴ 11/8/2004 N.T. at 102-04 (Frank Sassa). Mr. Costigan testified that he was a member of the bar of the Commonwealth of Pennsylvania in 2001. 11/8/2004 N.T. at 28-29. He conceded, however, that he had been suspended from the practice of law in 1984 and disbarred in 1992. *Id.* at 57-58.

and scheduled an appointment for him to visit Marie at her home in late May 2001.⁵⁵ Francis had to call to reschedule the appointment due to Marie's hospitalization. A meeting between Mr. Costigan and Marie was ultimately rescheduled for May 31, 2001.⁵⁶ On that day, Francis greeted Costigan at Marie's door, but Costigan asked him to leave.⁵⁷ Costigan testified that during this initial meeting with Marie, he prepared a will intake sheet.⁵⁸ Sometime during this initial meeting, Marie handed him a list of Sassa family members.⁵⁹ Although he did not know it at the time, Costigan stated that he later learned that this list had been prepared by Francis.⁶⁰

This list of Sassa relatives was attached to the attorney will intake sheet which consists of two pages admitted as exhibit C-2. The list of Sassa family members, brothers, nephews and grandnieces that was prepared by Frank⁶¹ contains names only, with no percentages indicated. During their initial meeting, Marie informed Costigan that she had executed a prior will but he was not given a copy of it. Although aware that Marie was on oxygen, Costigan concluded that "[s]he was physically infirm, she was mentally fine."⁶² Costigan further testified that Marie gave him the percentages for each beneficiary. He noted that while "[s]he had papers in front of her. I did not see her reading from them."⁶³ When asked whether Marie had discussed her relatives, Costigan replied that she had stated that Frank and another nephew were the people who mostly

⁵⁵ 11/8/2004 N.T. at 101-104 (Francis Sassa).

⁵⁶ 11/8/2004 N.T. at 104 (Francis Sassa).

⁵⁷ 11/8/2004 N.T. at 50 (Costigan). Costigan suggested that he had asked Frank to leave during his first meeting with Marie.

⁵⁸ 11/8/2004 N.T. at 37 (Costigan). See Ex. C-2.

⁵⁹ 11/8/2004 N.T. at 38 (Costigan).

⁶⁰ 11/8/2004 N.T. at 39(Costigan). Frank conceded this as well. 11/8/2004 N.T. at 106 (Frank Sassa).

⁶¹ 11/8/2004 at 106 (Francis Sassa).

⁶² 11/8/2004 N.T. at 39-40 (Costigan).

⁶³ 11/8/2004 N.T. at 41 (Costigan)

cared for her and that she was unhappy with Dennis because “he just never got around” to helping her amend her will.⁶⁴

A second meeting with Costigan was scheduled for June 7, but it was rescheduled June 12 by Francis. At this June 12th meeting, Francis once again greeted Costigan at Marie’s door.⁶⁵ Costigan brought along a notary public, Patricia Stewart. Frank left to get Daniel Zaborowski, a neighbor whom Frank had contacted to witness Marie’s execution of her will.⁶⁶ Costigan testified that he had previously told Francis that he should not be a witness to the will. As Costigan explained:

Well, when we were there previously, I told him (Frank) I would not want him to be a witness because he is a major beneficiary. I did not tell him the reason but I definitely told him that I needed another witness.⁶⁷

The witness, Daniel Zaborowski, testified that he was a neighbor who had been asked by Francis to witness Marie’s execution of her will.⁶⁸ When he arrived after being summoned by Francis, Mr. Zaborowski saw Marie sitting in the kitchen. He remained for a total of 15 to 20 minutes, and watched Marie sign the will before Costigan and Ms. Stewart. According to Mr. Zaborowski, Francis was not in the kitchen when the will was signed.⁶⁹ During this period, Mr. Zaborowski heard no discussions of the will nor did he observe Marie reading it.⁷⁰ He agreed, however, that the conversations involving Marie “made sense” and that she spoke clearly.⁷¹

⁶⁴ 11/8/2004 N.T. at 42 (Costigan).

⁶⁵ 11/9/2004 N.T. at 16-17 (Frank Sassa).

⁶⁶ 11/9/2004 N.T. at 17-22 (Frank Sassa).

⁶⁷ 11/8/2004 N.T. at 48 (Costigan). As a rebuttal witness, Costigan clarified more emphatically that he did not tell Frank that he was a major beneficiary. 11/10/2004 N.T. at 155-56.

⁶⁸ 11/8/2004 at 7-8 (Zaborowski).

⁶⁹ 11/8/2004 N.T. at 13-14 (Zaborowski). Costigan likewise testified that Francis was not in the kitchen when Marie signed her will though he was nearby. 11/8/2004 N.T. at 50.

⁷⁰ 11/8/2004 N.T. at 17 (Zaborowski).

⁷¹ 11/8/2004 N.T. at 25 (Zaborowski).

The Status of Marie's Health and Mental Acuity from April to June 2001

In addition to the testimony by Marie's relatives, attorney and witnesses concerning the genesis of her June 12, 2001 Will, the parties presented general testimony concerning her health and mental acuity by Carole Steep, a home health aid; Michele McNamee, a physical therapist; Carol Liberi, a registered nurse, and Elaine Weinstein, an occupational therapist. No expert testimony by a physician was presented by either party.

Carole Steep, a home health care aid, cared for Marie beginning in April 2001 and then throughout May until Marie's death in June. Her hours were from 8 to 12 and 4 to 8 on weekdays and every other weekend. Her tasks included preparing meals, doing the laundry and light housekeeping. She also monitored Marie's medications.⁷² Throughout this period, Ms. Steep noticed a significant change in Marie's health and comportment. In April, 2001, Marie was still comparatively independent: she would cook for herself and converse. She could take her own medications with reminders. She could measure her liquid intake as required. By mid-May Marie no longer cooked for herself. She began to sleep a lot. In April, she wrote out shopping lists, but ceased doing so by mid-May. In April, Marie read the Bible, but not by mid-May. By June of 2001, Ms. Steep believed that Marie was no longer capable of taking her own medications or dressing herself. She ceased initiating conversations.⁷³ In addition to this testimony, Ms. Steep's written record of her contact with Marie was introduced as C-6. These notes, however, do not address Marie's mental status and focus instead on her physical care, diet and hygiene.

⁷² 11/9/2004 N.T. at 33-35 (Carole Steep).

⁷³ 11/9/2004 N.T. at 36-56.

The testimony and notes of the registered nurse Carol Liberi and the physical therapist Michel McNamee more specifically address Marie's mental status. Ms. McNamee performed a physical therapy evaluation of Marie on May 31, 2001 after her hospitalization and found Marie "alert, oriented times three."⁷⁴ Moreover, this testimony was backed up by Ms. McNamee's written report presented as P-6. Carol Liberi cared for Marie as a registered nurse who made assessments of Marie's status throughout April, May and until her death in June 2001.⁷⁵ She testified that her initial nursing evaluation of Marie's neurological condition on April 4, 2001 found her "awake, alert, oriented times three."⁷⁶ Her final assessment of Marie was on June 20, 2001, when once again Ms. Liberi's notes indicate that Marie was "awake, alert, oriented times three."⁷⁷ She elaborated that while Marie "would be sleepy, she was 91 years old, on oxygen, easily arousable," but "she always knew who I was, answered questions that I asked her."⁷⁸ Ms. Liberi unhesitatingly stated that she had never seen Marie in a disoriented state.⁷⁹ Throughout her testimony, Ms. Liberi consulted and explained her written progress notes which were admitted as P-7.

Finally, Eileen Weinstein, an occupational therapist, performed an evaluation of Marie on April 7, 2001, which was substantiated by written reports admitted as P-8.⁸⁰ According to Ms. Weinstein, the evaluation on April 7, 2001 indicated that Marie's communication and ability to follow instructions were intact as was her interpersonal

⁷⁴ 11/10/2004 N.T. at 12. See also Ex. P-6.

⁷⁵ 11/10/2004 N.T. at 26 - 27.

⁷⁶ 11/10/2004 N.T. at 27.

⁷⁷ 11/10/2004 N.T. at 32.

⁷⁸ 11/10/2004 N.T. at 32.

⁷⁹ 11/10/2004 N.T. at 32-33.

⁸⁰ 11/10/2004 N.T. at 71-72,

relations.⁸¹ Ms. Weinstein thereafter developed a plan for occupational therapy for the period of April 7 through May 10, 2001. She performed a final evaluation of Marie on May 29, 2001 in which she concluded that Marie's ability to communicate and follow directions was intact. She also testified based on her notes that Marie's learning speed, attention and retention span and interpersonal relations were intact.⁸²

Legal Analysis

In appealing from the July 15, 2003 Decree of the Register of Wills, the petitioners assert that Marie Lista's June 12, 2001 Will should have been admitted to probate rather than her prior October 10, 1988 Will.⁸³ Francis Sassa was named Executor of both the 1988 Will and the 2001 Will. Larry Sassa had been named co-executor of the 1988 Will, as well as successor executor of the 2001 will.⁸⁴ In both Wills, Marie distributed the residue of her estate to various Sassa Relatives, but the percentages allocated to the petitioners and contestants differed as indicated below:

<u>June 12, 2001 Will (Ex. C-1)</u>	<u>October 10, 1988 Will (Ex. C-3)</u>
35% Francis Sassa (nephew)	21% Dominic Sassa (brother)
21% Dominic Sassa (brother)	21% Augustus Sassa (brother)
10% Lawrence Sassa (nephew)	16% Larry Sassa (nephew)
10% Dennis Sassa (nephew)	16% Dennis Sassa (nephew)
10% Vincent Sassa (nephew)	6% Francis Sassa (nephew)
10% Richard Sassa (nephew)	6% Vincent Sassa (nephew)
4% in ten equal shares to grandnieces and grandnephews:	6% Richard Sassa (nephew)
Denise Dinger Melissa Higgins	4% Denise Dinger (grandniece)
Andrea Sassa Richard Sassa	2% Nicole Dinger (great grandniece)
Dennis Sassa Vincent Sassa	2% Danielle Dinger (great grandniece)
Lawrence Sassa Nichole Sassa	
Maryanne Skalski	
Jennifer Sassa	

⁸¹ 11/10/2004 N.T. at 90.

⁸² 11/10/2004 N.T. at 95-99.

⁸³ Petition for Citation.

⁸⁴ Ex. C-1 & Ex. C-3.

The contestant emphasizes that the 2001 Will substantially benefits Francis Sassa as well as his brothers and father in contrast to Marie's earlier 1988 Will. Under the 1988 Will, Marie left approximately 60% of her estate to contestant's side of the family through his father Augustus Sassa and approximately 40% of her Estate to the proponents' side of the family through Dominic. Under the 2001 Will, in contrast, the proponents' side of the family is allocated 80%, while the contestants' side of the family was bequeathed 20% of the Estate residue.⁸⁵ The contestant asserts that Marie lacked testamentary capacity on June 12, 2001 and that the will she executed that day was the result of the undue influence of proponent Francis Sassa.⁸⁶ The proponents argue that Marie's 2001 was valid and not the result of either lack of testamentary capacity or undue influence.

A. Contestant Failed to Meet His Burden of Showing that the June 12, 2001 Will was Invalid as the Result of Undue Influence

Determination of whether a will is the result of undue influence, the Pennsylvania Supreme Court has observed in the Estate of Clark, 461 Pa. 52, 59, 334 A.2d 628, 631 (1975), "is inextricably linked to the assignment of the burden of proof. Once the proponent presents evidence of the formality of probate, a presumption of lack of undue influence arises; the effect is that the risk of non-persuasion and the burden of coming forward with evidence of undue influence shift to the contestant." In the instant case, however, the parties agree that the Register of Wills denied probate of Marie's 2001 Will. During the hearing, the parties also stipulated to the execution of the 2001 Will and

⁸⁵ Contestant's Memorandum at 2-3.

⁸⁶ Contestant's Memorandum at 1-2.

that the contestant had the burden of going forward.⁸⁷ Pennsylvania courts have concluded that where proper execution of a will is shown, a presumption of lack of undue influence arises so that the burden shifts to the contestant to show by clear and convincing evidence either a lack of testamentary capacity or undue influence. Thompson Will, 387 Pa. 82, 87, 126 A.2d 740, 744 (1956); Estate of LeVin, 419 Pa. Super. 89, 94, 615 A.2d 38, 40 (1992), app.denied, 534 Pa. 639, 626 A.2d 1158 (1993). As one commentator has observed, where the register has refused probate of the will, the proponent must establish proper execution but once this is done, “the proponent may then rest and the burden of moving forward with the evidence shifts to the contestant.”⁸⁸

In the instant case, therefore, Dennis Sassa in contesting Marie’s June 12, 2001 will had the burden of showing undue influence by clear and convincing evidence. If he succeeds in meeting this standard, the proponent must then present clear and convincing evidence that shows the absence of undue influence. Estate of Clark, 461 Pa. at 60-61, 334 A.2d at 632. Various definitions of undue influence have been provided. The Pennsylvania Supreme Court in Brantlinger Will, 418 Pa. 236, 250-51, 210 A.2d 246, 254 (1965) characterized it as “imprisonment of the body or mind, frauds or threats of misrepresentation, or circumstances of inordinate flattery, or physical or moral coercion to such a degree as to prejudice the mind of the testator or destroy his free agency, or to operate as a present restraint upon him in the making of the will.” Undue influence, Pennsylvania courts have repeatedly emphasized, is “subtle, intangible and merely psychic in its effect so that its existence cannot be detected, weighed or measured by instruments of science....” Quein Will, 361 Pa. 133, 146, 62 A.2d 909, 915 (1949).

⁸⁷ 11/8/2004 N.T. at 5-6.

⁸⁸ J. Brooke Aker, Thomas Boulden, Law of Wills in Pennsylvania, 2d Ed. (Bisel Co. Philadelphia) § 9.2 at 9-9.

Consequently, courts have recognized that undue influence “may be, and often can only be” proven by circumstantial evidence.⁸⁹ A contestant, therefore, may establish a presumption of undue influence by showing by clear and convincing evidence (1) that when the will was executed, the testator was of weakened intellect, (2) that a person in a confidential relationship with the testator (3) received a substantial benefit under the disputed will. Estate of Ziel, 467 Pa. 531, 541, 359 A.2d 728,734 (1976); Estate of Clark, 461 Pa. at 60, 334 A.2d at 632.

1. The Proponents, and Especially Francis Sassa, Received a Substantial Benefit Under the June 12, 2001 Will of Marie Lista

Although the proponents assert that they did not receive a substantial benefit under the 2001 Will of Marie Lista,⁹⁰ that argument is unpersuasive. In fact, the proponent’s own attorney was quite forthright in his observation that Francis Sassa could not serve as a witness to Marie’s execution of her will because he was a substantial beneficiary under it.⁹¹ The proponent’s invocation of Simpson Estate, 407 Pa. Super. 1, 595 A.2d 94 (1991) for the proposition that a bequest of 25% of an estate’s assets does not constitute a substantial benefit is also inapposite. In the instant case, Francis Sassa was designated to receive 35% of his aunt’s estate in a will that named sixteen beneficiaries. In that factual context, his bequest was substantial. Moreover, when the 10% interests of the other proponents, who are Francis’s brothers, Vincent and Richard, are combined with the bequests to Francis and their father Dominic, their side of the family received 76% of the estate assets compared to their combined 39% share of the

⁸⁹ Estate of Ziel, 467 Pa. 531,541, 359 A.2d 728, 734 (1976). See generally J. Mannion, “The Presumption of Undue Influence and the Shifting Burden of Proof,” 18 Fid. Rep. 2d 348, 349 .

⁹⁰ Proponents’ Memorandum at 3-4.

⁹¹ 11/8/2004 N.T. at 48. As previously noted, Mr. Costigan provided credible testimony that he did not tell Francis the reason why an independent witness was necessary or advisable.

bequests under the prior 1988 will. Under these facts, therefore, the proponents received a substantial benefit under Marie's 2001 Will.

2. Francis Sassa Was in a Confidential Relationship with Marie Lista as One of Her Trusted Advisors and Assistants

A confidential relationship cannot be reduced to a formula. Rather, 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.” Estate of Scott, 455 Pa. 429, 432, 316 A.2d 883, 885 (1974). Each relationship must therefore be analyzed on a fact by fact basis. Pennsylvania courts have observed, for instance, that a confidential relationship is not established merely because a proponent performs business services for a testator. Nor is a confidential relationship established merely because a proponent draws checks or pays the testator's bills. Brantlinger Will, 418 Pa. at 250, 210 A.2d at 254. On the other hand, a business relation may be the basis of a confidential relationship “if one party surrenders substantial control over some portion of his affairs to the other.” Estate of Scott, 455 Pa. at 433, 210 A.2d at 886.

Physical limitations resulting from illness and old age likewise do not necessarily create a confidential relationship except “as they may bear on a party's capacity to understand the nature of the transaction in question.” Estate of Scott, 455 Pa. at 433, 316 A.2d at 886. The grant of a power of attorney over a sizable checking account or over an account that constituted the testator's entire life savings, in contrast, has been deemed a prima facie case for a confidential relationship. Estate of Clark, 461 Pa. at 63, 334 A.2d at 633-34 (power of attorney over sizable savings account); Foster v. Schmitt, 429 Pa. 102, 108, 239 A.2d 471, 474 (1968)(power of attorney over entire life's savings). The

proponents, however, invoke Estate of Ziel, 467 Pa. 531, 359 A.2d 728 (1976) to support the argument that the mere fact a person holds a power of attorney does not establish a prima facie case of a confidential relationship with the donor of the power. Instead, the proponents assert, the underlying facts must be examined to see if there was any overmastering influence.⁹² Thus, in Ziel the Pennsylvania Supreme Court observed that while “no clearer indication of a confidential relationship could exist than giving another person the power of attorney over one’s life savings,” on the facts of Ziel a power of attorney did not evidence a confidential relationship where the testator was active in handling his business affairs and “the contestant’s evidence does not demonstrate convincingly that” the testator “was subject to any overmastering influence.” Ziel, 467 Pa. at 542-43, 359 A.2d at 734.

In the will contest case of Ziel, the test for a confidential relation set forth by the Pennsylvania Supreme Court commingles an analysis of the existence of “overmastering influence.”⁹³ In the instant case, it is clear that Francis Sassa performed many vital services for his aunt Marie, especially as her health deteriorated in her final days. He signed her hospital consent forms, picked her up after her hospitalizations, and was designated as the responsible person for her hospital discharge instructions.⁹⁴ He purchased her prescriptions.⁹⁵ He prepared her tax returns.⁹⁶ He was granted a power of

⁹² Proponent’s Brief at 19.

⁹³ This contrasts with the more neutral definition of confidential relation that the Pennsylvania had previously outlined in Foster v. Schmitt, 429 Pa. 102, 107, 239 A.2d 471, 474 (1968): “Although no precise formula has been devised to ascertain the existence of a confidential relationship, it has been said that such a relationship is not confined to a particular association of parties, but exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interest.”

⁹⁴ 11/8/2004 N.T. at 81-84;(Francis Sassa); Ex. C-3a & C-4; 11/9/2004 N.T. at 127 (Dennis Sassa).

⁹⁵ 11/8/2004 N.T. at 93 (Francis Sassa).

⁹⁶ 11/8/2004 N.T. at 78 (Francis Sassa).

attorney over a PNC savings account.⁹⁷ He contacted the attorney who drafted her will and greeted him at Marie's door both at the initial interview and on the date the will was executed. He contacted the witness for the execution of the will.⁹⁸ Yet there were limits on the role Francis played in managing his aunt's affairs that were set both by his aunt and by her other nephews.

The contestant Dennis Sassa maintained that Francis was not in favor of the continued services of the home health aids.⁹⁹ As a consequence, it was Larry who took over the responsibility of paying for those services.¹⁰⁰ The contestant also conceded that Marie had asked him to contact an attorney so that she could revise her will but he failed to do so.¹⁰¹ While it was true that Francis was at Marie's home when the attorney arrived to discuss and execute her will, he was instructed by the attorney to leave and to obtain another witness for the will execution.¹⁰² Moreover, the evidence at the hearing established that Francis's presence was not unique to matters involving Marie's will. On the contrary, Francis was frequently at Marie's home to help her in her various affairs. While Francis may have prepared checks for Marie, he maintains that she was the one who signed them.¹⁰³ Finally, Francis emphasizes that the power of attorney granted to him by Marie was limited to a single PNC account.¹⁰⁴

Based on the record presented, therefore, it is clear that Francis as his aunt's trusted advisor and helper had a confidential relationship with Marie, though there was no evidence of his exerting an overmastering or undue influence over her. But just because

⁹⁷ 11/8/2004 N.T. at 77-78 (Francis Sassa).

⁹⁸ 11/8/2004 N.T. at 105 (Frank Sassa).

⁹⁹ 11/9/2004 N.T. at 97 (Dennis Sassa).

¹⁰⁰ 11/9/2004 N.T. at 8-9 (Francis Sassa).

¹⁰¹ 11/9/2004 N.T. at 111 & 116 (Dennis Sassa).

¹⁰² 11/8/2004 N.T. at 48, 52 (Costigan).

¹⁰³ 11/9/2004 N.T. at 7 (Francis Sassa).

¹⁰⁴ 11/8/2004 N.T.. at 77 (Francis Sassa); Proponents' Memorandum at 19.

a beneficiary under a will is in a confidential relationship with the testator does not mean that the burden of proof is shifted to the proponent to prove that there was no undue influence. Instead, courts have cautioned that before that burden shifts, the contestant must satisfy all three elements of the three part test. Estate of Simpson, 407 Pa. Super. 1, 9, 595 A.2d 94, 98 (1991), app.denied, 529 Pa. 622, 600 A.2d 538 (1991). In this case, therefore, the issue of weakened intellect is highly significant.

3. Marie Lista Was Not Shown To Have a Weakened Intellect by the Requisite Clear and Convincing Evidence

On the record presented, the contestant failed to establish that Marie suffered from weakened intellect. The weakened intellect that must be shown to establish undue influence “does not rise to the level of testamentary incapacity.” Estate of Ziel, 467 Pa. at 542, 359 A.2d at 734. Weakened intellect in an undue influence case is a relative concept, as Judge Taxic observed:

The closest we can come therefore to a definition of weakened intellect is that it is a mind which, in all the circumstances of a particular situation, is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality. It should be viewed essentially as a *relative state* as the term is applied to cases of undue influence, as these cases always involve the effect of one intellect upon another. Heffner Will, 19 Fid. Rep. 542, 546-57 (Mont. Cty. OC. 1969).

The critical period focused on in this case was between April 2001 when Marie was released from Nazareth Hospital until her death on June 26, 2001. Undoubtedly, during this period Marie’s health deteriorated as she declined into death at the age of 92. Numerous cases caution, however, that “old age, sickness, disability or debility of body do not raise a presumption of incapacity.” King Will, 369 Pa. 523, 528, 87 A.2d 469, 472 (1952). As the King Will court cautioned, “one may be physically weak and yet have

a perfectly sound and strong mind.” Id., 369 Pa. at 530, 87 A.2d at 473. Accord Ash Will, 351 Pa. 317, 323, 41 A.2d 620, 623 (1945).

In attempting to establish that Marie possessed a weakened intellect, however, the contestant essentially emphasizes Marie’s age, her reliance on oxygen and the care of home health aides.¹⁰⁵ Although he invokes the testimony of the home health aide, Carole Steep, and the registered nurse, Carol Liberi, neither of these witnesses support his argument.¹⁰⁶ As previously discussed, Carole Steep cared for Marie as a home health care aide from April 2001 until her death in June. Throughout this period, she noticed a weakening of Marie’s physical condition. While in April 2001, Marie could still cook for herself, by mid-May she was no longer able to do so. By mid-May, Marie began to sleep a lot. By June, Ms. Steep believed that Marie was no longer capable of taking her own medications nor of dressing herself.¹⁰⁷ While these observations reflect Marie’s painful physical decline, they do not address her mental state nor do Ms. Steep’s notes (C-6) address that key issue.

The testimony and notes of the registered nurse, Carol Liberi, and the physical therapist Michel McNamee, in contrast, more specifically address Marie’s mental status. According to Ms. McNamee, her evaluation of Marie on May 31, 2001 found her “alert, times three.”¹⁰⁸ Ms. Liberi testified that when she performed an initial nursing evaluation of Marie’s neurological condition on April 4, 2001, she found Marie “awake, alert, oriented times three.”¹⁰⁹ Her final assessment of Marie was on June 20, 2001, when once

¹⁰⁵ See, e.g., Contestant’s Memorandum at 14 (“Even if it were concluded that Marie Lista did not lack testamentary capacity on June 12, 2001, there can be no question that she was of weakened intellect. Marie Lista was 92 years old, on oxygen for 24 hours a day, and required home health care aides to care for her”).

¹⁰⁶ Contestant’s Memorandum at 14.

¹⁰⁷ 11/9/2004 N.T. at 36-56 (Carol Steep).

¹⁰⁸ 11/10/2004 N.T. at 12 (Michel McNamee).

¹⁰⁹ 11/10/2004 N.T. at 27 (Carol Liberi).

again Ms. Liberi's notes indicate that Marie was "awake, alert, oriented time three."¹¹⁰ She elaborated that Marie "would be sleepy, she was 91 years old, on oxygen, easily arousable, always knew who I was answered questions that I asked her."¹¹¹ Ms. Liberi unhesitatingly stated that she had never seen Marie in a disoriented state. Throughout her testimony, she consulted and explained her written progress notes that were admitted as P-7.

Finally, Eileen Weinstein, an occupational therapist, performed an evaluation of Marie on April 7, 2001, which was substantiated by written reports admitted as P-8. According to Ms. Weinstein, the evaluation on April 7, 2001 indicated that Marie's communication and ability to follow directions were intact as was her interpersonal relations.¹¹² Ms. Weinstein thereafter developed a plan for occupational therapy for the period of April 7 through May 10, 2001. She performed a final evaluation of Marie on May 29, 2001 in which she concluded that Marie's ability to communicate and follow directions was intact. Her notes also indicate that Marie's learning speed, attention and retention span and interpersonal relations were intact.¹¹³

The testimony of these professionals as to Marie's mental acuity during the final months of her life was highly credible, especially when contrasted to the less disinterested testimony on Marie's intellectual status of both the proponents and the contestants who all had an interest in the estate and the outcome of this litigation. As the Pennsylvania Supreme Court has indicated in Quein Will, 361 Pa. at 148, 62 A.2d at

¹¹⁰ 11/10/2004 N.T. at 32 (Carol Liberi).

¹¹¹ 11/10/2004 N.T. at 32. (Carol Liberi).

¹¹² 11/10/2004 N.T. at 90 (Weinstein).

¹¹³ 11/10/2004 N.T. at 98-99 (Weinstein).

916, the personal interest of a party is a factor to be considered in determining the weight to be given to testimony.

The evaluations of the home and health care professionals were also supported by the scrivener, Mr. Costigan. He testified that during his 45 minute initial meeting with Marie on May 31, 2004, “she answered all of the questions I asked her. Her answers seemed to be coherent. I have no reason at all to doubt her mental capacity.”¹¹⁴ It is well established that the “draftsman of a will, is always an important and usually the most important witness in a contested will case....” King Will, 369 Pa. at 530, 87 A.2d at 473. Although the scrivener conceded that he had been suspended from the practice of law and disbarred at some point, contestant did not provide any clear evidence as the offenses. Moreover, the scrivener confirmed that he was a member of the Pennsylvania bar in June 2001.¹¹⁵ In any event, these issues would go to the weight to be accorded to his testimony which was coherent, frank and credible.

The contestant, therefore, failed to establish that Marie Lista had a weakened intellect by the requisite clear and convincing evidence. The contest of Marie’s June 12, 2001 Will is thus without merit.

Even If The Burden of Proof Shifted to the Proponent Francis Sassa, There Was No Evidence That He Exerted Undue Influence over his Aunt Marie

The disinterested, highly credible testimony and notes of Carol Liberi, Michel McNamee and Eileen Weinstein clearly show that Marie Lista did not suffer from weakened intellect at the time she executed her will. Under the three part test set forth in Clark and its progeny, the contestant Dennis Sassa thus failed to satisfy his burden of

¹¹⁴ 11/8/2004 N.T. at 62.

¹¹⁵ 11/8/2004 N.T. at 28-29.

proof so the presumption of a lack of undue influence remains, with no shift of the burden to the proponents to establish a lack of undue influence. But even assuming, arguendo, that the contestant did meet his burden, the record is nonetheless lacking in evidence of undue influence by Frank Sassa over his Aunt. As the Pennsylvania Supreme Court has observed, the “concept of undue influence is predicated on the assumption that the influence of a strong and predatory character close to the testator who is possessed of a weakened mental state will prey insidiously on the weakened intellect in order to extract testamentary benefactions that would not otherwise be forthcoming.” Estate of Ziel, 467 Pa. at 543, 359 A.2d at 734-35.

The mere fact that Francis was at Marie’s home to greet the attorney who helped her execute a new will did not constitute undue influence based on the record presented. In bringing an attorney to Marie’s home, Francis was acceding to her request. Even Dennis conceded that his aunt had requested him to contact an attorney for this purpose but he failed to honor that request. Although Francis was present when Mr. Costigan came to Marie’s house, he left the kitchen where the attorney-client discussions occurred and where the will was executed. Moreover, his presence at Marie’s home was not unusual since he lived only a few doors away from Marie and frequently assisted her with such day-to-day activities as trips home from the hospital, food shopping, and preparing checks for her signature. It is important not to penalize or stigmatize the person who assists an ill and dying person in her last days. As the Pennsylvania Supreme Court observed: “What offends against an innate sense of justice, decency and fair play offends against good law. And if a testatrix rewards a benefactress who cared for her when her need was great and others passed her by, the courts will not find her bequest offending

against nature or law.” King Will, 369 Pa. at 531-32, 87 A.2d at 474. On the record presented, the bequest to Francis in Marie’s final will is neither unnatural nor the result of undue influence.

In contrast, Dennis Sassa, in his testimony and notes, presented a chilling depiction of his intense and repeated efforts to hound Marie about her will and the percentages to be allotted to each family member at a time when he was aware of her frailty. By his own admission, he attempted to assert his overmastering will over his aunt by reading her 1988 will without her permission and removing it from her home.¹¹⁶ He conceded that he thereafter badgered her about the terms of her 1988 will until she became upset and began to “tear” up.¹¹⁷ Finally, he refused to honor her direct wish that he contact an attorney to draft a new will for her.

B. Contestant Failed to Meet His Burden of Showing by Clear and Convincing Evidence that Marie’s June 12, 2001 Will Was the Result of a Lack of Testamentary Capacity

The contestant also challenges Marie’s June 21, 2001 Will on the grounds that she lacked testamentary capacity. Once proper execution of a will has been established, testamentary capacity is presumed. A contestant challenging a will on the grounds of lack of testamentary capacity has the burden of proof by clear and convincing evidence. Brantlinger Will, 418 Pa. at 242, 210 A.2d at 249-50. This presumption of testamentary capacity arises from proof of the testator’s signature and not by any verification of the testator’s mental capacity by the witnesses. Id., 418 Pa. at 243, 210 A.2d at 250.

Testamentary capacity is defined as whether a testator “has an intelligent knowledge regarding those who are the natural objects of his bounty, of what his estate

¹¹⁶ 11/9/2004 N.T. at 133-37.

¹¹⁷ 11/9/2004 N.T. at 137-38; 140; 154-55; Ex. C-9.

consists, and of what he desires done with it..." Protyniak Will, 427 Pa. 524, 529, 235 A.2d 372, 375-76(1967)(citation omitted). It is determined as of the date of the execution of the contested will. Estate of Ziel, 467 Pa. at 538, 359 A.2d at 732. In attempting to prove that Marie lacked testamentary capacity at the time she executed her June 12, 2001 Will, the contestant once again focuses on Marie's physical condition, emphasizing that she was a weak, ill women who had been hospitalized in April, May and June 2001, who required oxygen twenty-four hours a day and who was cared for by home health aides.¹¹⁸ More specifically, he relies on the testimony of the home health aide, Carole Steep that by mid-May 2001, Marie was no longer cooking for herself, measuring her own liquids, or dressing herself.¹¹⁹ This testimony, however, relates to Marie's old age, sickness and disability which courts have concluded is not determinative of mental capacity.

Lawrence's Estate, 286 Pa. 58, 65, 132 A. 786, 789 (1926). As the Pennsylvania

Supreme Court observed:

Old age, sickness, distress or debility of body neither prove nor raise a presumption of incapacity. Nor will inability to transact business, physical weakness or peculiar beliefs and opinions. Failure of memory does not prove incapacity unless it is total and so extended as to make incapacity practically certain. A testator may not be able at all times to recollect the names of persons or families of those with whom he has been intimately acquainted. He may ask idle questions and repeat himself, and yet his understanding of the ordinary transactions of his life may be sound. He may not have the strength and vigor of a man able to digest all the parts of a contract, yet he may be competent to distribute his property by will.

Lawrence Estate, 286 Pa. at 65, 132 A.2d at 789 (citations omitted).

Contestant also attempts to invoke the testimony of Carol Liberi, the registered nurse who cared for Marie during the last months of his life. In so doing, however, he fails to acknowledge Ms. Liberi's written reports and testimony consistently characterize

¹¹⁸ Contestant's Memorandum at 3.

¹¹⁹ Contestant's Memorandum at 4.

Marie as “alert and oriented times three” even as late as June 20, 2001.¹²⁰ Although acknowledging that Marie was very ill and tired at this time, Ms. Liberi concluded that Marie “would be sleepy, she was 91 years old, on oxygen, easily arousable” but nonetheless “she always knew who I was, answered questions that I asked her.”¹²¹ She affirmed that she had never seen Marie in a disoriented state.¹²² This testimony was particularly impressive for two reasons: as a nurse caring for Marie, Ms. Liberi was disinterested and well versed in Marie’s condition, especially in contrast to the other witnesses. Similarly, Ellen Weinstein, an occupational therapist who examined Marie during the last 3 months of her life consistently reported that Marie’s ability to communicate was intact.¹²³

Contestant also invokes that facts surrounding the execution of Marie’s June 12, 2001 Will as supporting his conclusion that she lacked testamentary capacity. The fact that Francis contacted an attorney to draft Marie’s will as well as the individuals who witnessed it are less significant than the testimony of the attorney, Mr. Costigan, and the witness, Daniel Zaborowski, who verified that at the time she executed her will Marie was coherent.¹²⁴ Moreover, all of the witnesses agreed that Francis was not in the kitchen when Marie executed her will.¹²⁵ Finally, while the contestant emphasizes that Francis prepared the list of Sassa relatives that was given to Mr. Costigan, that list did not contain the percentages that are in dispute in this will contest. Mr. Costigan’s testimony that it

¹²⁰ 11/10/2004 N.T. at 32 (Carol Liberi).

¹²¹ 11/10/2004 N.T. at 32. (Carol Liberi)

¹²² 11/10/2004 N.T. at 32-33 (Carol Liberi).

¹²³ 11/10/2004 N.T. at 98-99 (Weinstein).

¹²⁴ 11/8/2004 N.T. at 25 (Zaborowski); 11/8/2004 N.T. at 62 (Costigan testified that he had no reason to doubt Marie’s mental capacity and that she was able to maintain a conversation “very easily.”)

¹²⁵ See, e.g., 11/8/2004 N.T. at 16-17 (Zaborowski stated that Francis was not in the kitchen when Marie signed her will); 11/10/2004 N.T. at 109 (Patricia Stewart, the notary, stated that Francis was in the living room (and not in the kitchen) when Marie signed her will).

was Marie who told him how to divide up her estate among those relatives¹²⁶ was credible and uncontested.

Conclusion

For all of these reasons, contestant failed to show by clear and convincing evidence that Marie Lista lacked testamentary capacity or that the Will she executed on June 12, 2001 was the result of undue influence.

Date: _____

BY THE COURT:

John W. Herron, J.

¹²⁶ 11/8/2004 N.T. at 41 (Costigan).