

## **MOM REALLY DID LIKE ME BETTER: THE BASICS OF ESTATE LITIGATION**

### **I. Will Contests**

#### **A. Caveats**

20 Pa.C.S.A. § 906 governs the filing of caveats with the Register of Wills. An informal caveat may consist simply of a letter to the Register, with the payment of a \$50 filing fee, but it is only a temporary impediment to the probate of a will, as follows, in pertinent part:

(a) Bond.—When a caveat has been filed, the register shall not delay the probate of a will or the grant of letters for more than ten days after the filing of the petition for probate or for the grant of letters, or after the filing of the caveat, whichever shall be later, unless within such ten-day period a party in interest shall file with the register his bond in the name of the Commonwealth with sufficient surety in such amount, not less than \$500 or more than \$5,000, as the register consider necessary conditioned for the payment of any costs which may be decreed against the caveator.

(b) Failure to give bond.—If no bond is filled within the ten-day period, the caveat shall be considered abandoned, except as the register, for cause shown, shall extend the time.

In short, the formal caveat, which takes the form of a pleading, with the required bond, must be filed within ten days of either the filing of the informal caveat or the intervening filing of the probate petition, to prevent the probate of the contested will.

#### **B. Appeal from probate to the Orphans' Court.**

20 Pa.C.S.A. § 908 governs appeals from the Register's decree granting letters, whether without a contest before the Register or after hearing and decision by the Register, as follows, in pertinent part:

(a) When allowed. —Any party in interest seeking to challenge the probate of a will or who is otherwise aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the court within one year of the decree: Provided, That the executor designated in an instrument shall not by virtue of such designation be deemed a party in interest who may appeal from a decree refusing probate of it. The court, upon petition of a party in interest, may limit the time for appeal to three months.

(b) Bond. –The court, upon cause shown and after such notice, if any, as it shall direct, may require a surety bond to be filed by anyone appealing from a decree of the register conditioned for the payment of any costs or charges that may be decreed against him. The sufficiency of the surety shall be determined by the register in the first instance, with right of appeal to the court. If a bond in compliance with the final applicable order is not filed within ten days thereafter, the appeal shall be considered abandoned.

(c) Effect of appeal. – No appeal from a decree of the register shall suspend the powers or prejudice the acts of a personal representative to whom letters have been granted.

Question? Is an executor who is not a beneficiary a proper party to a will contest?

#### C. Caveat Pros and Cons

1. The caveat prohibits the appointment of the personal representative named in the contested will. This stops potentially undesirable action, from which there could be no practical adequate remedy, from being taken by the fiduciary. On the other hand, it also stops actions which may be necessary to protect the estate and its assets, such as the payment of debts, expenses and taxes and the maintenance of property and investments. The appointment of an administrator ad litem should be considered.
2. The hearing before the Register may be used as discovery and as a first bite at the apple.
3. Duplicity of hearings causes delay and is expensive.

#### D. Standing

To challenge a will, the contestant must be a “party in interest”.... 20 Pa.C.S.A. § 908(a). “A contestant to the validity of a will does not have standing to do so unless he can prove he would be entitled to participate in the decedent’s estate if the will before the court is ruled invalid.” In re Ash’s Estate, 351 Pa. 317, 41 A.2d 620 (1945). To be aggrieved by the probate of a will, the contestant’s share of the estate must be smaller because of probate or larger if probate is denied. Estate of Luongo, 823 A.2d 942, 952 (Pa.Super. 2003). In other words, the contestant must either be an intestate heir, who would inherit if the decedent had no will or a beneficiary of the decedent’s immediately previous will, which would be revived by the invalidation of the revocation clause in the contested will.

#### E. Grounds to challenge the will

1. Lack of testamentary capacity

## 2. Undue influence

Because no one can know what was in the testator's mind and the circumstances surrounding the execution of the will are often exclusively within the proponent's knowledge, Pennsylvania law, initially held by the Supreme Court in Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975), recognizes a presumption of undue influence if the contestant, by clear and convincing evidence proves three things:

a. The proponent of the will was in a confidential relationship with the testator. A confidential relationship exists for purposes of undue influence whenever circumstances make it certain that the parties did not deal on equal terms but that on one side there was an over-mastering influence or, on the other dependence or trust, justifiably reposed. *Owens v. Mazzei*, 847 A.2d 700, 709 (Pa. Super. 2004). The conduct constituting influence must consist of imprisonment of the body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flatter or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate a present restraint upon him in the making of a will. Estate of Angle, 7771.2d, 114, 123 (Pa. Super. 2001). While there is no precise formula for determining the existence of a confidential relationship, it has been said that such a relationship 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. Estate of Keiper, 308 Pa. Super. 82, 86, 454 A.2d. 31, 33 (1982). A confidential relationship is presumed to exist as a matter of law between a trustee and beneficiary, guardian and ward, and scrivener and testator and may include the relationship or physician or nurse with patient, banker or accountant or client, and, in particular, principal and agent.

b. At or around the time of the execution of the will the testator had a weakened intellect, which 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.... If the intellect of the testator is substantially impaired in comparison to that of the proponent or beneficiary it must be regarded as weakened since there could be no equal dealings between the two parties." Paolini Will, 13 Fiduc. Rep. 2d 185, 187-88 (O.C. Montg. 1993). Because undue influence is generally exerted over a period of time and accomplished by a gradual, progressive inculcation of a receptive mind, evidence of the testator's mental condition for the period preceding the execution of the will is more significant than the particular mental condition on the date of execution. Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975).

c. The proponent of the will receives a substantial benefit under the will. A commission for service as executor or trustee, with extensive powers over the distribution of a trust in perpetuity, may constitute such a substantial benefit. Estate of LeVin, 419 Pa. Super 89, 615 A.2d 94 (1992).

d. Once the presumption of undue influence has been established, the burden of proof shifts to the proponent of the will to prove the absence of undue influence, also by clear and convincing evidence. Estate of Clark, supra. Excellent and thorough analyses of the shifting burdens of proof in undue influence cases are found in articles by Pennsylvania attorney James F. Mannion and former Montgomery County Orphans' Court judge Robert W. Tredinnick at 15 Fiduc. Rep. 2d 348 and 7 Fiduc. Rep. 2d 102 respectively.

3. Fraud
4. Forgery
5. Mistake in Execution
6. Mistake in Inducement
7. Insane Delusion

## II. Questions of Will Interpretation

- A. The Polestar Rule: "It is now hornbook law (1) that the testator's intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) that technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain." Burleigh Estate, 405 Pa. 373,376 (1961).
- B. The "Armchair Rule": "In order to ascertain the actual intent of the settlor or testator, the Court must place itself in his armchair and consider not only the language and scheme of the instrument but also the facts and circumstance with which he was surrounded; and these surrounding facts and circumstances include the condition of his family, the natural objects of his bounty and the amount and character of his property." Pew Trust, 411 Pa. 96, 107 (1963).
- C. Statutory Presumptions: These include the Slayers Act, 20 Pa.C.S.A. §§ 8801-8815, Modification by circumstances, 20 Pa.C.S.A. §§ 2507 and 6111.1 (divorce and pending divorce), Abatement, 20 Pa.C.S.A. § 5541; Income during administration, 20 Pa.C.S.A. § 3543; Simultaneous death, 20 Pa.C.S.A. § 8501, Death tax apportionment, 20 Pa.C.S.A. §§ 3701 and 3701, and Fiduciary investments, 20 Pa.C.S.A. § 7301.

- D. Judicial Presumptions: These include the presumption against absurd results, the presumption against superfluous words, the presumption against intestacy, the presumption against inconsistency, the presumption against disinheritance, language given consistent meaning throughout the will, the presumption of equal treatment, and that the intent is to be determined from the entire will.
- E. Rules of Interpretation. 20 Pa.C.S.A. §§ 2514 and 6114 (for conveyances) apply in the absence of a contrary intent appearing in the will.
- F. Precedents are of little value. “(N)o will has a brother...it has been said that precedents are of little value in will cases.” Lockhart’s Estate, 306 Pa. 394, 400 (1932).
- G. In terrorem or forfeiture clause is largely ineffective. A provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceedings relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings. 20 Pa.C.S.A. § 2521.

### III. Procedure in Orphans’ Court

#### A. Accounts and Audits

1. Form under Pa.O.C. Rule 2.1. Accounts shall conform with the Model Accounts attached to the Rules.
2. Petition for Adjudication under Pa.O.C. Rule 2.4 shall be file with the Clerk at the time of the filing of the account and shall be signed and verified by at least one accountant and signed by counsel.
3. Notice under Pa.O.C. Rule 2.5(b) shall be given to all parties in interest, whether or not represented by counsel and to parties’ counsel of record.
4. The account is filed with the Clerk, Pa.O.C. Rule 2.6, and counsel shall file an entry of appearance on a separate form at the time of audit, Bucks O.C. Rule 2.6A(3).
5. Objections shall be filed with the Clerk before the audit, Pa.O.C. Rule 2.7(a).
6. Pleadings after objections are filed may consist of an answer or preliminary objections to the objections, and an answer to the preliminary objections, but these pleadings are not mandatory, and no rights are waived if these pleadings are not filed. Pa.O.C. Rule 2.8(a). The preliminary objections are limited to lack of jurisdiction over the subject matter and lack of standing. Pa.O.C. Rule 2.8(b). All such pleadings must be filed within 20 days of service of the prior pleading. Pa.O.C. Rule 2.8(c).

#### B. Petition Practice

1. Pa.O.C. Rule 3.5(a) requires the issuance of a citation to obtain personal jurisdiction.

2. Pa.O.C. Rule 3.5(b) governs notice practice when personal jurisdiction is not required to be obtained.
3. After the filing of a petition and issuance of a citation, the responsive pleadings consist of an answer and new matter, a reply to new matter, preliminary objections, an answer to preliminary objections, and a joinder petition. Pa.O.C. Rule 3.6. Preliminary objections are moved for disposition in Bucks County pursuant to Bucks County Rule of Civil Procedure 208.3(b).
4. All responsive pleadings shall be filed within 20 days after notice of the prior pleading, unless a returnable date is supplied in the citation. Pa.O.C. Rule 3.7.
5. An amended pleadings may be filed within 20 days of the notice of the preliminary objections. Pa.O.C. Rule 3.9.
6. A failure to properly deny the facts stated in pleadings is deemed an admission. Pa.O.C. Rule 3.10(b).

#### C. Discovery and Other Motions

1. Leave for discovery may be granted only on petition upon cause shown, except upon agreement of counsel, Bucks O.C. Rule 7.1A(1), and, if granted, is governed by Pennsylvania and Bucks County Rules of Civil Procedure. Bucks O.C. Rule 7.1A(2).
2. Discovery may be obtained, for example, of the scrivener's file in a will contest, of expert testimony and reports, and of pertinent medical records. Note that the personal representative stands in the decedent's shoes and has the authority to obtain all of the decedent's financial and medical records, as well as to waive attorney-client privilege. Robert Mancini serves as a discovery master for the Bucks County Orphans' Court.
3. A motion for judgement on the pleadings may be filed pursuant to Pa.O.C. Rule 7.2.
4. A motion for summary judgement may be filed pursuant to Pa.O.C. Rule 7.3.
5. A motion for reconsideration may be filed to a final appealable order or to an interlocutory order which is subject to immediate appeal. Pa.O.C. Rule 8.2.
6. A pretrial conference pursuant to Bucks O.C. Rule 7.1B will be scheduled by the court after audit when objections are filed to an account and may be ordered by the court of its own motion or upon motion of any party at any time.

### IV. Accounts and Audits

#### A. Commonly Raised Objections to Accounts

1. Fees and Commissions
  - a. What about the schedule in Johnson Estate, 4 Fiduc.Rep.2d 6 (O.C. Chester Co. 1983)?

- b. For attorneys' fees, review the factors stated in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968).
2. Breach of Fiduciary Duties and Surcharge
- a. A court may impose a surcharge against a personal representative for failing to perform his fiduciary duties. "A surcharge is a penalty imposed to compensate the beneficiaries for loss of estate assets due to the fiduciary's failure to meet his duty of care; however, a surcharge cannot be imposed merely for an error in judgment." In re Estate of Lux, 480 Pa. 256, 265, 389 A.2d 1053, 1057 (1978).
  - b. A personal representative's basic duties are to marshal the decedent's assets, liquidate them as necessary to pay expenses and debts, timely file death tax returns and pay the applicable taxes, and distributed the remaining assets pursuant to the decedent's will or the intestate law. The personal representative has no duty to invest and may be surcharged for the loss of value caused by the failure to liquidate assets. Geniviva Estate, 450 Pa.Super. 54, 675 A.2d 306 (1996).
  - c. A personal representative must "preserve and protect the property for distribution to the proper persons within a reasonable time." In re Estate of Campbell, 692 A.2d 1098, 1001 (Pa. Super. 1997)
  - d. A personal representative must exercise "judgment, skill, are and diligence that a reasonable or prudent person would ordinarily exercise in the management of his own affairs. In re Estate of Campbell, supra.
3. Reasonableness of Administrative Expenses
4. Claims of Creditors
- a. Pursuant to 20 Pa.C.S. A. § 3155, remember that a creditor, if there are no intestate heirs, may have priority to serve as administrator or to designate the administrator. It is important to search for heirs, noting that the most distant relations to qualify as an heir is a first cousin once removed from the decedent. In serving as administrator, the creditor is a fiduciary with the same duties as any other administrator.
  - b. Claims by caretakers or for household services are common but often fraudulent and, accordingly, difficult to prove. There is a presumption of periodic current payment for personal services rendered in a household setting. Dart Estate, 426 Pa. 296 (1967). In a family relationship, without a written contract, all such services are presumptively gratuitous. Gadola Estate, 410 Pa. 250 (1963). Furthermore, the claimant's testimony will be barred by the Dead Man's Rule, 42 Pa.C.S.A. § 5930.
  - c. The statute of limitations, in general, is extended by one year following the decedent's death. 20 Pa.C.S. A. § 3383.

5. Inter vivos Gifts
  6. Joint Accounts/Survivorship
  7. Changes to Beneficiary Designations
  8. Challenges to Actions taken by Agent under Decedent's Power of Attorney
    - a. How far back will the court's review extend?
  9. Issues concerning the Decedent's Residential Real Estate. The personal representative, unless the property is occupied with the decedent's consent at the time of the decedent's death by an heir or devisee, has the right and obligation to take possession of the property and to maintain and administer it. 20 Pa.C.S. § 3311. Rents are not to be collected from an heir or devisee unless needed for payment of claims, but the tenants are required to pay for utilities. Section 3311 does not affect the personal representative's authority to sell the real estate.
- B. Pursuant to Pa.O.C. Rule 5.5, the court may appoint a guardian ad litem to represent a minor or person who is not sui juris in the litigation
- C. Notice of the account and audit must be given to the Attorney General of any residuary bequest, any pecuniary bequest in excess of \$25,000.00, or any pecuniary bequest which will not be paid in full. Pa.O.C. Rule 4.4
- D. Alternative Resolutions
1. Pursuant to Pa.O.C. Rule 1.6, all parties having an interest in a matter may participate by written agreement in private mediation or in court-supervised mediation.
  2. Robert Mancini is the settlement master for the Bucks County Orphans' Court.
  3. "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and a waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man." Annenberg Estate, 4 Fid. Rep. 2d 143 (O.C. Phila. en banc 1984), quoting Abraham Lincoln.

## V. Enforcement of Court's Orders and Decrees/Attachment

A fiduciary who fails to comply with an order, adjudication or decree of the Orphans' Court may be held in contempt of court, and, ultimately, his person may be attached. Attachment of the person requires a five-step process outlined in Commonwealth ex re. Magaziner v. Magaziner, 434 Pa.1, 253 A.2d 263 (1969), as follows:

1. A petition with a rule to show cause why the fiduciary should not be held in contempt;
2. A hearing at which the fiduciary must appear;
3. A determination of contempt;
4. A petition with a rule to show cause why the fiduciary should not be attached;
5. A hearing and entry of a rule absolute for attachment.



See Lang, Incapacitated Persons (No. 2), 16 Fiduc. Rep. 2d 218 (O.C. Montgomery Co. 1996).

VI. Questions and Comments