

## Pendergrass Will

### *Codicil — Signature by agent*

Probate of codicil signed by widow as agent for paraplegic husband stricken for failure to comply with PEF 2502 (3) for signature by another. (Hunter — Execution of Wills 4 (c)).

In the Orphans' Court Division of the Court of Common Pleas of Montgomery County. Estate of Theodore Dereese Pendergrass, deceased. Objections to appeal from probate and motion for judgment on the pleadings. No. 10-0189.

*James F. Mannion*, for Theodore D. Pendergrass II.

*Helen L. McCrary*, for Joan Pendergrass.

### MEMORANDUM OPINION BY OTT, J., AUGUST 4, 2010:

The decedent, Theodore D. Pendergrass, died on January 13, 2010, survived by his wife, Joan, two daughters, a son, and two step-daughters. On January 25, 2010, Mrs. Pendergrass applied for and received letters testamentary pursuant to a will dated March 25, 2009, and codicil thereto dated October 17, 2009. On March 3, 2010, the decedent's son, Theodore D. Pendergrass, II, filed an appeal from probate, seeking to strike the October codicil<sup>1</sup> for lack of proper execution. On March 26, 2010, counsel for Mrs. Pendergrass filed "objections" to the appeal from probate. On April 14, 2010, counsel for Mr. Pendergrass, II filed the instant motion for judgment on the pleadings, and a response was filed thereto on May 28, 2010. Counsel submitted memoranda of law and the matter was argued before the undersigned on July 14, 2010.

The following facts are undisputed. The decedent was a paraplegic; Mrs. Pendergrass held his power of attorney. The probated will was a joint will for both Mr. and Mrs. Pendergrass. The contested codicil, which was also joint, revoked certain gifts and otherwise ratified the March will. It did not mention the May will. The codicil was signed by Mrs. Pendergrass as "Joan Pendergrass, agent for T.D.P" and also by Mrs. Pendergrass as testatrix. Counsel for Mr. Pendergrass, II must prevail on his motion to set aside probate of the codicil because an agent under a power of attorney does not

1. Mr. Pendergrass, II, also intends to challenge the March will and substitute for it a will dated May 24, 2009, in which he is named the sole beneficiary.

have the power to execute a testamentary document on behalf of his or her principal. This concept is axiomatic — so much so that we can find and were cited to no Pennsylvania cases that spell it out, although numerous legal treatises, commentaries and internet blogs and commentaries affirm it.

Counsel for Mrs. Pendergrass asserts that the Court can overlook the “Joan Pendergrass, agent for” portion of the execution language relating to Mr. Pendergrass, and apply the relevant portion of §2502 (Form and Execution of a Will) of the PEF Code to deny this motion. The pertinent subsection of the statute states:

Every will shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

(3) Signature by another. — If the testator is unable to sign his name or to make his mark for any reason, a will to which his name is subscribed in his presence and by his express directions shall be as valid as though he had signed his name thereto: Provided, That he declares the instrument to be his will in the presence of two witnesses who sign their names to it in his presence.

We assume, for the sake of this argument, that Mr. Pendergrass could not sign his name or make his mark, that the signing took place in his presence and he declared the document to be his will in the presence of two witnesses who signed the will. Under these circumstances, arguendo, if Mrs. Pendergrass had signed the document with just the initials “T.D.P.,” this would meet the requirement that the testator’s name be subscribed to the document. However, Mrs. Pendergrass clearly identified herself as agent and signed in this capacity. Because she did so, we can not say she signed the testator’s name as required under Section 2502(3). Her counsel’s arguments that the words “Joan Pendergrass, agent for” were mere surplusage or were added to ensure that she had “dotted all the i’s and crossed all the t’s” are simply not persuasive. In light of the foregoing, the following Order is appropriate.

#### *Order*

And Now, this 4th day of August, 2010, after argument and consideration of memoranda of law, the motion for judgment on the pleadings filed on behalf of Theodore D. Pendergrass, II, is Granted, the appeal from probate filed on February 19, 2010, is Sustained, and that portion of the decree of the Register of Wills admitting to probate the codicil dated October 17, 2009, is Stricken.

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EDITORS’ NOTE: This case was annotated in the October 2010 issue of *Fiduciary Review*.