

# Anatomy of a Will Contest



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## Facts

Wilmer died on January 4, 2001 at the age of 93. Wilmer was survived by his live-in friend, Luscious Lucy, his first wife Amanda (who divorced him in 1995) and his son, George. Wilmer's daughter, Mary, predeceased him on June 23, 1999. Both children were born of Wilmer's marriage to Amanda. Wilmer's estate is worth about two million dollars. Wilmer's Will dated December 24, 1998 gives his estate equally to Luscious, George and Mary, or the survivor or survivors of them. On December 24, 1998, the same day the Will was signed, Wilmer executed a general durable power of attorney naming Luscious Lucy attorney-in-fact. Wilmer's earlier Will of 1990 gave his estate in equal one-third shares to Amanda, George and Mary.

In 1997 Wilmer had been hospitalized and the charts noted mild dementia, most likely attributable to early stage Alzheimer's. Wilmer did not visit the doctor during 1998. By lay witness accounts, Wilmer's mental status deteriorated in 1999, and he was too confused to attend the funeral of his daughter, Mary, in June 1999. Subsequent hospitalizations in 2000 again carried notations of dementia, in addition to notations of delusions and flat affect.

Amanda and George filed a caveat to the probate of the 1998 Will. On June 1, 2001, the Register of Wills dismissed the caveat and probated the 1998 Will; Letters Testamentary were issued to Luscious Lucy as Executrix. On advice of counsel, Luscious Lucy made an advance distribution of \$50,000 to George, which he accepted. After the distribution, but within one year of the date of probate, Amanda and George filed an appeal to your Court from the probate decree, alleging lack of testamentary capacity and undue influence.

### Chronological Summary of Facts

1990	Wilmer executes a Will leaving estate equally to Amanda, George and Mary
1995	Wilmer's divorce from Amanda
1997	Wilmer hospitalized; charts noted mild dementia, most likely attributable to early stage Alzheimer's
December 24, 1998	Wilmer executes a Will leaving estate equally to Luscious Lucy, George and Mary, or the survivor or survivors of them  Wilmer executed a general durable power of attorney naming Luscious Lucy attorney-in-fact
1999	Lay accounts of Wilmer's mental deterioration
June 23, 1999	Wilmer's daughter, Mary, dies; Wilmer too confused to attend funeral
2000	Wilmer hospitalized, charts note dementia, delusions and flat affect
January 4, 2001	Wilmer dies
June 1, 2001	Register of Wills dismisses caveat to December 24, 1998 Will and grants probate
September 1, 2001	\$50,000 advance distribution made to Wilmer's son, George
January 2, 2002	Appeal from Probate Decree to your Court

## **I. Distinction between a Caveat filed with the Register of Wills and an Appeal from Probate**

Prior to the probate of a Will, a contestant may initiate attack on the Will by filing a caveat with the Register of Wills. The caveat requests the Register of Wills not to probate the Will until the contestant has been given a hearing before the Register. The Register of Wills may accept an informal caveat, which is a matter of local practice not governed by the PEF Code. An informal caveat is merely a request that the Register of Wills not accept an identified testamentary writing for probate without notice. Some Registers use pre-printed forms; other Registers may accept a letter from the attorney and/or an attorney-prepared form. Within ten days of filing of the informal caveat or petition for probate, whichever is later, contestant must post any required bond for payment of costs file a formal caveat. The Register may set bond from \$500 to \$5,000. PEF Code § 906.

Formal caveat pleads facts as precisely as would be required by Orphans' Court in a petition on appeal from probate. Where matter is certified to the Orphans' Court, the formal caveat may be the only pleading as in *Thomas Will*, 349 Pa. 212, 36 A.2d 819 (1944).

### **A. No formal discovery before Register**

The acts of a Register are judicial and the admission of a Will to probate is a judicial act: *Commonwealth v. Bunn*, 71 Pa. 405; *Szmahl's Est.*, 335 Pa. 89.

Discovery is controlled by Pa. R.C.P. 4001 et seq. Rule 4001(a)(1) provides "The rules of this chapter apply to any civil action or proceeding at law or in equity brought in or appealed to any court which is subject to these rules ...". The definition of "unified judicial system" in Judicial Code 42 Pa. C.S.A. § 301 does not include Register of Wills. See also definition of "Court" in PEF Code § 102.

Register of Wills is a county office whose existence is provided for in the Pennsylvania Constitution Article 9 § 4.

PEF Code § 903 allows the parties to subpoena witnesses and documents to the hearing without leave to do so, and provides the Register shall have power to "[i]ssue a subpoena to any person in any county of the Commonwealth to appear or produce papers or records before him" and under subsection (3) to "[i]ssue commissions or rules to take the depositions of witnesses in another county or outside the Commonwealth. The practice relating thereto shall conform to the practice in the local Orphans' Court Division." PEF Code § 905 provides a method to enforce orders and subpoenas of the Register.<sup>1</sup>

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<sup>1</sup> "Should any person refuse to comply with any subpoena or order of the register or to pay all costs, the register shall forthwith certify the record of the proceedings to the court. The court, upon petition of any party in interest, shall compel payment



## **B. Advantages and disadvantages of a caveat versus an Appeal from Probate**

The most significant benefit to the contestant by filing a caveat prior to the probate of the Will is the ability to preclude the personal representative, often the anticipated respondent in the Will contest, from qualifying. More often than not, the Register will appoint an administrator *pendente lite* to collect the assets, pay any debts and taxes, and preserve the estate until the conclusion of the Will contest.

The most significant disadvantage is that a hearing before the Orphans' Court Division is *de novo* whether or not the appeal follows a prior hearing before the Register on caveat: PEF Code § 776.<sup>2</sup> 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 the matter to be considered on the hearing of the appeal depend upon what is set forth in the petition which must be filed": *Doran Est.*, 65 D. & C. 227, 229.

The best of both worlds to the contestant is to file caveat before the Register and then have the matter certified to the Orphans' Court under PEF Code § 907. Section 907 provides:

Whenever a caveat shall be filed or a dispute shall arise before the register concerning the probate of a will, the grant of letters or the performance of any other function by the register, he may certify, or the court upon petition of any party in interest may direct the register at any stage of the proceedings to certify, the entire record to the court, which shall proceed to a determination of the issue in dispute. No letters of administration *pendente lite* shall be granted by the register after proceedings have been removed to the court except by leave of court.

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of the costs and shall enforce obedience to the subpoena or order in the same manner as in cases of subpoenas and orders issued or made by the court.”

<sup>2</sup> PEF Code § 776 provides: “On appeal from the register, or in a proceeding removed from the register, the orphans' court division may find, upon the testimony taken before the register, that a substantial dispute of fact exists and grant a jury trial. When upon the testimony taken before the register a jury trial is not granted, the division shall hear the testimony de novo unless all parties appearing in the proceeding agree that the case be heard on the testimony taken before the register. In any event, the division may require witnesses already examined and other witnesses to appear before it. The division, in its discretion, may impanel a jury at any stage of the proceedings.” (Emphasis added).

Many Orphans' Courts will not accept or direct certification, however, until the Register has held an initial hearing, unless there are unique or difficult issues of law presented. *See* Fiduciary Reporter July 1976 and cases cited therein; Hunter's Orphans' Court, Register of Wills § 5.

## **II. Appeal from Probate - Procedural and Technical Issues**

### **A. Timeliness**

PEF Code § 908(a) provides

Any party in interest who is 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.

PEF Code § 3138 provides

If a later will or codicil is submitted to the register for probate within three months of the testator's death but after the register shall have probated an earlier instrument, the register, after such notice as he deems advisable, but with at least ten-days' notice to the petitioner who presented the probated instrument if he has not requested probate of the later will or codicil, shall have power to open the probate record, receive proof of the later instrument or instruments and amend his probate record.

The interplay between these two sections was dealt with by Superior Court in *Peles Estate*, 739 A.2d 1071. In *Peles* a petition for probate of a Codicil was presented to the Register thirteen months after probate of decedent's Will. The Register refused probate under PEF Code § 3138; on appeal to the Orphans' Court Division the Court affirmed; and on appeal Superior Court affirmed. On the facts of the case, the decision was patently correct because the Codicil having been offered for probate thirteen months after probate of the Will, there was no compliance with either PEF Code § 908 or § 3138.

The problem with *Peles* is in its footnote 5 wherein the Court said:

The one-year period for an appeal from probate of a will, provided in Section 908 of the Probate Code, does not govern the time period in which to submit a later codicil for probate. The three-month time limit applicable to submission of a later will or codicil is found in Section 3138 of the Probate Code.

That footnote was not necessary to the decision and was in error. As pointed out in *Fiduciary Review*, Feb. 2000:

Prior to 1967 when what is now PEF 3138 was added to the Register of Wills Act of 1951, the law was that, once the register granted probate, his jurisdiction ended and the only way to deal with the after-discovered testamentary writing was to appeal from probate asking the Orphans' Court to authorize the register to open the probate decree and then to consider whether to probate the later document. PEF 3138 was added so that application could be made directly to the register if made within three months of death. After three months, the procedure is to appeal from probate within one year from probate under PEF 908. The proper procedure is summarized in *Pennsylvania Fiduciary Guide* (4th rev. ed.) § 4.13:

Sometimes, after the probate decree has been entered, a later will is found; more commonly, a codicil is discovered which should have been probated with the will. If the codicil is submitted to the register within three months of the death of the testator, the register after such notice as he deems advisable can open and amend the probate record: PEF 3138. In all other circumstances, an appeal to the court must be taken to authorize the register to open the decree of probate: PEF 908; 3133(b); *Fiduc. Rev.* April 1959, p. 3, May 1966, p. 2, Jan. 1970, p. 4. The procedure therefor is similar to that followed in will contests. It should be noted that if the will first probated disposed of the decedent's entire estate, a later discovered will or codicil cannot be probated after one year from the time of original probate.

The confusion spawned by the *Peles* footnote 5 has already surfaced in *Wheelock Estate*, 20 *Fiduc. Rep.2d* 198 and in *Schrader Will*, 21 *Fiduc. Rep.2d* 197, where both Courts refused probate of a Codicil because of applying the three month rule of PEF Code § 3138 saying they were "compelled to follow" *Peles*.

The error in *Peles* apparently arose because counsel failed to call to the Court's attention PEF Code § 3133 which is not mentioned anywhere in the opinion. PEF Code § 3133 provides

The probate of a will shall be conclusive as to all property, real or personal, devised or bequeathed by it, unless an appeal shall be taken from probate as provided in section 908 of this code (relating to appeals), or the probate record shall have been amended as authorized by section 3138 of this code (relating to later will or codicil). (emphasis added)

Note the word "or". When the predecessor of PEF Code § 3138 was added in 1967, the legislature also added the above underscored words to the predecessor of PEF Code § 3133. The official comments to the 1967 changes state as to what is now PEF Code § 3138 "This section is intended to make it unnecessary to take an appeal in the numerous instances when a later will or codicil is discovered shortly after the death of the testator" and the comment to what is now PEF Code § 3133 states "The additional language conforms this section with the provisions of the new Section 308 of this Act" (now PEF Code § 3138).

It is hoped that if this issue arises before your Court, you will, based on the foregoing analysis, argue you are not bound by *Peles* footnote 5 in the same manner Judge Lazarus argued in *Estates of Stewart and Krasner*, 21 Fiduc. Rep.2d 199, that she was not bound by a Commonwealth Court decision.

In *Schulman Will*, 21 Fiduc. Rep.2d 310, a motion to dismiss an appeal from probate filed more than one year after probate was denied where the executrix-daughter failed to serve a Supreme Court Orphans' Court Rule 5.6(a) notice of beneficial interest on her brother-appellant. The Court said

There are four judicially created exceptions to this limitations period: forgery (see, *Kirkander's Estate*, 490 Pa. 49, 415 A.2d 26 (1980)); where the decree admitting the will to probate fails to address whether cancellations, interlineations or marginal writings form part of the probated document (see, *Rockett Will*, 348 Pa. 455, 35 A.2d 303 (1944)); where the contestant is the Commonwealth of Pennsylvania as *parens patriae* for charities (see, *Matzuk Estate*, 9 Fiduc. Rep.2d 128, 132 (O.C. Alleg. 1989)); or where there has been fraud on the Register of Wills or on the court (see, *Kiger Estate*, 487 Pa. 143, 409 A.2d 5 (1979)).

\* \* \*

In our view, a finding that an appeal from probate may be filed more than one year after the decree when a fiduciary or fiduciary's counsel fails to both provide timely notice to beneficiaries and to file a truthful certification of notice as required by a Supreme Court rule, does not confer additional *substantive* rights. Rather, it assures that the unnotified beneficiary is given a fair and reasonable opportunity to exercise the substantive right that the fiduciary's conduct has prevented.

#### **B. Shortening the appeal period to three months**

PEF Code § 908(a) after prescribing the one year limit for an appeal from probate, provides in the last sentence "The court, upon petition of a party in interest, may limit the time for appeal to three months."

The application is made directly to the Court by Petition for citation to Show Cause. The Petition can only be filed by a party in interest, which presumably will not include the personal representative, with notice to all other known parties in interest. Because no standards are set forth in the statute it is impossible to determine whether the burden is on the applicant to establish good reason why the prayer of the petition should be granted, or whether the burden is on others to show cause why the appeal period should not be shortened. It would appear that the Court has wide latitude.

Petition to reduce the period for appeal from probate dismissed where not required to protect assets or avoid delay in administration: *Thomas Est.*, 19 Fiduc. Rep. 184. Period for appeal from probate by agreement of parties was reduced to eight months: *Medve Est.*, 25 Fiduc. Rep. 391.

Appeal dismissed when filed after time fixed in decree which limited time for appeal from probate measured from date of probate decree, not from date of its entry: *Kiger Est.*, 487 Pa. 143.

### **C. Pleading requirements**

The Petition for citation must aver specific facts, not general conclusions (although leave to amend may be granted). See Pa. S. Ct. O.C. Rule 3.4(a)(3); *Thompson Will*, 416 Pa. 249, 206 A.2d 21 (1965). Petition must also include names of parties in interest and facts on which jurisdiction is based. Legal sufficiency of the Petition should be raised by Preliminary Objections. Pa. R.C.P. 1028; *Pavelchak Estate*, 2 Fiduc. Rep. 2d 318 (O.C. Bucks 1982); *Crain Will*, 2 Fiduc. Rep. 2d 362 (O.C. Centre 1982). Petition alleging forgery or fraud must plead all the facts and circumstances surrounding the charge with particularity. Pa. R.C.P. 1019; *Colucci Estate*, 342 Pa. Super. 349, 492 A.2d 1155 (1985). The Petition must be verified, PEF Code § 761; Pa. R.C.P. 1024, and should include a preliminary decree for the issuance of the citation and a proposed final decree for the relief requested.

### **D. Jurisdictional Requirements - Service of Citations**

A Will contest is a proceeding in rem: *Stewart Est.*, 358 Pa. 434. The Register of Wills and the Orphans' Court Division derive jurisdiction over the Will and the decedent's estate by virtue of decedent's domicile at death. Because jurisdiction has already attached, personal service on parties to a contest involving the will or the grant of letters is not always necessary. If service or notice as required by the applicable statutes and rules of court is given to all interested parties, the decision is binding as to all the world: *Mangold v. Neuman*, 371 Pa. 496. As stated in *Stewart Est.*, 358 Pa. 434, 437: "All that is needed to make the decree in such a proceeding conclusive as to everyone is that the jurisdiction of the court rendering it shall have been properly invoked with notice to all interested persons."

When any party in interest, including the executor, is not included as a respondent in the citation, the "remedy is not to dismiss the proceeding but to amend the proceeding by issuing another citation directed to the persons omitted": *Yesner Will*, 1 Fiduc. Rep.2d 90.

A party in interest who is not given notice is not barred from a later independent action: *Miller's Est.*, 159 Pa. 562, 166 Pa. 97. However, failure to give notice to a party in interest does not, of itself, constitute reversible error: *Cohen Will*, 356 Pa. 161; *Thomas Will*, 349 Pa. 212.

In a contest commenced by caveat, the formal caveat will list all of the interested parties entitled to notice and to participate in the proceeding. Generally, no formal written papers need be served except that filed with the Register; the Register will generally contact all of such interested parties or their counsel to give them notice of the date set for hearing. Such practice may vary from county to county, however. Although no answer is required to be filed to a caveat, in some instances it may be desirable to file one in order to clearly define the points at issue.

In an appeal from probate, the procedure is by citation: PEF Code § 764. The appeal will list all of the interested parties entitled to notice and to participate in the proceeding. When the citations are issued a sufficient number for each party in interest are normally delivered to the appellant who must have the citation and a copy of the petition (Pa. O.C. Rule 3.5) served on each interested party under the requirements for service of a citation as set forth in PEF Code §§ 765 and 768. Service must be made at least ten days before the return day fixed in the citation: PEF Code § 764. Proof of service is by affidavit (PEF Code § 766), which is frequently printed on the original citation, a copy thereof being left with the party served. Once service has been made, all that is required with respect to any subsequent pleading or motion is notice: Probate, Estates and Fiduciaries Code § 768; Pa. O.C. Rule 5.1.

For discussion of when citations in Orphans' Court Division matters may be served by certified mail or must be served personally, see *Freeman Trust*, 5 Fiduc. Rep.2d 1, annotated in *Fiduciary Review*, March 1985, p. 3. In *Freeman Trust*, 5 Fiduciary Reporter 2d 1 (O.C. Div. Alleg.), the Court said:

Process in the orphans' court may be by citation or notice. A citation has many purposes. As in section 764 of the Probate, Estates and Fiduciaries Code of June 30, 1972, *supra*, 20 Pa. C.S.A. 764, it is the process to secure jurisdiction over a person. A citation may also be used to obtain appearance at a hearing, the highest form of notice, without securing jurisdiction over the person so long as there is jurisdiction over the res to be affected, the trust fund.

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Thus, when the fund is within the power of the court, a citation may be used as the highest form of notice of a potential decision to be made about the

fund and is not necessarily used as a form of process to secure personal jurisdiction.

See also Pa. Supreme Court Orphans' Court Rule 3.5:

Proceeding on petition shall be by citation to be awarded by the Court upon application of petitioner in any case where jurisdiction over the person of the respondent is required and has not previously been obtained. In all other cases, proceedings on petition shall be by notice. In either event a copy of the petition shall be served with the citation or notice unless service thereof is made by publication. Neither a citation nor notice shall be required where all parties in interest are the petitioners or their consents or joinders are attached.

Where personal jurisdiction is not needed but only notice, service may then be effected not under PEF Code § 765 but rather under PEF Code § 768 which provides:

**Notice** of any proceeding in an orphans' court division may be given within or outside the Commonwealth by personal service, by registered mail, by publication, or otherwise, as the division shall direct by general rule or special order. Notice may be in the form of a citation served as provided in this section. (Emphasis added).

Pa. O.C. Rule 5.1 provides:

Except where otherwise provided by a rule adopted by the Supreme Court or by an Act of Assembly, whenever **notice** is to be given a person, it shall be given

(a) by service upon the attorney appearing of record for such person;  
or

(b) if there is no such attorney, by personal service, delivery at the residence of such person or by mail, if his residence is known; or

(c) If his residence is not known, by publication once a week during three successive calendar weeks in the legal periodical, if any, and in a newspaper of general circulation published at or near his last known residence within the county; or

(d) in such other manner as the court shall direct.

Note the words "appearing of record". See *Rienzi Est.*, 21 Fiduc. Rep.2d 155.

On an appeal from probate, the Orphans' Court Division of Allegheny County in 1987 decided that service of the citation by regular mail was not proper notice because it did not conform to local Orphans' Court Rule 11: *Pagella Will*, 7 Fiduc. Rep.2d 273. Compare *Levine Will*, 19 Fiduc. Rep.2d 308, where the Montgomery County Orphans' Court Division decided that a citation on appeal from probate may be served by regular mail unless the Court specifies otherwise.

Whether proceeding by either citation or notice, "a copy of the petition shall be served with the citation or notice unless service is made by publication." Pa. O.C. Rule 3.5. Once the original citation has been served, an amended petition need not request issuance of a new citation: *Conley Est.*, 8 Fiduc. Rep. 427.

The citation will contain a return day. The return day is normally not a date for hearing but merely the date on or before which the party named therein must "file a complete answer under oath to the averments of the petition": PEF Code § 764. In some counties, however, at least in some cases, the hearing may be held on the return day.

### **III. Overview of various grounds to Contest a Will**

**A. Lack of Testamentary Capacity:** Testator must be at least 18 years of age and of "sound mind" to make a Will. PEF Code § 2501. Testator has testamentary capacity if at the time of execution of the Will he had an intelligent knowledge regarding the natural objects of his bounty, of the property he possesses, and of what he desires to do with his estate, even though his memory has been impaired by age or disease. *Cohen Will*, 445 Pa. 549, 284 A.2d 754 (1971); *Protyniak Will*, 427 Pa. 524, 235 A.2d 372 (1967); *Williams v. McCarroll*, 374 Pa. 281, 97 A.2d 14 (1953).

**B. Undue Influence:** Undue influence may be proven in two ways: (1) directly, by evidence of acts which prejudice a testator's mind or destroy his free agency, and (2) indirectly, through the shifting of the burden of proof as set forth in *Estate of Clark*, 461 Pa. 52, 334 A.2d 628 (1975). See also Mannion, *The Presumption of Undue Influence and the Shifting Burden of Proof*, 18 Fiduc. Rep. 2d 348.

**C. Fraud:** Fraud is a trick, artifice or management which induces a person to dispose of his property or to do some act contrary to his wishes, or in such way as he would not do but for the fraud. 1 Bowe-Parker: *Page on Wills*, § 14.3 (1960). See also *Markantone Will*, 16 Fiduc. Rep. 2d 134 (O.C. Allegh. 1996). Fraudulent representation made to the testator (or nondisclosure) must be made intentionally. See 1 Bowe-Parker: *Page on Wills*, supra, at § 14.1. "Although undue influence is very much like fraud, the two are not identical. . . Theoretically, fraud is separate and distinct from undue influence, since, when the former is exercised the testator acts as a free agent but is deceived into acting by false data, and when the latter is exercised the mind of the testator is so overmastered that another will is substituted for his own." *Estate of Glover*, 447 Pa. Super. 509 (1996).



**D. Forgery:** Forgery may be the unauthorized signing of a Will by another, the fabrication of a dispositive scheme over the testator's general signature, or the substitution of one page of a Will with another. *Kane's Estate*, 312 Pa. 531, 168 A. 681 (1933).

**E. Mistake:** There are two types of "mistakes". The first occurs when there is a mistake in identity of instrument executed, such as where the testator executed his Will thinking he was signing some other document or where he intended to sign his Will but executed another document. Where testator signs document other than Will, he has no testamentary writing since he has not complied with formalities. *Pavlinko Will*, 394 Pa. 564, 148 A.2d 528 (1959), aff'g, 8 Fiduc. Rep. 208 (O.C. Allegh. 1958). Where testator unintentionally signs Will, it is void because not executed with testamentary intent. *Bryen's Estate*, 328 Pa. 122, 195 A. 17 (1937). The second type of mistake occurs when there is a mistake in the inducement for executing Will. Mistake itself must appear on the face of the Will, as well as the disposition but for the mistake. *Piper Estate*, 473 Pa. 318, 374 A.2d 535 (1977), aff'g, 18 Adams 99 (1976). Where mistake can be shown, portion of Will thereby induced Will be void. *Mendenhall's Appeal*, 124 Pa. 387 (1889).

**F. Insane Delusion:** Insane delusion is defined to mean an insane belief or a mere figment of the imagination, a belief in something which does not exist and which no rational person, in the absence of evidence would believe to exist. *Leedom's Estate*, 347 Pa. 180, 32 A.2d 3 (1943); *Plaska Estate*, 11 Fiduc. Rep. 2d 369 (O.C. Phila. 1991). To set aside a Will on grounds of insane delusion it must be shown by clear and convincing evidence the Will was executed as a direct result of an insane delusion. *Protyniak Estate*, 427 Pa. 524, 235 A.2d 372 (1967); *Estate of Agostini*, 311 Pa. Super. 233, 457 A.2d 861 (1983). Furthermore, the insane delusion must have caused the testator to make a Will in a manner entirely different from what he would have in the absence of the insane delusion. *Protyniak Estate*, supra.

#### **IV. Pre-trial issues that commonly arise in Will contests**

##### **A. Applicability of Mental Health Procedures Act**

Section 111 of the Mental Health Procedures Act ("MHPA"), 50 P.S. § 7111, provides in pertinent part:

All documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed to anyone except:

- (1) those engaged in providing treatment for the person;
- (2) the county administrator, pursuant to section 110;
- (3) a court in the course of legal proceedings authorized by this act; and

(4) pursuant to Federal rules, statutes and regulations governing disclosure of patient information where treatment is undertaken in a Federal agency.

In no event, however, shall privileged communications, whether written or oral, be disclosed to anyone without such written consent. . . .

The MHPA, including the confidentiality provision of Section 7111, establishes rights and procedures for both involuntary and voluntary<sup>3</sup> mental health treatment. 50 P.S. § 7103. Section 7111 confers a statutory privilege of confidentiality on a patient's records. *Commonwealth v. Moyer*, 407 Pa. Super. 336, 342, 595 A.2d 1177 (1991). The confidentiality provisions are designed to develop the trust and confidence necessary for therapeutic intervention. 55 Pa. Code § 5100.31(b). Thus, persons seeking or receiving treatment are entitled to do so with the expectation that information about them will be treated with respect and confidentiality. *Id.*

Section 7111 of the MHPA must be strictly construed. *Commonwealth v. Moyer*, 407 Pa. Super. at 340. A strict construction reveals that, absent a written release by a person authorized to do so, all documents concerning persons in treatment are to be kept confidential and not disclosed to anyone, except under the four narrow exceptions specifically delineated in Section 7111. *Id.* Moreover, even when released without permission pursuant to one of the four exceptions, the records remain confidential and cannot be re-released to additional persons or entities, or used for different purposes, without the patient's consent. 55 Pa. Code § 5100.32(c).

These confidentiality provisions are not effected by Decedent's death -- "the protection from disclosure in Section [7]111 does not end with a person's death." *Hunt v. Pennsylvania Dept. of Corrections*, 698 A.2d 147, 150 (Pa. Commwlth. 1997). In *Interest of Roy*, 423 Pa. Super. 183, 189, 620 A.2d 1172 (1993), the Superior Court was presented with the issue of whether "an heir can waive the confidentiality provisions of the Mental Health Procedures Act in order to secure documents which might assist in contesting the validity of the decedent's will." 423 Pa. Super. at 184. The Superior Court held that the heir was not authorized to release the records:

Roy urges that he is the heir of his deceased father and therefore he should be permitted to waive the confidentiality provisions of the Mental Health Procedures Act. Even if this were not statutorily prohibited - which it is - Roy could not prevail. The record is clear that the letters testamentary were issued to Roy's brother, Donald, the named executor. Only Donald could even attempt an argument that he was in a position to give the written consent required under the Act. Since, Roy was before the trial court admittedly seeking to overturn the

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<sup>3</sup> Voluntary admissions under the MHPA are governed by 50 P.S. § 7201, and are commonly referred to as a "201". Involuntary admissions are governed by 50 P.S. §§ 7301-7305, and are commonly referred to as a "301", etc.

validity of the decedent's will, he is clearly adverse to the decedent's interest and could not purport to give any consent for release of confidential information.

*Id.* at 188.

Referring to Section 7111, that the first, second and fourth exceptions to confidentiality are not applicable in Will contests. The third exception, disclosure to "a court in the course of legal proceedings authorized by this act", has been construed in several appellate decisions to mean that the records "may be used by a Court *only* when the legal proceedings being conducted are *within the framework* of the MHPA, that is, involuntary and voluntary mental health commitment proceedings." *Commonwealth v. Moyer*, 407 Pa. Super. at 341 (emphasis in original); *Commonwealth v. Fewell*, 439 Pa. Super. 541, 562, 654 A.2d 1109 (1995); *Hahnemann University Hospital v. Edgar*, 74 F.3d 456, 463 (3d Cir. 1996). Moreover, *Roy* specifically rejected the argument that a Will contest falls within the third exception, noting:

there is no language within the Act which includes probate proceedings within the framework of the Act, nor have we been referred to any caselaw to support such a proposition.

## **B. The Attorney-Client Privilege**

The concept of privileged communications between attorney and client is the oldest testimonial privilege. *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 459, 357 A.2d 689, 691 (1976)(citations omitted), *alloc. denied*, *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). The privilege is now codified:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. 42 Pa.C.S.A. § 5928 (West 1982).

The statute represents, essentially, the codification of the common law attorney-client privilege *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 462, n. 2, 357 A.2d 689 (1976). Under common law, however, the privilege covered communications relating to the transactions between the parties, made by one to the other. *Davenport Co. v. Pennsylvania Railroad Co.*, 166 Pa. 480, 31 A. 245 (1895); *Kaut v. Kessler*, 114 Pa. 603, 7 A. 586, (1887); *Moore v. Bray*, 10 Pa. 519 (1849). With the codification of attorney-client privilege, the focus became "confidential communications," rather than "communications" relating to "transactions" between the lawyer and the client.

Confidential communications have become clearly defined in terms of legal advice. For example, confidential communications to an attorney for the purpose of securing legal advice are entitled to protection of the privilege. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 882

F.Supp. 1532 (E.D. Pa. 1995)(applying Pennsylvania law). Under Pennsylvania law, in order for attorney-client privilege to apply, the communications must have been made for the purpose of securing legal advice. *In re Ford Motor Co.*, 110 F.3d 954, 965 (3d Cir. 1997)(applying Pennsylvania law)(citing *Rhone-Poulenc*, 32 F.3d at 862). The privilege applies where communications were conveyed in confidence by client to attorney in an attorney client relationship, and "... **only** when the communication relates to a fact of which the attorney was informed for the purpose of securing either a legal opinion, legal services or assistance in some legal proceeding." *Marian Bank v. Lawrence Voluck Assoc.*, 26 D. & C. 3d 48, 51 (1982) (emphasis added). There is no presumption of confidentiality simply based upon the existence of an attorney-client relationship. *Id.* at 52. Instead, the circumstances of the communication must indicate that confidentiality was intended. *Id.*

The client is the holder of the privilege. The personal representative of the deceased client's estate may also assert the privilege. In *Jenkintown Cab* at 460, 357 A.2d at 693, the Superior Court recognized that, in litigation involving the estate of the client, the privilege may be raised or waived by the client's representative, "... so long as the waiver would not reveal scandalous and impertinent matter (citations omitted)." This recognition was made despite the lack of an estate in *Jenkintown Cab*.

Death of the privilege holder is not sufficient to compel disclosure of privileged communications. In *Hartley Estate*, 61 D. & C.2d 732, 734 (1972), the Court acknowledged that the decedent's attorney-client privilege could be invoked by her personal representative. See also *Zikorus v. Wood*, 12 Fiduc.Rep.2d 241, 242 (C.C.P. Dauph. 1992)(the Court found that neither the decedent, prior to his death, nor his co-executors, waived the privilege); *Cohen v. Jenkintown Cab Co.*, 238 Pa.Super. 456, 357 A.2d 698 (1976)(the Court notes, however, death "substantially reduces" the possibility that the client's rights and interests could be significantly affected by disclosing privileged communications. *Id.*, 357 A.2d at 693). This concept of the privilege being qualified after death can also be found in *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), rev'd, *Swidler & Berlin, et. al. v. U.S.*, 524 U.S. 399 (1998)(O'Connor, J., dissenting).

In Will contests, the attorney-client privilege is typically waived by the personal representative on the theory that the scrivener's testimony will support the validity of the Will. Even where not waived, however, the scrivener can testify as to competency, which is not based upon "confidential communications" but rather the scrivener's observations of the decedent. Moreover, the scrivener can testify to the instructions given by the decedent which resulted in the executed Will. As the Court pointed out in *Hartley Estate*, 61 D. & C.2d 732, 734 (1972), a Will is not a privileged document. It is executed and published by the decedent, and therefore the decedent's instructions in the preparation of the Will are either not privileged in the first instance, or the privilege is deemed waived once the Will is offered for probate.

### **C. Acceptance by contestant of bequest under disputed Will**

The general rule is that one who accepts a benefit under a Will cannot controvert its validity. He cannot affirm the Will so far as it is beneficial to himself and deny its validity as to others who are beneficiaries. *Forsythe's Estate*, 81 Pa. Super. 347, 349 (1923); *Miller's Estate*, 159 Pa. 562, 574 (1894). The acceptance of the legacy is an election to stand by the provisions of the Will. *Hickman's Estate*, 308 Pa. 230, 235 (1932).

The issue, properly raised, is one of estoppel, and should be raised as new matter pursuant to Pa. R.C.P. 1030(a) and not by preliminary objection. *See Hook Will (No. 2)*, 9 Fiduc. Rep. 2d 196 (O.C. Greene 1989). Whether or not the contestant is estopped depends upon the facts of the acceptance. Where the acceptance was made in ignorance of the beneficiary's rights, or consists merely of a pecuniary legacy, the beneficiary can remove himself from the general rule by returning the money to the estate. *Miller's Estate*, 159 Pa. at 575; *Hickman's Estate*, 308 Pa. at 235.

It is also common for the proponent of the Will to petition the Court to direct the return of the legacy as a condition to proceeding with the Will contest. *Keller Estate*, 12 Fiduc. Rep. 2d 138, 139 (O.C. Allegh. 1992), *appeal quashed* 427 Pa. Super. 616, 629 A.2d 1040 (1993), annotated in *Fiduciary Review*, Feb. 1994, p. 3.

### **D. Standing**

PEF Code § 908(a) provides "Any party in interest who is 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. . . ." (Emphasis added)

#### **1. In General**

The Orphans' Court Division has jurisdiction to determine the kinship of persons who attempt to contest a Will (*Taylor v. Common.*, 103 Pa. 96; *Frazier Est.*, 75 D. & C. 577), and when the issue of status is raised the Court will generally exercise its discretion and resolve such issue before hearing on the merits: *Rogers's Est.*, 154 Pa. 217; *Kreider Est.*, 85 D. & C. 443. A person without interest is not a proper party contestant: *Carothers's Est.*, 300 Pa. 185; *Widdowson's Est.*, 189 Pa. 338.

Generally speaking, any person whose share in the estate is larger or smaller depending on whether probate is granted or refused is a proper party: *Ash Will*, 351 Pa. 317; *Boland's Est.*, 99 Pa. Super. 321; *Kreider Est.*, 85 D. & C. 443; *Leathem's Est.*, 54 D. & C. 73. Presumably the rules for determining who is a proper party contestant would be the same for a caveator as for a

party appealing from the Register to the Orphans' Court: *Hetzel Will*, 3 Fiduc. Rep. 564; *Fleszar Will*, 8 Fiduc. Rep. 99.

The determination of status is not one where jury trial is a matter of right: *Davis Est.*, 365 Pa. 605; annotated in *Fiduciary Review*, Dec. 1950; *Rooney's Est.*, 338 Pa. 268; *Link's Est. (No. 1)*, 319 Pa. 513; *Hile's Est.*, 310 Pa. 541; *Kate's Est.*, 148 Pa. 471.

As in other branches of law, champerty (for example, solicitation by heir-hunter) is condemned: *Frazier Est.*, 75 D. & C. 577.

## **2. Spouse**

As a general rule, a spouse who may elect to take against a Will may not contest it: *McMasters v. Blair*, 29 Pa. 298; *Kase's Est.*, 10 Dist. 497. However, a spouse who would receive a larger share under a former or later Will may be a contestant (*Boland's Est.*, 99 Pa. Super. 321; *Prager's Est.*, 70 Pitts. 217), as may also a spouse whose right to the \$30,000 allowance in the event of intestacy is involved: *Sherman Est.*, 5 Fiduc. Rep. 497; *Butler Est.*, 3 Fiduc. Rep. 104. When the alleged spouse is an innocent second wife, where the first wife is alive and undivorced, the second alleged spouse is not a party in interest entitled to contest the grant of letters: *Wilson Est.*, 52 Berks 67. Appeal from probate dismissed because appellant lacked standing to appeal where his marriage to decedent was void because his prior marriage had not been terminated: *Settle Est.*, 24 Fiduc. Rep. 96. Where the spouse is entitled to contest, there is nothing inconsistent with both electing to take against the will and contesting same: *Butler Est.*, 3 Fiduc. Rep. 104. Surviving spouse may file both election against will and appeal from probate, but may not recover under both; Will contest to proceed first: *Hollabaugh Est.*, 13 Fiduc. Rep.2d 133, annotated in *Fiduciary Review*, May 1993, p. 3.

## **3. Minors and Incapacitated Persons**

Minors and incapacitated persons should be represented by a guardian of their estate. This is necessary to have proper standing before the Register or Court could probably be cured at any stage of the proceeding by appointment of a guardian as soon as the minority or incapacity is discovered.

A parent may not appeal as the minor's natural guardian or next friend: *Boland's Est.*, 99 Pa. Super. 321. A guardian *ad litem* for minors will be directed not to appeal from probate where such action is not in the best interest of the minor: *Posey's Est.*, 52 D. & C. 127.

The guardian of an incapacitated person's estate may appeal if the incapacitated person is a party in interest: see *Barbey Est.*, 9 Fiduc. Rep. 108. Where no guardian of the estate exists, a guardian *ad litem* will be appointed: *Hammers Est.*, 8 Fiduc. Rep.2d 115, annotated in *Fiduciary Review*, March 1988, p. 3; *Furda Will*, 40 Wash. 72. For authorization of Will contests on behalf of incapacitated persons, see also *Brindle Will*, 360 Pa. 53.

Are minors bound by the one-year limitation period for appeal from probate? See Judicial Code, 42 Pa. C.S.A. 5533(b) discussed in *Fiduciary Review*, March 1987, and Section 1991 of the Statutory Construction Act, 1 Pa. C.S.A. § 1991, which defines "action" as "[a]ny suit or proceeding in any court of this Commonwealth."

#### **4. Personal Representative**

Although an executor named in a Will is a necessary party to a contest involving the Will (*Haueisen Will*, 30 Fiduc. Rep. 145; *Evans Will*, 8 Fiduc. Rep. 431; see *Fiduciary Review*, Dec. 1953, p. 3), he is generally not a party in interest who may instigate a contest: PEF Code § 908(a); *Fleigle Est.*, 664 A.2d 612, 444 Pa. Super. 632, annotated in *Fiduciary Review*, Dec. 1995; *Knecht's Est.*, 341 Pa. 292; *Fleszar Will*, 8 Fiduc. Rep. 99; *Hetzel Will*, 3 Fiduc. Rep. 564; cf. *King's Est.*, 9 W.N.C. 207. He is entitled to notice and may then elect whether to become a party (*Royer's Ap.*, 13 Pa. 569; *Yardley v. Cuthbertson*, 108 Pa. 395, 445-448), although if he does become a party his costs and counsel fees must be paid by him or those who authorize him, not by the estate: *Faust Est.*, 364 Pa. 529, annotated in *Fiduciary Review*, June 1950, p. 3.

Executor in his representative capacity has the right to appeal from probate of a codicil which cancels gift of residuary estate to local charities to be chosen by the executor: *Thompson Will*, 416 Pa. 249. Co-executor named in Will has standing to file caveat against codicil which replaces him: *Underdown Will*, 24 Fiduc. Rep. 311. An executor of a later Will may appeal from probate of earlier dated Will, and executor of earlier Will has no status to contest the appeal: *Gulden Will*, 3 Fiduc. Rep. 627, annotated in *Fiduciary Review*, Dec. 1953, p. 3. An administrator may not contest probate of a later discovered Will: *Sherman Est.*, 5 Fiduc. Rep. 497.

Action by beneficiaries or family members to destroy or suppress the Will does not deprive the executor of his right to letters: *Waltz's Ap.*, 242 Pa. 167; *Martin Est.*, 349 Pa. 255.

Role of administrator pendente lite: *Fiduciary Review*, June 1998.

#### **5. Trustee**

A testamentary trustee is a proper party to a Will contest because it is his duty to defend the trust, and his counsel fees and costs are payable out of the trust estate: Probate, Estates and Fiduciaries Code § 908(a); *Martin Est.*, 349 Pa. 255; *Lowe's Est.*, 326 Pa. 375; *Shelly Will*, 24 Fiduc. Rep. 264; *Thompson Est.*, 16 Fiduc. Rep. 279. Compare, however, *Girt Est.*, 452 Pa. 156, 164, n. 7:

The professional corporate fiduciary-testamentary trustee through its counsel, has briefed and argued before this Court its interpretation of decedent's will. The trustee's position is identical to that of the Toner Institute, the residuary legatee. On this record, there is neither need nor reason for the corporate fiduciary

to regard itself as having an interest in this appeal that would warrant its additional participation and payment, by the estate, for a separate brief and representation by counsel. The controversy here is between a disinherited daughter, a specific legatee under the will, and the residuary beneficiary - the trustee is not involved.

\* \* \*

The professional corporate fiduciary, having no estate interest whatsoever in the outcome of this litigation, should not have participated in this appeal, and may not be compensated for such participation or reimbursed for expenditures so incurred, since its actions do not protect, defend or advance the interests of the decedent's estate.

A trustee who acts in his individual capacity, however, is not entitled to his costs from the trust: *Bremer's Est.*, 18 D. & C. 497. Trustee is proper party to oppose request for termination of trust: *Krewson Trust*, 24 Fiduc. Rep. 391, aff'd 458 Pa. 624, annotated in *Fiduciary Review*, July 1974. When the testamentary trustee does not defend the trust, a trustee *ad litem* may be appointed: *Snyder Est.*, 274 Pa. 574. The rights of the trustee are not destroyed by agreement of the parties to destroy the trust: see 1 *Hunter's O.C. Commonplace Bk.*, *Contests of Wills* §§ 2(d), 4(c).

## **6. Parties Under Another Will**

Parties under one Will may contest another (*Ash Will*, 351 Pa. 317; *Boland's Est.*, 99 Pa. Super. 321; *Musser Est.*, 10 Fiduc. Rep.2d 246, annotated in *Fiduciary Review*, Nov. 1990; *Gelwicks Est. (No. 2)*, 1 D. & C. 2d 72; see *Cahill's Est.*, 21 Dist. 660), but parties under an earlier Will may not contest a later Will after a finding that the earlier Will was revoked: *McCarty Will*, 355 Pa. 103. A party whose interest under either of two testamentary writings is identical may not contest: *Knecht's Est.*, 341 Pa. 292; *Hetzel Will*, 3 Fiduc. Rep. 564. For the right of next of kin to contest the last Will where there is a series of wills, see *Frazier Est.*, 75 D. & C. 577. Preliminary objections to appeal from probate sustained because appeal did not attack prior Will under which contestant was executrix but received no benefits: *Jacszyn Will*, 25 Fiduc. Rep. 393.

In appealing from probate as legatee under prior Will, petitioner "must specifically set forth under which instrument she claims to be an interested party and attach a copy of it and other relevant testamentary writings to her petition": *Lazar Est. (No. 1)*, 15 Fiduc. Rep. 600, 604.



## 7. Heirs

Intestate heirs who would share in the estate if no Will were probated, may contest: *Rogers's Est.*, 154 Pa. 217; *Whitaker's Est.*, 10 W.N.C. 106. A natural child adopted into another family, however, has no status to contest a Will of his natural family: *Paris Est.*, 47 Luz. 75. An after-born child or after-adopted child (PEF Code § 2507(4)), or an after-married spouse (PEF Code § 2507(3)), need not contest, but receive their statutory shares automatically. Heirs at law may be proper parties to contest the Will even though disinherited by prior unprobated but properly executed Wills: *Holtz Will*, 13 Fiduc. Rep. 221, annotated in *Fiduciary Review*, May 1963, p. 3; *Heffner Will*, 17 Fiduc. Rep. 572; but cf. *Wills, Alleged Incapacitated Person*, 20 Fiduc. Rep.2d 16.

On appeal from probate of wife's Will, heirs of her predeceased husband are not parties in interest entitled to appeal issue of mistake in the inducement: *Piper Est.*, 473 Pa. 318, aff'g 18 Adams 99.

The lower Court improperly ruled under the pedigree exception to the hearsay rule that a person could not testify "as to the declarations made to her by the decedent himself concerning his family and relatives." The requirement that the decedent be related to the family of which he spoke "should not be enforced in the situation where, as here, the out-of-court declaration is made by the very party (i.e., the decedent) whose own pedigree is in question": *McClain Est.*, 481 Pa. 435.

Contestants of Will having established their relationship to decedent need not account for other possible next of kin to continue their contest of the Will: *McClain Est.*, 30 Fiduc. Rep. 232.

Status as "heir" determined under law of jurisdiction where illegitimate was born: *Kajut Will*, 2 Fiduc. Rep.2d 197.

Persons who are not intestate heirs have no status to contest a Will; evidentiary hearing is required to establish their rights based on alleged contract to make a Will in their favor: *Seasongood Est.*, 320 Pa. Super. 565.

## 8. Power of Appointment

A person who would take in default of the exercise of a power of appointment is a proper party to contest the Will which exercises such power: *Hurst Will*, 406 Pa. 612, *Coleman's Est.*, 4 Dist. 105.

## 9. Remaindermen

Persons who have contingent remainder interests under the Will are parties in interest entitled to notice of any contest: *Barbey Est.*, 9 Fiduc. Rep. 108; *Hanau's Est.*, 2 Dist. 127. Charitable remainderman is an aggrieved party entitled to appeal from Register's refusal of probate: *Shelly Will*, 24 Fiduc. Rep. 264. Unborn contingent remaindermen are bound by the judgment even though not represented: *McCay v. Clayton*, 119 Pa. 133.

## 10. Creditor or Mortgagee of Heir

Although the mortgagee of an heir has been held to be a proper party (*Cosgrove Est.*, 28 Pitts. 272; *Mushrush v. Mushrush*, 7 Dist. 743), an unsecured creditor who has not reduced his claim to judgment and had attachment execution issued may not become a party: *Shepard's Est.*, 170 Pa. 323; *Lazar Est. (No. 1)*, 15 Fiduc. Rep. 600.

## 11. Deceased Party

Where a party in interest dies during the proceedings, his personal representative will be substituted (PEF Code § 3372; Pa. R.C.P. Rules 2351-2354), and no advantage can be gained by failing to arrange such substitution: *Stewart Est.*, 358 Pa. 434; *Hoopes's Est.*, 185 Pa. 167; *Trainer v. McGarrity*, 40 Pa. Super. 57.

## 12. Commonwealth or Escheator

The Commonwealth is a party in interest entitled to appeal from probate where it is questionable whether the decedent had relatives as close as those who qualify as intestate heirs entitled to distribution under the statute: *Tierney Will*, 10 Fiduc. Rep. 310; *Ford Will*, 8 Fiduc. Rep. 372; cf. *Cardwell's Est.*, 10 C.C. 318. Commonwealth as statutory heir is entitled to appeal from probate of Will leaving residue to strangers despite possible existence of first cousin and first cousin once removed. "A will contest is basically an action in rem. Therefore, all parties who have a possible interest have a right to appear in such action": *Dettra Will*, 13 Fiduc. Rep. 227, annot. in *Fiduciary Review*, May 1963, p. 3; see 13 Fiduc. Rep. 463, 415 Pa. 197.

When a charitable trust or bequest is involved, the Attorney General is entitled to notice as a necessary party: *Pruner Est.*, 390 Pa. 529; *Garrison Est.*, 391 Pa. 234; *Fiduciary Review*, April 1958.

An escheator is a party in interest: *Smith's Est.*, 23 D. & C. 519; *Cassidy's Est.*, 54 D. & C. 647; *Mellor v. Smyth*, 220 Pa. 169; *Seiler's Est.*, 14 Pa. Super. 504; *Ford Will*, 8 Fiduc. Rep. 372; see query in *Cozzens' Will*, 61 Pa. 196.

### 13. Unclean Hands

Without a finding of lack of testamentary capacity, or undue influence, and without a shifting of the burden of proof to the attorney-scrivener-beneficiary-proponent, the action of the Orphans' Court Division upholding the Will, affirmed by Superior Court, reversed; finding by Register of Wills that Will was invalid reinstated on finding that attorney did not come to the Orphans' Court with clean hands: *Estate of Pedrick*, 505 Pa. 530.

*Pedrick* represents the first time a court has ruled a will invalid on the basis of "unclean hands" -- the proponent could not bring before the court a decision by the Register of Wills. This issue was not briefed or argued, and the Court's opinion makes no reference whatsoever to PEF Code § 908 which provides that appeal from the Register of Wills to the Orphans' Court Division is a matter of statutory right, nor does it refer to PEF Code § 776 that the hearing is *de novo*, without regard to the Register's decision.

In *Pedrick*, if the Register of Wills had decided the will was valid, the *Pedrick* reasoning could not apply to invalidate the Will. Nor would *Pedrick* apply if the party charged with unclean hands was not the proponent for probate, which would occur if the party charged with unclean hands received a pecuniary legacy and someone else received the residue.

"Unclean hands" not applied: *Younger Est.*, 352 Pa. Super. 414; *Sterling Will*, 6 Fiduc. Rep.2d 149.

Petition to revoke letters testamentary because of later dated Will denied on finding that petitioner-attorney who was scrivener of the later dated Will that contained a \$100,000 bequest to the attorney-scrivener came to the court with "unclean hands": *Narducci Will*, 16 Fiduc. Rep.2d 263 (O.C. Div. Erie).

Outright bequest to B awarded to B's wife under unclean hands doctrine where B had failed to pay for equitable distribution, alimony and child support; unclean hands applied where PEF Code § 6112 was applicable only to trusts and not to outright bequests: *Griffin Estate*, 17 Fiduc. Rep.2d 227, annotated in *Fiduciary Review*, Oct. 1997, p. 4.

### V. Initial Procedure at Trial - Use of record before the Register of Wills

Where the Register has refused probate of the Will, the proponent must prove execution of the Will by the testimony of two witnesses who testify as to the carrying out of the formalities required for proper execution of the Will: PEF Code §§ 2504.1 and 3132. The requirements which must be proved depend upon whether the Will is executed by regular signature, by mark, by another, or with physical assistance from another. Assuming that the document is *prima facie* testamentary, the proponent may then rest and the burden of moving forward with the evidence shifts to the contestant.

Where the Register probated the Will, the proponent merely offers in evidence the Register's record of probate without the production of witnesses, whereupon the burden of going forward shifts to the contestant: *Ash Will*, 351 Pa. 317.

Testimony given in hearing before the Register by person who was deceased by the time of Orphans' Court Division hearing was admissible: *Murray's Est.*, 58 Lanc. 185.

The appellant should discuss with the Register whether the Register will voluntarily produce the Register's file, including notes of testimony, exhibits and probate decree. If the Register will not agree to do so, appellant may ask the Court to issue a subpoena or other order directing the Register to do so.

## **VI. Undue Influence**

### **A. *Estate of Clark***

As noted above, undue influence may be proven in two ways: (1) directly, by evidence of acts which prejudice a testator's mind or destroy his free agency, and (2) indirectly, through the shifting of the burden of proof as set forth in *Estate of Clark*, 461 Pa. 52, 334 A.2d 628 (1975). See also Mannion, *The Presumption of Undue Influence and the Shifting Burden of Proof*, 18 Fiduc. Rep. 2d 348. Indirect proof by the shifting of the burden of proof is most common.

In *Estate of Clark*, the Pennsylvania Supreme Court restated the requirements for a contestant to shift the burden of proof to a proponent of a Will to affirmatively disprove undue influence by clear and convincing evidence. The Court held that where it is proven by clear and convincing evidence that (1) a person who is in a confidential relationship with the testator, (2) receives a substantial benefit under the proposed Will, (3) from a testator who had a weakened intellect at or around the time the Will was executed, the risk of burden of proof shifts to the proponent to prove the absence of undue influence by clear and convincing evidence. 461 Pa. at 61, 334 A.2d at 633. If any one element is lacking, the contestant failed to meet his burden of proof. *Estate of Simpson*, 407 Pa. Super. 1, 9 (1991).

Clear and convincing evidence is the highest burden in civil trials, requiring the witnesses to be credible, the facts distinctly remembered, the details narrated exactly and in due order, so as to be clear, direct and convincing, enabling a jury to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue. *LaRocca Trust*, 411 Pa. 633, 640, 192 A.2d 409, 413 (1963).

### **B. Pleading undue influence**

Although there is very little authority dealing with the form or necessary content of caveats, there are a number of cases dealing with the requirements of a petition on appeal to the Orphans' Court Division. It is suggested that in general the same requirements of form are

applicable to formal caveats, for the simple reason that where the matter is certified to the Orphans' Court Division the caveat may be the only pleading (as for example in *Thomas Will*, 349 Pa. 212), and therefore the formal caveat should set forth as much information and in as specific detail as required for a petition on appeal from probate.

The petition for citation on appeal from probate or from denial of probate must aver specific facts, not general conclusions, although leave to amend is generally granted: *Thompson Will*, 416 Pa. 249. Pa. O.C. Rule 3.4(a)(3) states that the petition must set forth "a concise statement of the facts relied upon to justify the relief desired."

Where the issue is undue influence, the cases all agree in requiring a statement of the underlying facts from which the conclusion could be drawn: *Evans Will*, 8 Fiduc. Rep. 431, and cases cited above. As stated in *Carty's Est.*, 90 Pitts. 592, 594:

"There is no allegation of when or how this influence was unduly practiced, under what circumstances it was exercised, and whether the mind and will of the testatrix were overcome and adjudged by the misrepresentations, overpersuasion, or fraudulent conduct on the part of others. There is an entire absence in the petition of any statements from which the court could determine facts and circumstances upon which the charge of undue influence is founded."

Merely naming the party who allegedly exercised the undue influence is not sufficient: *Missimer Est.*, 23 Montg. 49. Cf. *Hintz's Est.*, 32 Berks 85, where the allegations of undue influence were sustained as sufficient.

In the case of undue influence perhaps less detail need be pleaded where the burden of proof would shift because of the existence of a confidential relationship: *Taylor Will*, 423 Pa. 276; *Kris's Est.*, 29 Dist. 447; *How's Est.*, 21 Dist. 493.

"Contestants may allege as many grounds as they hope to establish. If it is possible that two or more grounds of contest could exist at the same time, the contestant may take advantage of all of them although they are technically inconsistent": *Jones Will (No. 2)*, 10 Fiduc. Rep. 89, 92; cf. *Tranowicz's Est.*, 303 Pa. 202.

Where the petition for citation on appeal is dismissed for lack of specificity the Court will generally allow the petitioner a stated period of time within which to file an amended petition: *Thompson Will*, 416 Pa. 249; *Publicker Est.*, 4 Fiduc. Rep. 237. The right to amend to include an entirely new ground will be denied after hearing: *Tranowicz's Est.*, 303 Pa. 202; *Leech v. Leech*, 21 Pa. 67; see *Doran Est.*, 65 D. & C. 227. For limitation to grounds alleged, see *Orlady's Est.*, 336 Pa. 369 ("The sufficiency of the execution ... is always an issue in such a trial"); *Bobbitt's Est.*, 30 D. & C. 659, 664 ("Whether or not an alleged will has been properly executed is therefore always an issue on appeal from the register to the orphans' court").

"A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to him, it is sufficient so to state, together with the reason, and to set forth the substance of the writing": Pa. R.C.P. 1019(h). Pa. O.C. Rule 3.4(a)(3) states that the petition shall set forth "the citation of any Act of Assembly relied upon."

Surviving spouse may file both election against will and appeal from probate, but may not recover under both; Will contest to proceed first: *Hollabaugh Est.*, 13 Fiduc. Rep.2d 133, annotated in *Fiduciary Review*, May 1993, p. 3.

Sufficiency of the pleading should be raised by Preliminary Objections (*Crain Will*, 2 Fiduc. Rep.2d 362; *Beringo Will*, 10 Fiduc. Rep. 656; *Barbey Est.*, 9 Fiduc. Rep. 108; *Evans Will*, 8 Fiduc. Rep. 431; *Conley Est.*, 8 Fiduc. Rep. 427), which must not be based on facts extraneous to the facts set forth in the Petition: *Doran Est.*, 65 D. & C. 227. In *Publicker Est.*, 6 Chester 65, the Court approved raising the issue by Answer. As to whether both Preliminary Objections and Answer may be filed simultaneously, compare *Hochberger Est. No. 2*, 72 D. & C. 454; *Jaco Est.*, 69 D. & C. 298; *Thompson's Est.*, 35 D. & C. 6 with *Bailey Est.*, 384 Pa. 24.

*Res judicata* may not be raised by demurrer; misjoinder of parties may not be raised by preliminary objection: *Commonwealth v. The Barnes Foundation*, 9 Fiduc. Rep. 196.

If the caveat or appeal from probate alleges merely undue influence, may the contestant proceed with evidence to establish the tripartite test of confidential relation, weakened intellect, and substantial benefit in an effort to shift the burden of proof? This issue arose in *Jervis Will*, 20 Fiduc. Rep. 449, a case involving allegations of both lack of capacity and undue influence. After dismissing both allegations for failure of proof, President Judge Taxis of the Montgomery County Orphans' Court Division went on to say:

“Although unnecessary to the ruling in this case, an interesting question was presented and argued concerning the specificity required of a caveator or contestant in pleading facts requisite to place the presumption of undue influence upon proponents. (See *Heffner Est.*, 92 Montg. 44). The caveat in the present case merely alleges that the will dated October 8, 1968 was obtained by undue influence, exercised either by Robert A. Jervis alone or by Robert A. Jervis and Mary L. Duncan jointly. This, of course, states a good cause of action and at that point there was no responsibility upon the proponent to plead except by general denials. The caveat is absolutely silent about, and contains no allegations of confidential relationship, weakened intellect or receipt of benefit to the persons exercising such undue influence sufficient to put the proponents on any notice whatsoever that the caveator's case would be based upon the exception to the general rule concerning burden of proof. This court believes that proper pleading requires that a contestant or caveator plead sufficient facts to indicate clearly the true basis of their complaint. Use of this rule by contestants should not be

inferred as a part of the general allegation of undue influence but should be expressly alleged.”

In affirming the lower court's finding that contestant had not proved lack of capacity or undue influence, the Pennsylvania Supreme Court in *Jervis Will*, 443 Pa. 226, stated in its footnote 4

“Unlike the court below, however, we deem the allegations contained in appellant's caveat sufficient to have enabled him to prove, if he could, the existence of a confidential relationship between the decedent and Robert and mental and physical infirmity, not amounting to lack of capacity. However, the record fails to justify any finding of the existence of a confidential relationship and such an infirmity to justify shifting the burden to proponents to prove the lack of undue influence.”

### **C. Confidential Relationship**

A confidential relationship exists "when the circumstances make it certain the parties [did] not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." *Leedom v. Palmer*, 274 Pa. 22, 25, 117 A. 410, 411 (1922); *Estate of Clark*, 461 Pa. at 63, 334 A.2d at 633 (quoting *Leedom*); *Burns v. Kabboul*, 407 Pa. Super. 289, 308-09, 595 A.2d 1153, 1163 (1991). The relationship of the parties is determinative:

“[a]lthough 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.”

*Estate of Keiper*, 308 Pa. Super. 82, 86, 454 A.2d 31, 33 (1982).

Such a relationship is created when one person occupies a superior position over another, intellectually, physically, or morally, with the *opportunity* to use the superiority to the other's disadvantage. *Weir by Gasper v. Estate of Ciao*, 521 Pa. 491, 504-05, 556 A.2d 819, 825 (1989). The opportunity to take advantage of the other need not have been acted upon in order to establish a confidential relationship. *Estate of Reichel*, 484 Pa. 610, 615, 400 A.2d 1268, 1270 (1979).

The Supreme Court has held that where the decedent grants a power of attorney to the proponent, it is a clear indication of a confidential relationship. *Foster v. Schmitt*, 429 Pa. 102, 108, 239 A.2d 471, 474 (1968) (“[I]f there be any clearer indicia of a confidential relationship

than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia."); *Estate of Clark*, 461 Pa. at 63, 334 A.2d at 633-34 (citing *Foster*); *Estate of Bankovich*, 344 Pa. Super. 520, 524, 496 A.2d 1227, 1229 (1985) (same). This is particularly true where the proponent "is shown to have spent a great deal of time with decedent or assisted in decedent's care." *Hera v. McCormick*, 425 Pa. Super. 432, 449, 625 A.2d 682, 691 (1993); *Estate of Lakatos*, 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (1995). The mere existence of a power of attorney, however, does not establish a confidential relationship as a matter of law. *Estate of Ziel*, 467 Pa. 531, 542, 359 A.2d 728, 734 (1976).

Testimony as to the relationship between the testator and the proponent must pertain to the point in time when the Will was executed to be relevant, as the contestant must prove by clear and convincing evidence that the confidential relationship existed at that time. *Hera v. McCormick*, 425 Pa. Super. 432, 447 (1993); *see also Leedom v. Palmer*, 274 Pa. 22, 27 (1922) (power of attorney executed ten months after disputed transaction "is not sufficient evidence to establish a preexisting confidential relation."); *Estate of Jackiella*, 353 Pa. Super. at 587 (evidence of proponent's restricting testatrix's access to outside world 15 months after the execution of the contested Will is "too remote in time to bear on his relationship with the testatrix at the time the Will was drafted."); *Estate of Kirkander*, 326 Pa. Super. 380, 387 (1984) ("Unless such testimony [of the relationship between proponent and testator] pertains to the point in time *when the will was executed*, we fail to see how such was relevant.") (emphasis in original).

In May of 2001, the Superior Court issued a very significant case addressing the standard for confidential relationship. *Basile v. H & R Block, Inc.*, 777 A.2d 95 (Pa. Super. 2001). In addition to correcting a conflict among appellate cases regarding whether one needed to prove both overmastering influence **and** "weakness, dependence or trust, justifiably reposed"<sup>4</sup>, the *Basile* expressly confirmed that it is a *subjective* analysis of the relationship between the parties on a "sliding scale":

Our Supreme Court has acknowledged that "[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line." *In re Estate of Scott*, 455 Pa. 429, 316 A.2d 883, 885 (1974).

The Court has recognized, nonetheless, that "[t]he 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." *Id.* Accordingly, "[a confidential

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<sup>4</sup> This disparity is evident in the following cases, all of which say "and" instead of "or": *McClatchy Estate*, 433 Pa. 232, 237 (1969); *Zarnowski v. Fidula*, 376 Pa. 602, 605-06 (1954); *Rebidas v. Murasko*, 450 Pa. Super. 546, 553 (1996); *Biddle v. Johnsonbaugh*, 444 Pa. Super. 450, 456 (1995); *Burns v. Kabboul*, 407 Pa. Super. 289, 309 (1991); *Estate of Jackiella*, 353 Pa. Super. 581, 586 (1986).



relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, *or*, on the other, weakness, dependence or trust, justifiably reposed[.]” *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416-17 (1981) (emphasis added). The Supreme Court’s use in *Frowen* of the disjunctive “or” to separate the cognizable characteristics of confidential relation is critical. Contrary to the trial court’s determination in this case, our law does not require both “over[mastering] influence **and**, ... weakness, dependence or trust.” See Memorandum Opinion and Order (Trial Court Opinion), 12/31/01, at 6 (emphasis added). Indeed, both elements need not appear together as “in both an unfair advantage is possible.” *Frowen*, 425 A.2d at 417.

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. . . Both our Supreme Court and other courts have recognized that those who purport to give advice in business may engender confidential relations if others, by virtue of their own weakness or inability, the advisor’s pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel. . . .

Although the language used to define such advisor/advisee relationships has varied over time and in response to the circumstances established by the record, the Pennsylvania Supreme Court has focused, consistently, on the disparity in position between the parties to determine whether their relationship is, in fact, confidential. . . .

Moreover, the Court’s decisions suggest that disparity between the respective parties is to be adjudged subjectively, and may occur anywhere on a sliding scale of circumstances. . . . We conclude that these cases, when considered together and in conjunction with prior authority, compel recognition of confidential relations between parties in a wide array of individual circumstances. The possibility of a confidential relationship cannot be excluded by a concrete rule. So long as the requisite disparity is established between the parties’ positions in the relationship, and the inferior party places primary trust in the other’s counsel, a confidential relationship may be established.

777 A.2d at 101-103.

#### **D. Substantial benefit**

In stating the rule in *Clark Est.*, 461 Pa. 52, and *Fickert Will*, 461 Pa. 653, the Pennsylvania Supreme Court used the language “receives the bulk of the testator’s property.” In *Dunlap Will*, 25 Fiduc. Rep. 529 (O.C. Montg. 1975), Judge Taxis of the Montgomery County

Orphans' Court addressed the use of the word "bulk" in the *Estate of Clark* decision -- "We were also concerned by the requirement in *Clark* that the beneficiary receive the 'bulk' of the estate. This was not a previous requirement; only substantial benefit was required. We doubt that Mr. Chief Justice Jones intended to change this aspect of the rule. While, as noted, he referred to the 'bulk' of the estate in summing upon the later rule which is now to be utilized, he thereafter referred to the same condition in terms of 'substantial benefit . . .' and we take this to be the correct rule."

*Dichter Will*, 354 Pa. 444, and *Quein Will*, 361 Pa. 133, also referred to the bulk of the estate. Most current cases refer to "substantial benefit" (*Ziel Est.*, 467 Pa. 531; *Reichel Est.*, 484 Pa. 610) and some earlier cases used language which seem to connote a lesser amount: "a large or considerable benefit" (*Cuthbertson Ap.*, 97 Pa. 163; *Boyd v. Boyd*, 66 Pa. 283; *Yardley v. Cuthbertson*, 108 Pa. 395; *Patti Est.*, 133 Pa. Super. 81); "a benefit" (*Adams Est.*, 220 Pa. 531; *Stewart Will*, 354 Pa. 288; *McFadden Will*, 177 Pa. Super. 37). In *Adams Est.*, 220 Pa. 531, and *Miller Est.*, 265 Pa. 315, the court said "any appreciable benefit" or "if benefitted in a legal sense," it is sufficient to shift the burden to the proponent. Cf. *Levin Est.*, 419 Pa. Super. 89, rev'g 11 Fiduc. Rep.2d 337.

In *Simpson Est.*, 407 Pa. Super. 1, appeal denied 529 Pa. 622, the court ruled that 25% of the estate was not a substantial benefit, and did not constitute the bulk of the estate. The court further ruled that in determining benefit, the proponent was not to be charged with the 25% share passing to her son. A bequest of \$500 of personal property in an estate of \$40,000 was not a substantial benefit: *Nunemacher Will*, 3 Fiduc. Rep.2d 292. Bequest "of an amount equal to one-half of one percent of the estate" was not a substantial benefit: *McCarthy Est.*, 513 A.2d 1080, aff'g 2 Fiduc. Rep.2d 410. Bequest of approximately \$342,000 in a \$1,000,000 estate was a substantial benefit: *Younger Est.*, 352 Pa. Super. 414.

In *Fitzpatrick Will*, 13 Fiduc. Rep.2d 248, one-half of the estate was found to be a substantial benefit. The Montgomery County Orphans' Court Division (Taxis, Sr.J.) found a substantial benefit where proponents, husband and wife, received the entire residue which was "close to \$500,000": *Stearnes Will*, 9 Fiduc. Rep.2d 100. In *Volkhardt Est.*, 8 Fiduc. Rep.2d 124, the Court found substantial benefit where the sole residuary legatee "would receive upwards of a million dollars."

In *Ziel Est.*, 467 Pa. 531, the burden of proof did not shift where beneficiary's status as decedent's attorney-in-fact was held not to establish prima facie case of confidential relation where beneficial interest under the will, although substantial, declined over the period the alleged undue influence was exerted. In *Stearnes Will*, 9 Fiduc. Rep.2d 100, decedent's May 1982 will gave the husband and wife/proponents \$50,000 which in March 1983 was increased to \$100,000, in July 1983 to \$150,000, and in August 1983 to \$200,000. The final will of December 1983 gave proponents the entire residue estimated as close to \$500,000, which the court found to be a substantial benefit.

Is the benefit to be measured by comparing it to the immediately preceding will? Is \$500,000 out of an estate of \$5,000,000 not a substantial benefit? Is there no benefit to the proponent who receives \$500,000 under the last will and who under earlier wills received \$750,000 and \$1,000,000? Is the entire residue not a substantial benefit where because of preresiduary gifts the proponent will receive only \$250,000 out of a \$12,000,000 estate? Cf. *Zukowsky Est.*, 14 Fiduc. Rep.2d 334, where the burden did not shift to proponent in confidential relation on finding no benefit where estate was insolvent.

Two cases have found no substantial benefit when the benefit in the will under attack is compared with the decedent's preceding will. In *Ciaffoni Will*, 18 Fiduc. Rep.2d 177, the court found a one-sixth share amounting to \$208,741 out of a net estate of \$1,250,000 did not constitute a substantial benefit. The court first compared the respondent's share to an intestate share, and deemed the increase from a one-seventh intestate share to a one-sixth testamentary share as not substantial, citing inter alia *Simpson Est.*, 407 Pa. Super. 1, 595 A.2d 94, where 25% of the estate was ruled not substantial. A peculiar provision in an earlier *Ciaffoni* will adjusted shares to take account of what each legatee received under the will of testatrix' predeceased husband, so that "each of my children will have received an equal share of the combined estates of myself and my deceased husband." The Court said the present will contest "cannot be decided now or anytime in the foreseeable future" because of litigation in both estates. Of interest is the Court's statement that before the Court could find a substantial benefit by comparing the last Will with the earlier will "there would have to be some evidence that [respondent] was aware of the contents" of the earlier Will.

In *Gower Will*, 18 Fiduc. Rep.2d 388, the court found no substantial benefit where decedent revised his Will to increase respondent's share from zero to one-fifth and to reduce contestant's from one-fifth to zero.

There "is no hard and fast rule to `exactly define the character of benefit or the extent of interest the confidential adviser must receive." Designation of proponent as executor is not a substantial benefit where he had no authority to dispose of the estate other than to fulfill usual executor's duties and distribute the residue, after \$10,000 of charitable gifts, to proponent's son and granddaughter who were decedent's blood relatives: *Stout Est.*, 746 A.2d 645 (Pa. Super.).

The mere appointment as executor has been held not to be such a benefit: *Conway Will*, 366 Pa. 641; *Griffith Will*, 358 Pa. 474, aff'g 63 Montg. 275; *Bhare Est.*, 4 Fiduc. Rep. 246. An executor/trustee that receives compensation for its services, and has extensive powers over the distribution and continuation of a trust in perpetuity, receives "substantial collateral benefits" under a will so as to convert it into a beneficiary for purposes of determining whether a substantial benefit exists under the *Estate of Clark* tripartite test: *Estate of Levin*, 419 Pa. Super. 89, 615 A.2d 38.

What is a substantial benefit must be determined by the facts and circumstances of each case, and "no hard and fast rule can be laid down:" *Adams's Estate*, 220 Pa. 531, 69 A. 989; *Estate of Levin*, 419 Pa. Super. 89, 615 A.2d 38.

Perhaps the most practical statement of the "benefit" prong of the *Clark Estate* tripartite test appears in *Miller's Estate*, 265 Pa. 315 at p. 318:

"The court will not be astute in determining the extent of interest the confidential adviser must receive in order to raise the presumption. Any appreciable benefit that would ordinarily actuate a mind inclined to exercise this control will be sufficient; each case must depend on its own circumstances, as no hard and fast rule can be laid down."

#### **E. Weakened Intellect**

Pennsylvania law is clear that a "weakened intellect" need not rise to the level of lack of capacity. *Burns v. Kabboul*, 407 Pa. Super. 289, 308, 595 A.2d 1153, 1163 (1991); *Estate of Lakatosh*, 441 Pa. Super. 133, 143, 656 A.2d 1378, 1384 (1995). As stated by the distinguished late Judge Taxis of the Montgomery County Orphans' Court:

"The closest that 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 always involve the effect of one intellect upon another; 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) (quoting *Heffner Will*, 19 Fiduc. Rep. 542, 546-47 (O.C. Montg. 1969)), *aff'd* 437 Pa. Super. 672, 649 A.2d 466 (1994). Because undue influence is generally exerted over a period of time, evidence of the decedent's mental condition for the period prior to the execution of the Will is directly relevant. *Estate of Clark*, 461 Pa. at 65, 334 A.2d at 634 ("Undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind. The 'fruits' of the undue influence may not appear until long after the weakened mental intellect has been played upon. In other words, the particular mental condition of the testatrix on the date she executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity. More credence and weight may be given to the contestant's remote medical testimony.").

Physical infirmities alone are not enough to establish a weakened intellect. *Estate of Glover*, 447 Pa. Super. 509 (1996).

## VII. Lack of Capacity

### A. Medical testimony

Medical testimony may fall into two categories: (1) direct testimony where the witness was in attendance upon the testator and can therefore testify from his own knowledge, in which case the only attack would go to the weight to be accorded his testimony; and (2) expert opinion evidence based on listening to the facts related by other witnesses and the other evidence in the case, such as hospital records, etc., or based on hypothetical questions. In the latter category it is, of course, important that the witness first be qualified as an expert entitled to give opinion evidence. It is believed proper to question any general practitioner as to his competence and experience with respect to matters dealing with mental capacity resulting from causes other than physical in nature: cf. *Commonwealth v. Cavalier*, 284 Pa. 311.

#### 1. Treating medical personnel

Following the decisions in *Masciantonio Will*, 392 Pa. 362 and 396 Pa. 16, there can be little doubt of the importance of medical testimony by treating physicians in contests involving testamentary capacity. The court flatly stated that testimony of medical experts who observed the testator within a reasonable length of time before and after but not during execution must be given weight equal to testimony of the attorney-scrivener present during execution of the Will. See also *Adams Est.*, 94 Montg. 92, aff'd 448 Pa. 524.

A treating physician may testify from hospital records and rely upon entries in those records made by hospital personnel not called to testify: *Commonwealth v. Thomas*, 444 Pa. 436 and *Jumper v. Jumper*, 240 Pa. Super. 99.

The "testimony of the nurse and scrivener is more credible and possesses greater probative weight regarding the testator's capacity than that of his heart specialist and [a person] who were not present at the execution of the will and also that of [cardiologists] who never saw" testator: *Cohen Will*, 21 Fiduc. Rep. 186, 190. See also *Campo Est.*, 23 D. & C. 2d 1, 14.

As to admissibility of death certificate as evidence of cause of death, see *Hauck v. Common.*, 47 Common. Ct. 554, 557:

[T]here is some conflict and confusion in Pennsylvania and elsewhere on whether death certificates are admissible on the cause of death, as distinguished from merely the date and fact of death. The weight of authority in Pennsylvania, however, is that a properly authenticated death certificate is generally admissible as proof, albeit not conclusive, of both the fact and the cause of death. If, however, there is some reason to suspect the trustworthiness of facts asserted in the certificate or the competency of its author, the certificate is not competent evidence of the facts in question."

See also *Pittsburgh Nat'l Bk. v. Mut. Life Insur. Co.*, 273 Pa. Super. 592, 598:

"Although the Vital Statistics Law, Act of June 29, 1953, P.L. 304, art. VIII, § 810, 35 P.S. § 450.810, and its predecessors, provide that a death certificate 'shall constitute prima facie evidence of its contents,' courts have recognized that certain information recited on the death certificate is hearsay. Therefore, the contents of the certificate are admissible only insofar as they would be admissible if the official preparing the same had been called as a witness. *Kubacki v. Metropolitan Life Insurance Co.*, 193 Pa. Super. 138, 164 A.2d 48 (1960); *Heffron v. Prudential Insurance Co.*, 137 Pa. Super. 69, 8 A.2d 491 (1939). In *Heffron*, the attesting doctor had no personal knowledge of the circumstances of the death, i.e. whether it was accidental or suicidal; and therefore, it was held that the certificate should have been excluded. The court concluded that in spite of the language 'prima facie evidence,' the statute did not authorize the admission of evidence which would otherwise be hearsay and inadmissible opinion. See also: *Meyers v. Metropolitan Insurance Co.*, 36 D. & C. 2d 479 (1964), which held that the statute makes the certificate admissible only insofar as it conforms to established rules of admissibility."

The admissibility of opinion evidence on the "ultimate issue" is dealt with by the Pennsylvania Supreme Court in *Commonwealth v. Daniels*, 480 Pa. 340:

"Appellant next contends that when Dr. Fillinger testified that, in his opinion, the manner of Smith's death was 'homicide,' he usurped the function of the jury by expressing an opinion on an ultimate issue, and that this constituted reversible error. This argument is devoid of merit."

"To show a fully drawn will to a physician, and to ask him whether his patient had mental capacity to understand it, is an unusual mode of examining a doctor": *Daniel v. Daniel*, 39 Pa. 191, 211. See also *Masciantonio Will*, 392 Pa. 362, 403.

Use of certified copies of medical records "of any health care facility licensed under the laws" of the Commonwealth without necessity of calling an authenticating witness: Judicial Code, 42 Pa. C.S. §§ 6151-6159.

Psychological records may be reviewed by contestant after court makes *in camera* review to delete anything irrelevant or blackening to decedent's character: *Musser Est.*, 10 Fiduc. Rep.2d 246, annotated in *Fiduciary Review*, Nov. 1990.

Pa. R.C.P. 1305(b) provides that with at least 20 days' notice, a party may offer in evidence, without further proof, the bills, records, and reports of health care providers.

Physician's records are admissible the same as hospital records; hospital records are admissible under the Pennsylvania Uniform Business Records as Evidence Act, if (1) made contemporaneously with acts to which they relate, and (2) at the time of making it was impossible to anticipate reasons which might arise subsequently for making a false entry, and (3) if the records contain a diagnosis or opinion, and the person responsible for the statements is known so that his qualifications can be examined; medical records of a deceased physician, if otherwise admissible, will not be excluded because they contain an opinion or diagnosis: *Meyers v. Genis*, 235 Pa. Super. 531.

Discussion of admissibility of medical testimony and deposition testimony in Will contest: *Wattley Will*, 14 Fiduc. Rep.2d 10, 86 Berks 48, aff'd 649 A.2d 466, 437 Pa. Super. 672, appeal denied 540 Pa. 622, 657 A.2d 492.

## **2. Expert medical evidence**

Although great weight is accorded the testimony of an attending physician (*Masciantonio Will*, 392 Pa. 362, annotated in *Fiduciary Review*, May 1958), comparatively little weight is given to the testimony of medical experts without direct knowledge of the facts as against the direct evidence of disinterested witnesses: *Sommerville Will*, 406 Pa. 207; *Conway Will*, 366 Pa. 641.

As in all cases of expert opinion testimony, unless there is a statute or rule of court forbidding testimony by certain persons as experts, the allowance of such testimony, and the weight to be accorded it, is pretty much in the discretion of the Trial Court. The only real guideline is what will assist the court in deciding the issue at hand. A psychologist, who is not a physician, is competent to testify as an expert on organic brain malfunctions: *Simmons v. Mullen*, 231 Pa. Super. 199.

Experts in one area of medicine may be found to be qualified to address other areas of specialization; no error in genetics expert relying on certified copies of hospital records as to blood type of alleged father, now deceased, based on tests in 1987: *Pew Est.*, 409 Pa. Super. 417, annotated in *Fiduciary Review*, Jan. 1992, aff'g 10 Fiduc. Rep.2d 360.

No error in excluding testimony by medical expert as to reports by other nontreating medical experts: *Emigh v. Consolidated Rail Corporation*, 710 F. Supp. 608 (USDCWD Pa.).

Pennsylvania authorities permit a treating physician to testify in reliance upon entries in hospital records made by persons not called to testify. The same rule was applied as to an expert nontreating medical witness in *Commonwealth v. Daniels*, 480 Pa. 340, where forensic pathologists testified in a voluntary manslaughter case. In dismissing appellant's argument that the Commonwealth's forensic pathologist was permitted to base his opinion on hearsay, the Pennsylvania Supreme Court said:

In addition, it should be observed that all expert opinion is based on 'hearsay' to some extent. As the Fifth Circuit has noted: '[T]he opinion[s] of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.' *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971)(en banc), cert. denied, 405 U.S. 594, 92 S. Ct. 1168, 31 L.Ed.2d 231 (1972).

*McCormick Evidence* § 15, at 35, has noted a 'strong trend' in recent cases towards permitting an expert medical witness to base his opinion on reports by others on which the expert customarily relies in the practice of his profession, including, in part, observations of behavior and symptoms by lay persons. Our own decisions have been part of this trend. See *Commonwealth v. Thomas*, 444 Pa. 436, 444-45, 282 A.2d 693, 698 (1971); *Jumper v. Jumper*, 240 Pa. Super. 99, 102-03, 362 A.2d 411 (1976). In *Commonwealth v. Thomas* the court said 'where the information is that of an attending nurse or physician having personal observation and an interest in learning and describing accurately, there seems to be every reason for admitting testimony based in part on this.' 444 Pa. at 445, 282 A.2d at 699.

In a Will contest, testimony by a non-treating doctor was stricken where based on medical records not properly authenticated for admission: *Fruh Will*, 28 Fiduc. Rep. 121.

Medical treatises upon which expert witness has not expressly relied may be used in cross-examining him: 11 *Villa L.R.* 637.

## **B. Scrivener's testimony**

The scrivener's testimony as to his understanding of what the testator intended is inadmissible: *Dembinski's Est.*, 316 Pa. 61. So also, evidence of testator's instructions to the scrivener which would alter or add to the terms of the will has been held inadmissible: *Penrose's Est.*, 317 Pa. 444; *Sauer v. Mollinger*, 138 Pa. 338; *Hoffman Will*, 8 Fiduc. Rep. 609, aff'd 394 Pa. 391; cf., however, *Brownfield v. Brownfield*, 12 Pa. 136, and *Homsher Est.*, 11 Fiduc. Rep. 335.

But an important area not closed by such decisions are written communications between the scrivener and the testator. For example, in *Galli's Est.*, 250 Pa. 120, testamentary writings not properly executed were probated to throw light on the testator's intention in the Will itself. If this is permissible, why not allow in evidence all written communications between the scrivener and the testator which preceded and culminated in and explained the will or any of its



provisions? For example, some attorneys prepare a sort of layman's explanation of the Will which they give to the testator. As long as the genuineness of the writing is authenticated, should it not be admissible? Another area not foreclosed by the cases referred to above would be the scrivener's testimony of what the scrivener told the testator the language meant: see *Homsher Est.*, 11 Fiduc. Rep. 335.

Guardian of incapacitated person petitioned to have ward's codicil declared null and void for lack of capacity. Petition denied based largely on testimony of attorney-scrivener over testimony of medical expert: *Burt, Incapacitated Person*, 19 Fiduc. Rep.2d 231, annotated in *Fiduciary Review*, Aug. 1999, p. 3.

Failure to produce as a witness any person present during the critical time involved in the contest may be occasion for an unfavorable inference and should be drawn to the attention of the court: see *Masciantonio Will*, 392 Pa. 362, 381.

### **C. Subscribing Witnesses**

The evidentiary value of subscribing witnesses is succinctly stated in *Whitehouse Est.*, 6 Fiduc. Rep. 11. The court stated on page 24, "... generally, where the proponent of a will produces witnesses who testify to its execution, such proof is strong, positive evidence of the will's validity" and "witnesses by attaching their signatures to a will in effect directly assert that the testator is competent to understand and did execute the will: *Keen's Est.*, 299 Pa. 430; *Plott's Est.*, 335 Pa. 81, 88; *Guarantee Trust v. Heidenreich*, 290 Pa. 249, 253; *Rowson's Est.*, 175 Pa. 150; *Egbert v. Egbert*, 78 Pa. 326; *Werstler v. Custer*, 46 Pa. 502, 503."

Subscribing witness can "be called, examined and cross-examined by contestant as well as by proponents, because subscribing witnesses are not regarded as ordinary witnesses, but rather as witnesses of the court": *Koltowich Est.*, 311 Pa. Super. 517.

Although the Will must be proved for probate by two witnesses, and each witness must separately depose to all facts necessary so that the will would be fully proved by the testimony of either alone (*James Est.*, 329 Pa. 273), there is no requirement that evidence on behalf of contestant must be established by two witnesses; testimony of only one if believed is sufficient: *Lewis v. Lewis*, 6 S. & R. 489.

The "two witness rule" of Probate, Estates and Fiduciaries Code § 3132, does not require that subscribing witnesses attest to testatrix' testamentary capacity. It is sufficient that they prove execution of the will: *Brantlinger Will*, 418 Pa. 236. Appeal from probate was sustained where neither subscribing witness was present when will was signed, and where one of two attesting witnesses was not present when Will was signed and was not familiar with decedent's signature: *Kovel Will*, 24 Fiduc. Rep. 304. Will executed by mark was refused probate where subscribing witnesses were deceased, attestation clause did not recite necessary facts, and only one but not

two witnesses could establish that execution was proper: *Sevich Will*, 23 Fiduc. Rep. 214, annotated in *Fiduciary Review*, April 1973, p. 4.

Appeal from probate nonsuited; Will was properly executed although neither of the witnesses saw decedent sign the Will: *Wyant Will*, 6 Fiduc. Rep.2d 83. No error for court at conclusion of petitioner's case to direct petitioner to present testimony of second witness; two witness rule met by testimony of notary who recognized her signature but had no specific recollection of signing and testified as to procedure always followed: *Seixas Est.*, 12 Fiduc. Rep.2d 1.

"In Pennsylvania it has always been the rule, that after a non-professional witness has stated the facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator": *Pidcock v. Potter*, 68 Pa. 342, 351; *Weir v. Ciao*, 364 Pa. Super. 490. Whether the witness "has testified to such facts as entitle his opinion to go to the jury is always a question for the court": *Wilson v. Mitchell*, 101 Pa. 495, 503. This rule does not extend to evidence of general reputation as to capacity, which evidence is not competent to establish incapacity: *Lawrence's Est.*, 286 Pa. 58, 68. A subscribing witness may state his opinion as to capacity without stating the facts upon which such opinion is based: *Keen's Est.*, 299 Pa. 430; *Titlow v. Titlow*, 54 Pa. 216.

A subscribing or attesting witness may testify that the essentials needed for probate were lacking, even to the point of contradicting the facts recited in the attestation clause: *Charles v. Huber*, 78 Pa. 448; *Derr v. Greenawalt*, 76 Pa. 239; *Snyder v. Bull*, 17 Pa. 54; *Barr v. Graybill*, 13 Pa. 396; *Barone Est.*, 2 Fiduc. Rep. 149; *Nowalis Est.*, 1 Fiduc. Rep. 303; *Maganuco Est.*, 1 Fiduc. Rep. 188. Such a witness may even contradict his own prior testimony, but such testimony is viewed with suspicion and great caution: *Fisher Will*, 10 Fiduc. Rep. 577, 403 Pa. 612; see *Rice's Est.*, 173 Pa. 298.

"Generally, if a litigant fails to call a witness who presumably would support his allegations, the opposing party is entitled to have the jury instructed that it may infer that the witness, if called, would testify adversely to the party who failed to call him. ... But this rule is inapplicable if such witness is equally available to both sides of the litigation. ... In other words, the inference is permitted only where the uncalled witness is peculiarly within the reach and knowledge of only one of the parties": *Bentivoglio v. Ralston*, 447 Pa. 24, 29. Where proponent did not call as her witness an independent subscribing witness to the Will, Court may presume his testimony would not help her case: *Wells Will*, 14 Fiduc. Rep.2d 383.

#### **D. Lucid interval doctrine**

Old age and its usually attendant physical and mental slowdown may or may not result in lack of testamentary capacity. If the testator's old age results in "profound general mental incapacity" (*Guarantee Co. v. Waller*, 240 Pa. 575), then testator lacks capacity: *Morgan's Est.*, 146 Pa. Super. 79; see also *Dichter Will*, 354 Pa. 444 and *Timmes' Ap.*, 237 Pa. 189. Where,

however, the aged testator is only old, weak and ill, capacity may be found to exist where the changes are only those average in a person of decedent's age: *Farmer Will*, 385 Pa. 486; *Higbee Will*, 365 Pa. 381; *Wilson v. Mitchell*, 101 Pa. 495.

In *Angle Will*, 21 Fiduc. Rep.2d 83, the court upheld as valid a Will against claims of lack of capacity and weakened intellect, saying "There is no support in the law for the idea that a person in the mild or even moderate stages of Alzheimer's disease per se lacks testamentary capacity." This finding was made over the testimony of decedent's treating physician who testified that decedent suffered from Alzheimer's disease for several years before his death; that he was mentally incompetent in April 1997 (the month the will was signed) "and could not have had instances of lucidity during that month". On appeal, Superior Court affirmed, 777 A.2d 114, saying

There is no doubt that Mr. Angle suffered from Alzheimer's disease; however, the existence of that disease, in itself, does not establish incompetency to execute a legal instrument: *Weir by Gasper v. Estate of Ciao*, 521 Pa. 491, 556 A.2d 819 (1989). Since there are periods of lucidity with the disease, the relevant inquiry is whether at the time of the execution of the document, the decedent was lucid and competent: *Id.* A doctor's opinion on medical incompetence is not given particular weight especially when other disinterested witnesses establish that a person with Alzheimer's disease was competent and not suffering from a weakened intellect at the relevant time: *Id.*

## **VIII. Consideration of Motions for Nonsuit**

### **A. Applicable Rules**

A motion for a compulsory nonsuit allows the proponent to test the sufficiency of the contestant's evidence at the close of the contestant's case-in-chief. *Burns v. Kabboul*, 407 Pa. Super. 289, 312, 595 A.2d 1153, 1165 (1991). Two sets of rules apply to nonsuits in the Orphan's Court Division. PEF Code § 779 provides:

(a) In general.—The orphan's 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 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.A. § 779. Given the “under the same circumstances . . . with the same effect as in an action at law” language, recently modified Rule 230.1 of the Rules of Civil Procedure also applies. In pertinent part, Rule 230.1 provides:

(a)(1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, *at the close of the plaintiff’s case on liability*, the plaintiff has *failed to establish a right to relief*.

(2) The court in deciding the motion shall consider only *evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff’s case*.

Pa. R. Civ. P. 230.1 (effective July 1, 2001)(emphasis added). Together, PEF Code § 779 and modified Rule 230.1 govern the timing of, standard applicable to, and evidentiary issues involved in, nonsuits.

## **B. Timing**

Before its recent modification, Rule 230.1 did not include paragraph (a)(2) which now allows courts to consider evidence favorable to a plaintiff introduced by a defendant before the close of a plaintiff’s case. Former Rule 230.1 simply provided that the defendant move for a nonsuit “at the close of the plaintiff’s case.” *See Pa. Rule Civ. P. 230.1 (repealed May 30, 2001, effective July 1, 2001)*. Courts interpreted former Rule 230.1 to mean that if a proponent introduced *any* evidence – favorable or unfavorable – during the contestant’s case-in-chief, the proponent could not move for a nonsuit. *DiMaio Will (No. 2)*, 10 Fiduc. Rep.2d 18 (O.C. Chester 1989) *aff’d* 406 Pa. Super. 668, 583 A.2d 837 (1990), *accord Atlantic Richfield v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978).

By allowing courts to consider proponent’s evidence favorable to the contestant introduced during the contestant’s case, modified Rule 230.1 shifts the nonsuit preclusion point from the proponent’s introduction of “any” evidence to the commencement of the proponent’s case-in-chief. Now, the critical inquiry is whether proponents have begun their cases-in-chief. As discussed below, in undue influence cases, proponents do not begin their cases-in-chief solely by virtue of proving valid execution; introducing documents during, or straying beyond the proper scope of, cross-examination; or by taking proponents’ witnesses out of sequence during contestants’ cases-in-chief. Conversely, if a proponent begins its case-in-chief, the proponent cannot protect the right to a nonsuit by invoking the catchphrases “without waiver” or “without prejudice” to the right to a nonsuit.

## **1. Proponent's Proof of Execution**

In will contests, a proponent's due proof of execution precedes the contestant's case on undue influence. *Estate of Clark*, 461 Pa. at 59, 334 A.2d at 631631. The proponent bears the burden of proof on that issue and, therefore, must present a case-in-chief on execution before the contestant begins its case-in-chief on undue influence. *Id.*

The Orphan's Court has recognized that so long as the proponent limits its evidence *before* the contestant begins its case-in chief to proof of execution, the proponent may move for a non-suit *after* the contestant's case-in-chief. *Fiduciary Review, June 1998*. The premise underlying this exception is that subscribing witnesses are the Court's witnesses, and, therefore, their testimony should not prejudice the proponent. *See Plott's Estate*, 335 Pa. 81, 5 A.2d 901 (1939); *Maganuco Estate*, 1 Fiduc. Rep. 188, 193 (O.C. Phila. 1951).

Modified Rule 230.1 does not alter this practice. Rule 230.1 has always provided for the filing of the nonsuit motion at the "close of the plaintiff's case on liability." *Pa. R. Civ. P. 230.1 (repealed effective July 1, 2001)*. In an undue influence case, the existence of undue influence – not proper execution of the will – is the real liability question. Accordingly, the proponent should be permitted to introduce evidence of proper execution without losing the right to a nonsuit.

## **2. Proponent's Witnesses out of Sequence**

As in many cases, Orphan's Court Judges and practitioners face the prospect of witnesses such as doctors or other professionals whose availability is limited by exigent circumstances. Traditionally, Courts work around availability issues by taking witnesses out of sequence. But before Rule 230.1 was modified, "if a defense witness [was] heard during the plaintiff's case, [former Rule 230.1] prohibit[ed] the court from entering a compulsory nonsuit." *Pa. R. Civ. P. 230.1, Explanatory Comment (May 30, 2001)*. According to the Rules Committee, modified Rule 230.1 "ameliorate[s]" that situation. *Id.*

## **3. Cross-Examination**

Under former Rule 230.1, a proponent could go too far on cross-examination. For example, a proponent could refer to documents during cross-examination, but could not introduce documents into evidence without losing the right to a nonsuit. *Compare Lonsdale v. Joseph Horne Co.*, 403 Pa. Super. 12, 25 587 A.2d 810, 816, *appeal denied*, 528 Pa. 637, 598 A.2d 994 (1991)(not reversible error where nonsuit granted after defendant had referred to document) to *Highland Tank and Mfg. Co. v. Duerr*, 423 Pa. 487, 225 A.2d 83 (1967) (nonsuit precluded by defendant's introduction of document as evidence). And if during cross-examination proponents began to present defenses, they risked their right to move for a nonsuit. *Smith v. Standard Steel Car Co.*, 262 Pa. 550, 106 A. 102 (1919).

Modified Rule 230.1 practically eliminates the above-described dangers. Now, proponents can introduce documents and, assuming the court allows it, venture beyond the scope of direct examination without peril to their right to seek a nonsuit. This leeway makes sense in an undue influence case, where once the burden of proof switches to the proponent, the proponent can attack the *Clark* prongs and/or attempt to rebut the presumption. Inevitably, during the contestants case-in-chief, the proponent will cross-examine on the *Clark* prongs. Rather than guessing whether such cross-examination initiates the proponent's case-in-chief, modified Rule 230.1 simply requires the courts to disregard such evidence when considering the nonsuit.

#### **4. Motion in Abeyance Without Waiver of Nonsuit**

Modified Rule 230.1, and the case out of which it grew, eliminate the practice wherein trial judges would hold a nonsuit in abeyance so as to give it proper consideration, but would allow/compel proponents to proceed with their case in chief. So compelled to move forward, proponents would assert that they were doing so “without prejudice” to their nonsuit. *See e.g. Davenport Will*, 18 Fiduc. Rep. 2d 154, 155 n.3 (O.C. Lanc. 1998). In *Harnish v. School District of Philadelphia*, 557 Pa. 160, 732 A.2d 596 (1999), the Supreme Court flatly rejected this practice.

In *Harnish*, the defendant moved for a compulsory nonsuit at the end of the plaintiffs’ case. The trial court held the motion in abeyance and allowed the defendant to raise it after the recess “without prejudice” on account of any testimony that would be taken in the meantime. The defendant put on two witnesses, after which the trial court heard the nonsuit motion. The trial court granted the motion for nonsuit, stating that it considered only the evidence as it existed at the close of the plaintiffs’ case. *Id.* at 161, 732 A.2d at 597.

In reversing the trial judge and remanding for re-trial, the Supreme Court addressed two lines of nonsuit decisions. In one line, courts did not require remand and retrial if the admission of evidence by the defendant was “harmless error,” *i.e.*, if the trial court did not consider the defendant’s evidence in ruling on the nonsuit motion. *Id.* at 162, 732 A.2d 597 (*citing Kratt v. Horrow*, 455 Pa. Super. 140, 687 A.2d 830 (1996)). In a second line, courts applied a *per se* rule requiring the remand and retrial of any case in which a nonsuit was entered after the defendant had offered any evidence. *Id.* at 162-163, 732 A.2d at 597 (*citing Robinson v. City of Philadelphia*, 149 Pa. Cmwlth. 163, 612 A.2d 630 (1992)). The Supreme Court adopted the *per se* rule, noting that Rule 230.1 did not then contain language allowing courts to consider a nonsuit motion after a defendant had introduced evidence. *Id.* at 166, 732 A.2d at 598.

Responding to *Harnish*, the Rules Committee and Supreme Court enacted modified Rule 230.1. But, modified Rule 230.1 leaves in place language from former Rule 230.1 providing that the nonsuit motion must be made “at the close of the plaintiff’s case on liability.” *Compare Pa. R. Civ. P. 230.1 (effective Jan. 1, 1984, rescinded effective July 1, 2001) to Pa. R. Civ. P. 230.1 (effective July 1, 2001)*. Modified Rule 230.1, therefore, does not reverse *Harnish*’s holding that

the trial court may not entertain a nonsuit motion after proponents have begun their cases-in-chief.

### C. Standard

A non-suit may be granted only where it is clear that the contestant presented insufficient evidence to maintain the action. *Estate of Dunlap*, 471 Pa. 303, 380 A.2d 314 (1977). In undue influence cases proven by indirect evidence, if the contestant fails to present evidence sufficient to prove any of the three *Clark* factors, a nonsuit may be granted. *In re Bloch*, 425 Pa. Super. 300, 305-308, 625 A.2d 57, 60-61 (1993).

At first glance, the standard for a successful nonsuit appears imposing. But, the Courts have read “sufficient” in conjunction with the “clear and convincing” standard applicable to will contests. See e.g. *Vanderkraats Will (No. 2)*, 12 Fiduc. Rep. 2d 60 (O.C. Chester 1991), *aff’d* 46 Pa. Super. 644 (1992). Chester County Judge Endy succinctly stated the nonsuit burden:

Only that evidence which is proffered by the contestant which rises to the level of being clear and convincing will satisfy his burden of overcoming the presumption of validity to avert the entry of a nonsuit. The contestant’s burden is the same whether the proponent moves for a nonsuit at the end of contestant’s case or not; the contestant must establish his case by clear and convincing evidence or the burden of going forward never shifts to the proponents.

*Id.* at 62; see also *Estate of Koltowich*, 311 Pa. Super. 517, 524, 457 A.2d 1302, 1305 (1983) (contestant did not meet burden of proving *prima facie* case by clear and convincing evidence).

“Clear and convincing” is the highest burden of proof in Pennsylvania’s civil law. *Estate of Heske*, 436 Pa. Super. 63, 65 (1994). The standard falls between preponderance of evidence and proof beyond a reasonable doubt. *Riker Will*, 9 Fiduc. Rep. 2d 349, 354 (O.C. Montg. 1989). The standard is defined as:

the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing so as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [at] issue.

*In re Estate of Fickert*, 461 Pa. 653, 658, 337 A.2d 592, 594 (1975).

Applying a clear and convincing standard, the Orphan’s Court has not hesitated to grant nonsuits where a contestant failed to satisfy any one of the *Clark* prongs. For example, in *Kile Estate* the trial court granted a nonsuit on the contestant’s undue influence claim: “the contestant has failed to prove by clear and convincing evidence that decedent was of weakened intellect.”

19 Fiduc. Rep.2d 22, 36 (O.C. Lanc. 1998); *see also Quigley Estate*, 15 Fiduc. Rep.2d 4 (O.C. Chester Co. 1994).

## **D. Evidence**

Modified Rule 230.1 allows the court to consider “evidence introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff’s case.” *Pa. R. Civ. P. 230.1(a)(2)(effective July 1, 2001)*. Left unaddressed in the Rule itself are (1) whether subscribing witness testimony may affect a nonsuit decision; (2) evidentiary inferences; (3) witness credibility; and (4) the contestant’s unfavorable, uncontradicted evidence.

### **1. The Court’s Witnesses**

Orphans’ Courts have viewed subscribing witnesses and the scrivener as the Court’s witnesses in will contests. *See Plott’s Estate*, 335 Pa. 88, 5 A.2d at 905; *Maganuco Estate*, 1 Fiduc. Rep. at 193. The Supreme Court has held that the adverse testimony of such witnesses should not bind either side. *Plott’s Estate*, 335 Pa. at 88, 5 A.2d at 905. Presumably then, at nonsuit the Court should not bind the contestant to unfavorable testimony given by the Court’s witnesses.

But the Superior Court has upheld at least one trial court decision based in part on the testimony of a subscribing witness. In *Estate of Koltowich*, a subscribing witness testified about execution of the will. The trial court considered that testimony in deciding that the contestant had not made a *prima facie* showing of weakened intellect. This did not trouble the Superior Court:

As a subscribing witness to the will, however, [the witness] could be called, examined and cross-examined by contestant as well as by proponents, because subscribing witnesses are not regarded as ordinary witnesses, but rather as witnesses of the court. [Citations omitted]. [The witness] therefore, in testifying as to the signing of the will at least, was as much contestant’s as proponents’ witness. In the particular circumstances of this case therefore we do not find that the court erred in considering the testimony.

311 Pa. Super. at 525, 457 A.2d at 1306. Although the court limited its holding to “the particular circumstances” of the case, *Koltowich* stands as potential precedent for the consideration of Court’s witness testimony averse to the contestant.

### **2. Evidentiary Inferences**

“[I]n ruling on a nonsuit the evidence is to be viewed in the light most favorable to the plaintiff and the plaintiff is to be given the benefit of all favorable evidence and all reasonable inferences therefrom.” *Estate of Dunlap*, 380 A.2d at 315; *Vanderkraats Will (No. 2)*, 12 Fiduc.



Rep.2d at 61. Viewing evidence in a light most favorable to the contestant, however, does not require the Court to elevate evidence to the level of “clear and convincing” or to stretch in drawing inferences.

For example, in *Vanderkraats Will (No. 2)*, the trial court accepted as true that decedent suffered from cancer and other ailments which impaired his physical abilities. 12 Fiduc. Rep.2d at 62. The court agreed that these ailments led decedent to rely on others to attend to this physical needs. The trial court did not, however, infer from those circumstances that the decedents possessed a weakened intellect:

An infirm body does not necessarily indicate a weakened mind, , and our evaluation of the evidence ... finds it less than clear and convincing that the decedent suffered from a weakened intellect.

*Id.*

### **3. Witness Credibility**

At nonsuit, any and all inferences regarding credibility are resolved in favor of the contestant. *See Montgomery v. South Philadelphia Med. Group*, 441 Pa. Super. 151 (1995) (citing *Scott v. Purcell*, 490 Pa. 109, 113 , 415 A.2d 56, 58 (1980)). This general rule has several implications. First, at nonsuit the trial court should disregard the proponent’s impeachment of any witnesses unless that impeachment resulted in the direct contradiction of a fact to which the witness previously had testified. Second, under Rule of Evidence 607, any party, including the party calling the witness, can attack the credibility of any witness. *Pa. R. Evid. 607*. Accordingly, if the contestant impeaches a witness, the court should resolve credibility issues against that witness.

### **4. Contestant’s Unfavorable Evidence**

Rule 230.1’s “evidence favorable to the plaintiff” language precedes and modifies the phrase “introduced by the defendant”. *Pa. R. Civ. P. 230.s(a)(2)*. No such language precedes or modifies the “evidence which was introduced by the plaintiff” provision of the Rule. *Id.* By logical implication, therefore, the Court can and should consider any and all evidence introduced by the proponent, favorable or unfavorable. If a contestant introduces and does not contradict, or impeach the witness providing, unfavorable testimony, then the contestant is bound by such testimony.

That interpretation comports with Orphan’s Court nonsuit decisions. For example, in *Estate of Koltowich*, the contestant called the proponent “as on cross.” The trial court considered the proponent’s testimony about the execution of the will in deciding that the contestant failed to prove weakened intellect. On appeal, the contestant argued that the trial court erred in considering the proponent’s testimony at the nonsuit stage. The Superior Court disagreed:

The difficulty with contestant's argument is that the testimony by proponent Susan Suman was elicited by counsel for the contestant, who had called proponent as for cross-examination shortly after the beginning of the trial. Susan Suman's testimony therefore was part of contestant's case.

*Koltowich*, 311 Pa. Super. at 1306, 457 A.2d at 524-525.

#### **E. Motion to take off nonsuit is prerequisite to appeal**

Where nonsuit is granted against contestant, under Pa. R.C.P. Rule 227.1, a motion to remove the judgment of nonsuit must be filed before appeal: *Duffy Will*, 4 Fiduc. Rep.2d 183. An appeal does not lie from the entry of a judgment of compulsory nonsuit, but rather from a refusal to take it off; standard of review on appeal discussed: *Biddle v. Johnsonbaugh*, 664 A.2d 159, 444 Pa. Super. 450.

#### **IX. Close of record - risk of non-persuasion**

When undue influence is raised as an objection to the probate of the instrument, the burden of proving same is on the contestant raising such issue: *DeMaio Will*, 363 Pa. 559. The presumption of innocence can be overcome by circumstantial evidence (*Hurst Will*, 406 Pa. 612; *Quein Will*, 361 Pa. 133), but the evidence must be clear and strong: *Thompson Will*, 387 Pa. 82; *Cressman Est.*, 346 Pa. 400. Proof only of opportunity to exercise undue influence is not sufficient (*Cookson's Est.*, 325 Pa. 81), nor is mere suspicion: *May v. Fidelity Co.*, 375 Pa. 135, 147. Kindly care and solicitous attention do not amount to undue influence: *Cole Est.*, 11 Greene 47, 12 Green 66, aff'd 439 Pa. Super. 677, 653 A.2d 1307, appeal denied 541 Pa. 631, 663 A.2d 684.

The burden of proof is different, however, when undue influence is proven indirectly, through proof of a confidential relationship, weakened intellect, and substantial benefit. As noted by Judges Ott and Drayer of the Montgomery County Orphans' Court:

The process, as set forth most cogently by James Mannion, Esquire, in a paper he presented to the Orphans' Court Section of the Pennsylvania Conference of State Trial Judges in July of 1998<sup>2</sup>, was as follows:

Thus, following the denial of a motion for nonsuit the proponent will necessarily put on all of his evidence, both to attack the three elements (the basic facts) and to rebut the presumed fact (undue influence). After hearing any rebuttal from the contestant the trial is over and the court must now decide the case. The first consideration for the court is whether, based upon all the evidence, the contestant has proven the three elements of confidential relationship, weakened intellect and substantial benefit by clear and

convincing evidence. If the court determines that the contestant has not carried the day on the three elements by clear and convincing evidence the case is dismissed and judgment is entered for the proponent. If the court determines that the contestant has met his burden of proof on those three elements despite the proponent's competing evidence on the same elements, the presumption of undue influence arises and the risk of non-persuasion shifts to the proponent. Thus, the presumption requires a judgment for the contestant absent clear and convincing evidence from the proponent on the ultimate issue of undue influence. The court must now determine, again based upon all the evidence and in light of the fact that the proponent now has the risk of non-persuasion, whether the proponent has rebutted the presumption of undue influence by clear and convincing evidence. If the proponent has carried the day on the ultimate issue of undue influence, the judgment must be entered for the proponent. If not, the judgment must be entered for the contestant.

‘The Presumption of Undue Influence and the Shifting Burden of Proof,’ 18 Fiduc. Rep. 2d 348, 361-362.

<sup>2</sup> Mr. Mannion’s article revisits and updates Judge Tredinnick’s classic paper ‘Presumptions and the Burden of Proof in Orphans’ Court Litigation,’ reported at 7 Fiduc. Rep. 2d 102. Of particular note, Mr. Mannion concludes that Judge Tredinnick’s proposal requiring a mini-trial limited to evidence relating to the three elements is problematic. While this court thinks very highly of Judge Tredinnick’s scholarly analysis, we agree with Mr. Mannion that such a mini-trial is impractical.

*Pratt Will (No. 2)*, 19 Fiduc. Rep. 2d 228, 229-230 (O.C. Montg. *en banc* 1999).

## **X. Interplay between Guardianships and Will Contests**

### **A. In challenges based upon lack of capacity, an adjudication of incapacity may significantly change the risk of non-persuasion depending upon when the Will was executed**

In *Estate of Hastings*, 479 Pa. 122, 387 A.2d 865 (1978), our Supreme Court stated:

Where a person is adjudicated a mental incompetent and thereafter executes a Will, the burden is shifted to the proponent of the Will to show by clear and convincing evidence that at the time the Will was made such person possessed testamentary capacity. Lanning Will, *supra*, and cases cited therein.

479 Pa. at 128, 387 A.2d at 868; *see also Girsh Trust*, 410 Pa. 455, 471, 189 A.2d 852, 859 (1963) (“[u]nder the instant circumstances, it being definitely appellees’ burden to prove that, on the date of the execution of the trust agreement, appellant possessed mental competency, i.e., the ability to understand and appreciate the nature and effect of the trust agreement, to sustain such burden required the production not of a preponderance of evidence but of proof clear and convincing in nature.”)

If the adjudication of incompetency or incapacity is made *after* the execution of the contested Will, the burden of proof does not shift and the adjudication is merely one piece of the contestant’s evidence of general or habitual incapacity. *Estate of Hastings*, 479 Pa. 122, 128, 387 A.2d 865, 868 (1978); *Mulholland’s Estate*, 217 Pa. 65, 68, 66 A. 150 (1907).

In order to appreciate the reasoning behind requiring clear and convincing evidence of capacity when the adjudication of incapacity precedes the execution of the Will, the evidentiary significance of an adjudication of incompetency or incapacity must be considered in the context of the “rules” governing contests of Wills on grounds of lack of testamentary capacity.

The proponent in a Will contest bears the initial burden of establishing the *prima facie* validity of the Will, by proving execution in accordance with the formalities required by law. Once proven, a presumption of testamentary capacity arises and the burden of proof shifts to the contestant to overcome that presumption by clear and convincing evidence. *Estate of Cohen*, 445 Pa. 549, 551, 284 A.2d 754, 755 (1971); *Estate of Brantlinger*, 418 Pa. 236, 246, 210 A.2d 246, 252 (1965).

In challenges to a Will based upon lack of testamentary capacity, the contestant may seek to satisfy his burden in one of two ways. Perhaps most common is that the contestant introduces evidence proving that at the time decedent executed the contested Will he lacked testamentary capacity. *Id.*; *Estate of Gold*, 408 Pa. 41, 51, 182 A.2d 707, 712 (1962), *overruled sub silentio on other grounds*, as noted in *Estate of Younger*, 314 Pa. Super. 480, 488, 461 A.2d 259, 263

(1983). Alternatively, the contestant may introduce evidence of general or habitual incapacity prior and subsequent to the execution of the contested Will.<sup>5</sup> *In re: Meyers (a.k.a Girsh Trust)*, 410 Pa. 455, 468, 189 A.2d 852, 859 (1963); *Estate of Heiney*, 455 Pa. 574, 577, 318 A.2d 700, 702 (1974); *First Nat'l Bank of Easton v. Wirebach's Exec.*, 106 Pa. 37, 1884 Westlaw 13113 at \*7 (1884). Upon proof of such general or habitual incapacity, the burden of proof shifts (back) to the proponent of the Will to prove capacity “not of a preponderance of evidence but of proof clear and convincing in nature.” *Girsh Trust, supra*, 410 Pa. at 471, 189 A.2d at 859.

The proponent of a Will faced with the burden of affirmatively proving testamentary capacity (as opposed to just defending an attack on capacity) can thereafter introduce evidence proving (a) a general restoration of mental faculties, and/or (b) capacity at the very moment of execution of the Will, otherwise known as a “lucid interval”. *Girsh Trust*, 410 Pa. at 477 and n.17, 189 A.2d at 862; *Brennan's Estate*, 312 Pa. 335, 339-40, 168 A. 25, 26 (1933) (“Proponents introduced two classes of evidence to substantiate testamentary capacity at the time the will was executed: (1) Evidence that the testatrix had had such capacity for a reasonable time before and after the time of execution of the will; (2) evidence that the testatrix had such capacity at the time of making the will.”); *Estate of Heiney*, 455 Pa. 574, 577, 318 A.2d 700, 702 (1974); *Hoffman's Estate*, 209 Pa. 357, 360, 58 A.2d 665, 666 (1904); *Denner v. Beyer*, 352 Pa. 386, 390, 42 A.2d 747, 748-49 (1945) (noting that a presumption of incapacity can “be overcome by evidence of restoration of mental faculties, or at least of a lucid interval.”); *Estate of Hunter*, 416 Pa. 127, 135, 205 A.2d 97, 102 (1964); *In re: Hoopes' Estate*, 174 Pa. 373, 379, 34 A.2d 603 (“proponents produced evidence to prove -- First, that the testator always had testamentary capacity, or, secondly, that he had at the time of the execution of the will”).

The legal consequence of an adjudication of incompetency or incapacity is that, if the adjudication precedes the execution of the disputed Will, it alone satisfies contestant's burden of proving general or habitual incapacity and raises a rebuttable presumption of lack of testamentary capacity. Regardless of how the contestant meets his burden of proof – by actual proof of general incapacity, or by an adjudication of incapacity preceding the execution of the Will, or both – the proponent must thereafter come forward with clear and convincing evidence showing that the decedent had testamentary capacity to execute the Will in dispute. The underlying medical evidence documenting the testator's mental incapacity is what satisfies the contestant's burden in both situations, and the adjudication of incapacity is simply a “short cut” to get to that point.

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<sup>5</sup> A third possibility – proving general incapacity to transact business – had been suggested but was thereafter labeled “dubious”. See *Estate of Cressman*, 346 Pa. 400, 404, 31 A.2d 109, 111 (1943); cf. *Estate of Hall*, 402 Pa. 212, 166 A.2d 644 (1961) and *Estate of Brantlinger*, 418 Pa. 236, 247 n.18, 210 A.2d 246, 252 n.18 (1965).

## B. Abuse of guardianship proceedings

Probate, Estates and Fiduciaries Code § 5501

"Incapacitated person" means an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

PEF Code § 5511 provides:

(a) RESIDENT. The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate. The petitioner may be any person interested in the alleged incapacitated person's welfare. The court may dismiss a proceeding where it determines that the proceeding has not been instituted to aid or benefit the alleged incapacitated person, or that the petition is incomplete or fails to provide sufficient facts to proceed. Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. \*\*\* (emphasis added).

Petition for finding of incompetency and appointment of guardian of estate dismissed for lack of evidence, for failing to proceed, and because brought in bad faith; limitations on discovery and on mental examination of respondent imposed; press and public barred: *Tose, Alleged Incompetent*, 21 Fiduc. Rep. 562. Appellate courts have cautioned that a guardianship statute is "a dangerous statute easily capable of abuse ..." *Smith v. Smith*, 365 Pa. Super. 195, 204, 529 A.2d 466, 470 (1987)(Beck, J., concurring)(citing *Myers Estate*, 395 Pa. 459, 462, 150 A.2d 525, 526 (1959) .

In determining whether to institute incompetency proceedings, the price to be paid must be considered if the Court dismisses the petition. In *Pratt Will*, 19 Fiduc. Rep.2d 72, 228, affirmed by Superior Court without opinion at 752 A.2d 427, the Will was upheld against a claim of undue influence where contestant-daughter's filing of petition to have her parents declared incompetent was the reason for her disinheritance.

Guardianships can be abused as anticipatory Will contests, seeking to have some judicial declaration of incapacity for assistance with a later Will contest. One may even try to have a Will or codicil invalidated, but it appears the Orphans' Court has no such authority.

PEF Code § 5524 provides:

A partially incapacitated person shall be incapable of making any contract or gift or any instrument in writing in those specific areas in which the person has been found to be incapacitated. A totally incapacitated person shall be incapable of making any contract or gift or any instrument in writing.

Guardian of incapacitated person petitioned to have ward's codicil declared null and void for lack of capacity. Petition denied based largely on testimony of attorney-scrivener over testimony of medical expert: *Burt, Incapacitated Person*, 19 Fiduc. Rep.2d 231, annotated in *Fiduciary Review*, Aug. 1999, p. 3.

The traditional method to contest a Will or codicil is by caveat (PEF 906) or by appeal from probate (PEF 908). There is no statutory authority to adjudicate the validity of the testamentary writing of a living person. To so rule during lifetime while the testator is able to write yet another Will, seems to invite a waste of the Court's time.

In *Felding v. Witmer*, 23 Pa. D. 182, 31 Lanc. L. R. 69, 1913 Westlaw 3913 (C.C.P. Centre 1913), the court rejected a lifetime challenge in equity to the a Will allegedly obtained by fraud, misrepresentation and undue influence:

In no case can there be a controversy about a will of a living man. No objection can be made to a will until the testator dies and it is offered for probate, when its validity may be tested. In Pennsylvania, we have a well defined statutory system for the probate of wills before the register of wills, for the contest of wills and issues devisavit vel non in and through the register and the Orphans' Court and . . . the directions of [the] acts of assembly establishing such procedure must be strictly pursued, and within its limits the Orphans' Court has exclusive jurisdiction of these matters. It is very manifest that there can be no jurisdiction in this proceeding to inquire into the validity of any will of William Witmer, even if he were dead, and certainly not so long as he is living.

### **C. Use of guardianship transcript in later Will contest**

It seems clear that an adjudication of incompetency entered prior to the date of the Will is admissible into evidence. If the adjudication of incompetency is entered after the date of the Will, admissibility is less certain but would seem admissible unless too remote.

If the entire transcript of the incompetency hearing is offered in a Will contest alleging undue influence, the rules applicable to the admissibility of testator's declarations would seem applicable. These rules were summarized in *Fiduciary Review*, July 1955, p. 4

Declarations of the testator, whether made before or after the execution of the will, are inadmissible on the ground of incompetency when offered as substantive evidence of acts intended to influence the testator: *Buhan v. Keslar*, 328 Pa. 312, 316; *Herster v. Herster*, 122 Pa. 239, 254. And, without substantive testimony on the first issue of intent to influence, such declarations will not be entertained on the susceptibility of the testator: *Herster v. Herster*, 122 Pa. 239, 255.

Generally speaking, testator's declarations are admissible on the issue of whether or not testator's mind was susceptible to such undue influence, provided there is independent evidence tending to prove the exertion of undue influence in the execution of the will: *Ries v. Ries's Est.*, 322 Pa. 211, 218; *Herster v. Herster*, 122 Pa. 239, 255. The theory is that such declarations show the effect of the alleged undue influence on the testator's mind. \*\*\*

Offering the transcript where the witnesses who testified in the guardianship are now unavailable raises is problematic.

42 Pa. C.S.A. § 5934 provides:

Whenever any person has been examined as a witness in any civil matter before any tribunal of this Commonwealth or conducted by virtue of its order or direction, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason, and if the party, against whom notes of the testimony of such witness are offered, had actual or constructive notice of the examination and an opportunity to be present and examine or cross-examine, properly proven notes of the examination of such witness shall be competent evidence in any civil issue which may exist at the time of his examination, or which may be afterwards formed *between the same parties and involving the same subject-matter as that upon which such witness was so examined*. For the purpose of contradicting a witness, the testimony given by him in another or in a former proceeding may be orally proved. (Emphasis added).

In *Estate of Keefeauver*, 359 Pa. Super. 336, 518 A.2d 1263 (1986), the Superior Court held that it was error to admit the guardianship testimony of a psychiatrist, finding that the appellant in the Will contest was not a party to the guardianship proceedings.



Since that decision, Pennsylvania enacted the Rules of Evidence, including specifically Rule 804(b)(1) which provides:

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

If the party against whom the testimony is offered was not a party to the earlier guardianship action, query whether the alleged incapacitated person is the “predecessor in interest” to his heirs, or at least to those seeking to uphold the Will, such that a different result might occur than in *Estate of Keefeauver*? See *Beaumont v. ETL Services, Inc.*, 761 A.2d 166 (Pa. Super. 2000).

## **XI. Perpetuation of Testimony**

Although used infrequently, a proceeding to perpetuate testimony is an acknowledged procedure in Orphans' Court Division matters. See PEF Code § 775 and Pa. O.C. Rule 3.6.

PEF Code § 775 provides

The orphans' court division, by general rule or special order, may prescribe the practice relating to the perpetuation of testimony and to the perpetuation of lost or destroyed court records. When proved, such court records shall have the same legal effect as original records would have had. Notice of proceedings for the perpetuation of testimony and for the perpetuation of lost or destroyed court records shall be given in such manner as the division shall direct.

Perpetuation of testimony in Orphans' Court matters has been granted in a number of lower court cases, but no appellate court decision on this procedure in Orphans' Court matters has been located: see *Watson v. Monroe*, 12 Dist. 570; *Baker v. Weiss*, 52 Dauph. 50, 43 D. & C. 707; *Hyndman Est.*, 1 Fiduc. Rep. 399; *Timko Est.*, 4 Fiduc. Rep. 169, 16 Som. 396; *Thompson Est.*, 25 Fiduc. Rep. 254; *Flum v. Lichtenfeld*, 2 Fiduc. Rep.2d 158; *Molloy v. Molloy*, 57 D. & C. 627; cf. *Axe Est. (No. 2)*, 16 Fiduc. Rep. 49, 37 D. & C. 2d 626.

See also as to perpetuation of testimony generally: 6 Partridge-Remick, *Pa. Orphans' Court Practice*, § 48.03; 12 P.L.E., Discovery and Depositions § 23.

No reported decision has been located which provides any guidance as to how the Court shall determine whether all, none, or only a part of the testimony and exhibits shall be perpetuated. Pa. R.C.P. Rule 1532(b) states merely that "The final decree shall direct whether or not the testimony or a part thereof shall be perpetuated," but no guidelines are set forth: 5 *Goodrich Amram 2d, Procedural Rules Service*, § 1532(b):2; 14 *Standard Pennsylvania Practice* chapter 82.

## **XII. Recusal of Judge from hearing Will contest where Judge heard guardianship**

For factors and procedure on motions for recusal see: *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 507 Pa. 194; *Reilly v. Southeastern Pa. Transportation Authority*, 507 Pa. 204.

Hearing judge did not abuse his discretion in refusing to recuse himself where there was no bias or animus by the judge against the attorney: *Albright Est.*, 9 Fiduc. Rep.2d 343.

Orphans' Court judge who presided over proceeding to appoint emergency guardian of estate and person need not recuse himself from presiding over later Will contest: *Yeager Est.*, 19 Fiduc. Rep.2d 126.

*Smith v. Wescott*, 21 Fiduc. Rep.2d 43, was a Civil Division action in equity instituted by a co-executrix to rescind decedent's deed to defendants on the grounds of fraud or undue influence. After a non-jury trial the Court entered a Decree Nisi in favor of defendants. On post-trial motions before the Court en banc the plaintiff claimed error in denying plaintiff's motion for recusal filed on April 6, one day before the matter was scheduled for hearing. The Court said

We find that plaintiff has not presented evidence of bias against her that would have rendered the trial judge unable to hear plaintiff's case fairly and without prejudice, and further find that plaintiff's claim of bias is time barred. A party seeking recusal of the trial judge bears the burden of establishing the grounds for recusal: *Commonwealth v. Mercado*, 649 A.2d 946, 960 (Pa. Super. 1994). Allegations of judicial bias must be set forth specifically, and it is not enough to merely list prior unfavorable decisions: *Borough of Kennett Square v. Lal*, 645 A.2d 474, 477 (Pa. Cmwlth. 1994), *allocatur denied*, 540 Pa. 613, 656 A.2d 119 (1995); *Ware v. U.S. Fidelity & Guar. Co.*, 577 A.2d 902, 904 (Pa. Super. 1990). Furthermore, a history of animosity, if one exists, between a judge and an attorney is irrelevant to an allegation of bias toward a party: *Reilly by Reilly v. Southeastern Pa. Transp. Auth.*, 507 Pa. 204, 489 A.2d 1291 (1985).

In *Reilly v. Reilly*, supra, our Supreme Court observed:

It is incumbent upon the proponent of a disqualification motion to allege facts tending to show bias, interest or other disqualifying events, and it is the duty of the judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice because we recognize that our judges are honorable, fair and competent. Once this decision is made, it is final and the cause must proceed. The propriety of this decision is grounded in abuse of discretion and is preserved as any other assignment of error, should the objecting party find it necessary to appeal following the conclusion of the cause.

If the cause is appealed, the record is before the appellate court which can determine whether a fair and impartial trial were had. If so, the alleged disqualifying factors of the trial judge become moot. (emphasis in original)

\* \* \*

Plaintiff next argues that the trial court should have recused herself from this matter because plaintiff alleges that the trial judge has evidenced prejudice and bias toward plaintiff's counsel in the judge's handling of cases previously litigated. Plaintiff does not provide any evidence, however, that the judge was prejudiced against a party in this or any other proceeding. Instead, plaintiff has provided a list of cases in which he or his firm were unsuccessful and alleges bias and prejudice against counsel himself.

An attorney who perceives he has developed an unfavorable relationship with a judicial officer is not entitled to vent his frustration by filing claims of bias. An allegation of judicial bias must be based upon "an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry:" *Office of Disciplinary Counsel v. Price*, Pa. , 732 A.2d 599, 604 (1999). Our Supreme Court has articulated that a trial judge's determination whether she is able to hear a case impartially is given great weight and will not be overruled absent an abuse of discretion: *Reilly*, 489 A.2d 1299. The *Reilly* court also stated that trial judges are allowed this discretion in order to avoid unnecessary delays of litigation and to discourage frivolous or malicious claims of judicial bias: *Id.*

\* \* \*

"[A] party seeking recusal or disqualification must `raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred.'" *Ware v. U.S. Fidelity & Guaranty Co.*, 577 A.2d 902, 904 (Pa. Super. 1990), quoting *Goodheart v. Casey*, 565 A.2d 757, 763 (Pa. 1989).

### XIII. Dealing with frivolous Will contests

PEF Code § 908(b) provides:

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.

42 Pa.C.S.A. § 2503 provides:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

\* \* \*

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

\* \* \*

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

In *Levine Estate*, 19 Fiduc. Rep. 2d 488 (O.C. Montg. 1999), the Montgomery County Orphans' Court required the contestants to post a bond in the amount of \$125,000 pursuant to PEF Code § 908(b), the amount bearing relation to the attorneys fees incurred to date pursuant to 42 Pa. C.S.A. § 2503:

Normally, at the beginning of a will contest, the Court does not concern itself with the possibility of one side's counsel fees being awarded against the other side. The issues usually arises (if at all) after the matter has been decided and the prevailing party files a petition to assess costs and fees. The instant matter was not a normal will contest. The initial petition was filed on December 16, 1997,. Exactly one year and eight months later, petitioners' counsel had still not gotten the correct pleading into the hands of those entitled to it. A "normal" will contest would have proceeded to a hearing *and been adjudicated* in that time frame. When we directed the bond be filed, it was already abundantly clear that the

petitioners' conduct was dilatory and thus within the parameters of 42 Pa. C.S.A. § 2503(7). Under the unique (and, it is hoped, never-to-be-repeated) circumstances of this case, it was a proper exercise of our discretion to factor in the executor's attorney's fees as an item of potential costs for the purpose of determining the amount of the appeal bond. (Emphasis in original).

19 Fiduc. Rep. 2d at 491-92.

On appeal to the Superior Court, the requirement of posting the bond was affirmed in a Memorandum Opinion, 3050 EDA 1999, J.A19020/00, June 9, 2000. Although a Memorandum Opinion cannot be cited as precedent, of interest is the Superior Court's holding that "dilatory" "contemplates both intentional and unintentional conduct. We see not benefit in requiring a finding that a party intentionally delayed to award counsel fees as costs for dilatory conduct. We hold that all that is required is that the court find that the actions of the party led to an unreasonable delay." June 9, 2000 Memorandum Opinion at 8.

It should also be remembered that frivolous conduct can be addressed in the context of discovery sanctions, if appropriate. Among the numerous options available to the Court under Rule 4019(a)(1) and (c) of the Pennsylvania Rules of Civil Procedure is the ability to enter an order "as is just." If the Court has the authority under Rule 4019(c) to enter a judgment of non pros or default against a disobedient party, it would seem the Court also has the authority to impose the less severe sanction of requiring the posting of a bond as a condition of continuing an Appeal from Probate.

## **XVI. Contests of inter vivos trusts**

*Estate of Pew*, 440 Pa. Super. 195, 665 A.2d 521 (1994), held that a gift in a Will to decedent's inter vivos trust agreement incorporated the trust agreement by reference into decedent's Will, and that therefore the trust agreement had to be offered to the Register of Wills for probate. The Court further held that the failure to offer the trust agreement for probate prevented the one year period of limitations set forth in PEF Code § 908 from running. The Will in question in *Estate of Pew*, was a classic "pour over" will, which gave the residue of decedent's estate to his trustees under his inter vivos trust agreement for distribution. After *Estate of Pew*, trust agreements can be offered for probate in connection with the probate of a pour over will. If so, the one year period of limitations under PEF Code § 908 begins to run from the date of probate.

What if the trust agreement is not offered for probate consistent with *Estate of Pew*, or what if the will does not pour over into the trust? How do you contest the validity of the trust agreement and within what time frame? There appears to be at least three methods to contest the validity of a trust agreement.

First, the contestant can petition the Court to direct the probate of the trust, consistent with *Estate of Pew*, then proceed with a caveat before the Register or an appeal from the new probate decree. Second, the Trustee(s) can be cited to file an account and objections filed at the audit of the account alleging the grounds for the contest (i.e., lack of capacity, undue influence, etc.). *McCune Estate*, 3 Fiduc. Rep.2d 95 (O.C. Allegh. 1983); *Hennig Estate*, 9 Fiduc. Rep.2d 286 n.1 (O.C. Allegh. 1989); *Hoffman Estates*, 12 Fiduc. Rep.2d 274 (O.C. York 1992); *Graves Trust*, 15 Fiduc. Rep. 429 (O.C. Phila. 1965). Third, the contestant can file a petition for declaratory judgment under 42 Pa. C.S.A. § 7535, to "ascertain any class of devisees, legatees, heirs, next of kin or others' and/or to determine a question arising in the administration of the ... trust."

Other methods, such as a petition to impose a resulting trust or a complaint in equity seem to have been used before the Orphans' Court Division acquired exclusive jurisdiction over the administration and distribution of inter vivos trusts, *Girsh Trust*, 410 Pa. 455 (1963); *Mulholland v. Pittsburgh Nat'l Bank*, 405 Pa. 268 (1961); *Mulholland v. Pittsburgh Nat'l Bank (No. 2)*, 418 Pa. 96 (1965); *Levering v. Lebanon Nat'l Bank*, 10 D. & C. 2d 145 (C.P. Leb. 1955); *Graves Trust*, 15 Fiduc. Rep. 429 (O.C. Phila. 1965).

Parties. Be careful to make sure that all parties in interest are joined in the process, either in the initial petition for citation or upon motion when objections are filed. Trustees are parties in interest and have an obligation to defend the trust agreement from challenge. *Lowe's Estate*, 326 Pa. 375 (1937); *Mead v. Sherwin*, 275 Pa. 146 (1922); *Henning Estate*, 9 Fiduc. Rep.2d 286 (O.C. Allegh. 1989):

"A trustee has broad powers in matters involving the validity of the document from which it derives its powers and a positive duty to defend the document: *Restatement of Trusts Second*, § 178. A trustee has a different duty from that of an executor. An executor is only a stakeholder in a will contest and, although he is a necessary party to be joined, he may not appeal from a refusal by the register to probate the testamentary document appointing him: Probate, Estates and Fiduciaries Code of June 30, 1972, P.L. 508, § 908, 20 Pa. C.S.A. 908. A trustee, on the other hand, since he has a positive duty to defend the trust, may under the same statutory section actively participate in an appeal from any decree of the register adversely affecting the trust. The statutory section and the case law recognize that a trustee must defend the trust from attack."

Time limitations. If the trust agreement is not probated, the statutory limitation imposed by Probate, Estates and Fiduciaries Code § 908 is not applicable. It is not clear whether any other statutory limitations of time would apply, or whether the contest would be subject to equitable limitations such as laches. It is also not clear when the time limitation, if any, would begin to run.

In a situation of a pour over Will incorporating an inter vivos trust, tactically it is probably best to attack both documents in the same proceeding although the law allows the incorporation by reference of even an invalid trust or non-testamentary document (deed, map,

etc.) *Smith Estate*, 18 Fiduc. Rep. 481, aff'd 435 Pa. 258. And therein lies the error in *Pew*. In *Pew* the one year limit to attack the Will had already expired -- so even on a proceeding to test the validity of the deed of trust, it could still be incorporated by reference.

Overview of Contesting Inter Vivos Trusts. A paper prepared by John F. Meck, Esquire of Kabala & Geeseman for the American College of Trust and Estate Counsel (ACTEC) titled *Contesting Inter Vivos Trusts* is published at 18 Fiduc. Rep.2d 489. This article provides a helpful overview of inter vivos trust litigation.

