

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THE ESTATE OF FREDERIC SHERMAN,

Appellee

v.

APPEAL OF: DAVID SHERMAN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 467 EDA 2012

Appeal from the Order Entered January 11, 2012
In the Court of Common Pleas of Montgomery County
Orphans' Court at No: 2009-X3127

BEFORE: FORD ELLIOTT, P.J.E., DONOHUE, J., and McEWEN, P.J.E.

MEMORANDUM PER CURIAM

FILED NOVEMBER 07, 2012

Appellant, David Sherman, appeals from the final order, as well as related interlocutory orders, that denied his challenges to separate codicils that had been appended to the last will and testament of the decedent, Frederic Sherman. We affirm.

The fundamental facts of this case are not in dispute and, for purposes of considering this appeal, we will adopt the factual summary provided by appellant in the brief filed with this court:

Petitioner is the son and sole remaining offspring of the Decedent, David Sherman. Decedent had one other child, a son, Henry William Sherman who passed away in 2000. Respondent has no children. ...

Respondent is a long-time friend/companion of Decedent. Respondent and Decedent purportedly were engaged to be married. However, Decedent and Respondent never resided together.

In or about April 2005, Janet Amacher prepared a new Will for Decedent. This Will gave Respondent 33% of Decedent's estate and bequeathed the remainder (66%) to [Petitioner]. The April [2005] Will appointed Petitioner as an executor of the Will. At the same time, Decedent granted Respondent a "Durable Power of Attorney." The Durable Power of Attorney granted Respondent broad powers over Decedent's affairs, including the ability to authorize medical and surgical procedures, authorize his admission to medical, nursing or other similar facilities, and to handle his interests in estates and trusts. In 2006, Ms. Amacher prepared a (First) Codicil to the Decedent's Will, under which Respondent and Petitioner would each receive 47% of the Decedent's estate and the remaining 6% would be bequeathed to Evelyn Sherman, Decedent's former wife. In May 2009, Ms. Amacher prepared a Second Codicil to the Decedent's Will. In this Second Codicil to Will, dated May 2009, approximately 14 weeks before Decedent's death, Decedent allegedly executed a Codicil to the Will in which he gave 70% of his Estate to Respondent and the remaining 30% to [Petitioner]. [Petitioner] continued to be named as an executor of the Will in effect as of May 2009.

On July 17, 2009, Decedent was involved in a motor vehicle accident. Following the accident, Decedent was transported to Mercy Suburban Hospital ("Mercy Suburban") in Norristown, Pennsylvania. Decedent was discharged from Mercy Suburban on July 21, 2009 and was admitted to Manor Care Rehabilitation in King of Prussia, Pennsylvania.

Decedent resided at Manor Care until August 18, 2009, when he was taken by ambulance to the emergency room at Mercy Suburban, where he was registered at 9:42 a.m. The initial Patient Access Registration Form indicates that Decedent was suffering from "lethargy." When examined in the emergency room, the Decedent also was suffering from respiratory distress. Later that same morning, Decedent was admitted as inpatient at Mercy Suburban with a chief complaint of "septic shock, UTI [urinary tract infection]." Upon his admission to Mercy Suburban, Decedent was considered to be in "Critical" condition. On August 20, 2009, while in the intensive care unit of

[Mercy Suburban] Hospital, Decedent executed a Third Codicil to his Will. This Codicil removed Petitioner as a beneficiary of Decedent's Estate and bequeathed the entire Estate to Respondent. On August 26, 2009, while still a patient at Suburban Mercy Hospital (sic), Decedent executed a fourth Codicil, which removed Petitioner as Executor of his Estate. As noted above, Decedent passed away on September 12, 2009.

Brief of Appellant, pp. 8–10 (record citations and footnotes omitted).

On September 21, 2009, a will dated April 12, 2005, together with four codicils, was admitted to probate by the Montgomery County Register of Wills, and letters testamentary were granted to Diane Williams, appellee herein. Thereafter, on July 6, 2010, appellant filed a petition in the Orphans' Court division of the Court of Common Pleas of Montgomery County entitled "Petition to Remove Executrix and Revoke Letters of Administration" (hereinafter "Petition"), which was ultimately regarded as an appeal of the decision admitting the decedent's will and codicils to probate.¹ The Petition specifically challenged the third and fourth codicils on the following grounds: (1) lack of "authenticity," (2) lack of "testamentary intent of the decedent," and (3) lack of "requisite mental capacity" of the testator. **See:** Petition, ¶¶ 11–12, 14. Appellee filed an Answer to this Petition, and the parties engaged in discovery.

¹ The Orphans' Court, at one point, questioned the viability of appellant's relatively late challenge to the issuance of the letters testamentary, but the presiding judge, per the agreement of the parties, ultimately resolved all questions on the merits.

The Orphans' Court, on May 10, 2011, ordered the Register of Wills to certify the probate record to the trial court, and, on June 20, 2011, appellant filed a "pre-trial motion" in which he requested leave to amend his previously filed Petition, so as to include a claim of undue influence. This request was denied — on the basis that it was untimely — by order of the Orphans' Court dated September 2, 2011.

The Orphans' Court conducted an evidentiary hearing on October 26 and October 27, 2011, and permitted appellant to introduce evidence in support of the claims raised in the original Petition. At the close of appellant's presentation of evidence, appellee did not introduce any evidence, but instead moved for a "compulsory nonsuit," in which she sought an immediate ruling in her favor. The Orphans' Court agreed with appellee, and, following the pronouncement of findings of fact, ruled that appellant had "failed to carry his burden of proving by clear and convincing evidence that Decedent, Frederic Sherman, lacked testamentary capacity on August 20, 2009, when he signed the Third Codicil to his will or on August 26, 2009, when he signed the Fourth Codicil to his will." Order Granting Motion for Nonsuit of the Respondent, Diane Williams, October 27, 2011, p. 3.

Appellant filed exceptions to the decision of the Orphans' Court, and subsequently sought to file "supplementary exceptions," all of which were eventually either dismissed or struck by an *en banc* panel of judges of the

Court of Common Pleas of Montgomery County. **See:** Order Dismissing Exceptions, January 11, 2012. This appeal followed.

Appellant, in the brief filed in support of this appeal, sets out the following questions for our review:

Did the record contain sufficiently clear and convincing evidence [that] Frederic Sherman (hereinafter referred to as the "Decedent") lacked the requisite testamentary capacity when he allegedly executed the Third Codicil to his Will so as to transfer the burden to [Appellee], Diane Williams ... to demonstrate the existence of testamentary capacity?

Did the record contain sufficiently clear and convincing evidence that the Decedent lacked the requisite testamentary capacity when he allegedly executed the Fourth Codicil to his Will so as to transfer the burden to [Appellee] to demonstrate the existence of testamentary capacity?

Was [Appellant] David Sherman ... entitled to amend his Petition to Revoke the Grant of Letters of Administration to assert a theory of undue influence, when [Appellant] timely filed his appeal and no statute of limitations precluded the assertion of additional claims after the one year period of appeal had passed?

Did the lower court abuse its discretion when it granted [Appellee's] Petition to Strike [Appellant's] Supplemental Exceptions while failing to indicate in its Order/Decree of January 11, 2012, what portions of the record it considered in deciding the Exceptions?

Brief of Appellant, p. 5.

Appellant in the arguments advanced in support of his first two questions challenges the order that was entered by the Orphans' Court pursuant to the following statutory authority:

§ 779. Nonsuits

(a) In general.--The orphans' court division may enter a nonsuit under the same circumstances, subject to review in the same manner and with the same effect as in an action at law.

(b) Will contest.--A nonsuit may be entered against a contestant in a will contest whenever the contestant has the burden of overcoming the presumption of validity arising from due proof of execution as required by law and the contestant has failed to satisfy that burden.

20 Pa.C.S. § 779(a)-(b). The Pennsylvania Supreme Court has explained the extent of a court's authority under this section, as follows:

In actions at law, a nonsuit may be granted at the close of plaintiff's case only when it is clear that plaintiff has presented insufficient evidence to maintain the action. In ruling on a nonsuit, the trial court views the evidence in the light most favorable to plaintiff and gives plaintiff the benefit of all favorable evidence and all reasonable inferences therefrom.

Estate of Dunlap, 471 Pa. 303, 306, 370 A.2d 314, 315 (1977) (citations omitted).

The standards governing our review of the decision of the Orphans' Court to grant the nonsuit in this case are well-settled.

A decree of the Orphans' Court may be altered on appeal only if the findings on which it rests are not supported by competent or adequate evidence or if there has been an error of law, an abuse of discretion, or a capricious disbelief of competent or credible evidence.

In Re Hastings Estate, 479 Pa. 122, 130, 387 A.2d 865, 869 (1978) (citations omitted); ***In Re Estate of Vanoni***, 798 A.2d 203, 206-207 (Pa.Super. 2002).

Having now reviewed the record in this case, as well as the arguments presented by the parties, in the light of the above-stated guidance, we find no basis upon which to overturn the nonsuit entered by the learned Judge Lois E. Murphy.² Moreover, we adopt the comprehensive statement filed by Judge Murphy as dispositive of the first two questions raised by appellant on this appeal. **See:** Order Granting Motion for Nonsuit of the Respondent, Diane Williams, October 27, 2011, pp. 1–8.

Appellant also challenges the decisions of the trial court to deny his request to assert a claim of undue influence. We note at the outset that the decision of a trial court to deny a motion to amend a pleading is governed by an abuse of discretion standard of review. **See: Ferraro v. McCarthy—Pascuzzo**, 777 A.2d 1128, 1132 (Pa.Super. 2001).

The Orphans' Court, in denying appellant's request to file an Amended Complaint, issued the following ruling:

The Motion for Leave to File an Amended Complaint is **DENIED** because the proposed Amended Complaint seeks to raise a new cause of action, namely a claim of undue influence, that is barred by the applicable statute

² It bears emphasis that, in arriving at our conclusion, we note with particularity that the trial court relied primarily upon the testimony of four witnesses **presented by appellant**, all of whom were in agreement that the Decedent "knew the natural objects of his bounty, including his son and his fiancée, he knew the general composition of his estate, and he knew and forcefully expressed what he intended to do with his property." Order Granting Motion of Nonsuit of the Respondent, Diane Williams, October 27, 2011, p. 5.

of limitations for appeal from a decree of the Register of Wills under 20 Pa.C.S.A. § 908. **See *Somerset Community Hospital v. Mitchell & Assoc.***, 685 A.2d 141 (Pa.Super. 1996); ***Horowitz v. Universal Underwriters***, 397 Pa.Super. 473 (1990).

Order, September 2, 2011, p. 1. Appellant argues that the court improperly regarded section 908 of the Estates Code as setting forth a statute of limitations that barred his proffered amended challenge to the administration of the estate, and that the court should have, instead, evaluated his request in accordance with Pennsylvania Rule of Civil Procedure 1033,³ which governs amendments to pleadings. Assuming arguendo the validity of appellant's position, we nonetheless find no reason to reverse the decision of the Orphans' Court.

³ Pennsylvania Rule of Civil Procedure 1033 reads as follows:

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.C.P. 1033.

Appellant in his brief not only fails to allege the existence of any evidence in support of his belated claim of undue influence,⁴ he fails to rebut appellee's quite compelling argument of the prejudice that would have been visited upon appellee, whose deposition had already been taken prior to the attempt by appellant to advance a new attack on the dispositional intentions of his father.⁵ Consequently, we find no reason to reverse the decision of the Orphans' Court on this issue.

We commence our review of appellant's final claim, that the Orphans' Court erred when it struck his supplemental exceptions to the court's

⁴ Appellant's entire argument on this issue is subsumed within the following conclusory paragraph:

Applying these rules to this case [i.e. that amendments to pleading should be liberally allowed], for the reason set forth above, since 20 Pa.C.S. § 908(a) is not a statute of limitations as to specific causes of action, the case law find that a new claim cannot be asserted after the running of the statute of limitations is inapplicable. Second, [Appellee] can claim no prejudiced from allowing [Appellant] to present a case on undue influence or breach of confidential relationship, since [Appellee] is the person **who supposedly asserted** the undue influence and therefore, she cannot be surprised by an evidence that relates to that issue. Accordingly, under Rule 1033, an amendment was permissible and should have been granted.

Brief of Appellant, p. 55 (emphasis supplied).

⁵ **See:** Brief of Appellee, p. 20. **See also:** Memorandum of Law of Respondent Diane Williams In Opposition to Pre-Trial Motion of Petitioner David Sherman, July 25, 2011, p. 4; Deposition of Diane J. Williams, February 2, 2011.

decision to dismiss his Petition, by reciting the actual ruling of the Orphans' Court, which contains therein the court's rationale:

The additional exceptions filed on December 29, 2011 along with the Praeipice to Exceptions is indisputably untimely as these additional exceptions were not filed with[in] twenty (20) days of this Court's Order of October 27, 2011 granting a nonsuit in favor of the Respondent, Diane Williams. The overly lengthy supplemental exceptions substantially and dramatically added to the issues proposed to be raised for reconsideration by this Court and addressed in the memorandum of law. Under all of the circumstances, it would not be reasonable to permit Mr. Sherman [appellant] to amend his Exceptions to raise new issues not originally raised in his November 16, 2011 Exceptions filed with the Court.

Order Dismissing Exceptions, January 11, 2012, pp. 1-2. Appellant, in his appellate brief offers but a perfunctory single paragraph response to the cogent explanation provided by the Orphans' Court, and provides no authority in support of his claim that the ruling of the court constituted an abuse of its authority.⁶ **See generally: *Berg v. Georgetown Builders, Inc.***, 822 A.2d 810, 815 (Pa.Super. 2002) (failure to cite to pertinent authority constitutes waiver of issue). Consequently, we find no basis upon which to disturb this ruling of the Orphans' Court.

⁶ In fact, appellant makes no more compelling argument than the following proffer: "Petitioner submits that the Court's ruling would be an abuse of discretion and reserves the right to address the issue further in a reply brief." Brief of Appellant, p. 55. Not only did appellant not further address this issue in his reply brief, such a "reservation" of argument is not a permissible use of a reply brief. **See:** Pa.R.A.P. 2113, *Note*: ("The scope of the reply brief is limited ... in that such brief may only address matters raised by appellee and not previously addressed in appellant's brief.").

J-A22036-12

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 11/7/2012