IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 2772 EDA 2001

In re: Estate of Adelaide Briskman, Deceased
Appeal of Mark G. Resop

BRIEF FOR APPELLEE

Appeal from the Order and Opinion of the Honorable Alex Bonavitacola
Issued August 13, 2001
In the Court of Common Pleas of Philadelphia
Orphans' Court Division, O.C. No. 1487 of 1994

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Estate of Julie K. Palley

Dated: March 4, 2002

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

In accordance with Pa.R.A.P. Rule 2112, the objectant presents the following counter-statement of the questions presented:

I. Whether the lower court relied on any evidence outside of the record in determining any material facts?

(Not answered by the lower court because the issue was not raised before the lower court.)

II. Whether proponent preserved the issue of standing in the proceedings in the lower court?

(Not answered by the lower court because the issue was not raised before the lower court.)

III. Whether the lower court denied the proponent due process or abused its discretion in denying the proponent a new hearing when the hearing judge failed to render a verdict after more than three years and a verdict was entered by a judge other than the hearing judge?

(Denied by the lower court.)

IV. Whether the lower court abused its discretion by determining the credibility of witnesses it did not observe?

(Not answered by the lower court.)

V. Whether the proponent produced the testimony of two competent and credible witness in support of the probate of the will?

(Denied by the lower court.)

VI. Assuming that there were two competent and credible witnesses to the will, whether the contestant provided sufficient evidence of fraud or undue influence to shift the burden of proof to the proponent of the will?

(Not answered by the lower court.)

COUNTER-STATEMENT OF THE CASE

The appellee does not object to the statement of the form of action or the procedural history presented by the appellant in his statement of the case (Brief of Appellant, pp. 5-6), but the appellee presents the following chronological counter-statement of facts in accordance with Pa.R.A.P. Rule 2112:

In late December of 1992, the decedent, Adelaide Briskman, then 82 years old, was hospitalized for a period of time. A friend of the decedent's, Tena Warnke, testified that the decedent was hospitalized for chronic sores on her legs and severe pains in her legs. (R. 97a-98a) The decedent received a bill from the hospital which she did not want to pay, but was worried that the hospital would place a lien on her home if she did not pay the bill. (R. 91a) The decedent said that she wanted to go talk to Mark Resop, the branch manager of the Nations Bank branch where Ms. Warnke was employed and the decedent did her banking, saying that she (the decedent) thought he could help her. (R. 91a) Ms. Warnke drove the decedent to the bank, saw her in the bank meeting with Mr. Resop, and took her home that evening, at which time the decedent announced that she had solved the problem of her house by deeding it to Mr. Resop. However, the decedent said that it was only temporary, until the situation with the hospital was straightened out. (R. 93a-94a) These events took place in mid or late January of 1993. (R. 94a)

A friend and neighbor of the decedent's, Margaret Ritchie, also testified that the decedent did not want to pay the hospital bill, but that she was afraid of losing all of the money she had worked so hard for. (R. 117a.) The decedent said the proponent was "very, very bright" about how to hide assets, and that she was putting everything into his name "temporarily." (R. 117a)

A recorded deed dated January 15, 1993, conveyed a remainder interest in the decedent's home in Naples, Florida, to the proponent of the will and the appellant in this appeal, Mark Resop. (Exhibit O-2; R. 244a) The deed was witnessed and notarized by employees of the bank who were under the supervision of the proponent. (R. 95a)

The will which was the subject of the contest below is dated January 21, 1993, and left the decedent's entire estate to the proponent, Mark Resop. The subscribing witnesses and notary public who signed the will were all employees of the bank branch of which the proponent was the manager. (Attachment A, p. 1; Attachment B, p. 1; Attachment C, p. 1)

One of the subscribing witnesses, Linda K. John, testified that she did not actually see the decedent sign the will, but found the will on her desk with a note from the proponent, Mark Resop, asking her to sign the will, which she did and then returned the signed will to Mr. Resop. (Attachment A, p. 3-4.)

The other subscribing witness, Rebecca K. Howard, recalled witnessing documents for the decedent, but did not know what the documents were. (Attachment B, p. 3.) She had no recollection of the execution of the will in this case (Attachment B, p. 3), and no recollection of witnessing any will for anyone, or anyone ever having a will executed at the bank. (Attachment B, p. 4.) Rebecca K. Howard also confirmed that there were "a few incidents" where she would see that the person whose signature she was witnessing was in the bank, but might not have seen the actual signature. (Attachment B, p. 5.)

In her deposition, the notary, Annette C. Tufano, had no specific recollection of the execution of the will, stating "I never knew there was a will," (Attachment C, p. 5). She said that the decedent and the witnesses signed the will in her presence because "I wouldn't have done it any other way." (Attachment C, p. 4.) However, she also stated "I don't really remember if she signed it in my office or in Mark's office, but I know that I would not have notarized it if she wasn't in front either me or him, you know." (Attachment C, p. 3)

Annette C. Tufano also appeared for the proponent at trial and contradicted both her own deposition and that of Linda K. John's by testifying that her present recollection was that the decedent signed the will in front of both subscribing witnesses (R. 185a), and that the proponent, Mark Resop, was not present when the will was signed. (R. 184a)

The proponent also called a stock broker to testify, Don Alan Morris, who had never met the decedent, but had talked to her about bond purchases on the telephone from time to time, including a purchase on January 21, 1993, the same date as the will. He testified that she was knowledgeable about bonds, "very conservative" in her financial dealings (R. 215a), and "appeared to have freedom of decision". (R. 207a-208a)

SUMMARY OF APPELLEE'S ARGUMENT

The facts alleged by the appellant to be based on evidence outside of the record were not material to the decision of the lower court and the appellant failed to raise the issue in his exceptions filed with the lower court.

The appellant failed to raise the issue of the standing of the appellee in the lower court.

The lower court did not abuse its discretion in denying the appellant a new hearing because the three year delay between the trial and the decree did not prejudice the appellant and the lower court (which did not hear the testimony at the trial) did not need to hear the testimony of any witnesses. The only witness whose testimony might be material to the appellant was thoroughly impeached by the inconsistencies between her deposition and her testimony at trial, as well as the shifting and conclusory nature of her testimony at trial, and requiring the lower court to observe her demeanor would not affect the decision of the lower court.

The lower court could determine the credibility of a witness even though the lower court did not observe her during the trial because her testimony at the trial was inconsistent with her testimony at her deposition, as well as shifting and conclusory at trial.

The evidence is insufficient to support the probate of a will when one subscribing witness testifies that she did not see the testator sign the will, the other subscribing witness testifies that she cannot remember the execution of the will, and the testimony of the notary on the self-proving affidavit first testifies at her deposition that she cannot remember the execution of the will and then gives contradictory and conclusory testimony at trial.

The objectant provided evidence of fraud or undue influence sufficient to shift the burden of proof to the proponent of the will (appellant) by showing that the proponent (who was also the manager of the decedent's branch bank) asked a bank employee to sign the will as a witness without seeing the decedent sign, and by testimony that the testator was elderly, suffering from painful sores on her legs, worried about losing her home and her savings to a claim of a hospital, and told friends that the proponent was very knowledgeable and that she was transferring assets to the proponent to protect them from the claims of the hospital.

ARGUMENT FOR APPELLEE

I. The lower court did not rely on any evidence outside of the record in determining any material facts.

The proponent of the will, the appellant in this court, complains that the lower court relied on evidence not in the record in making three findings of fact. However, the proponent failed to raise this objection in his exceptions to the decree of the lower court, and the three findings of fact are not material to the decision of the lower court.

In its opinion dated May 7, 2001, the lower court stated that (a) the decedent's "first meeting" with the proponent was on January 15, 1993, (b) the proponent sold the decedent's condominium for $118,900 after her death, and (c) the decedent transferred her investment accounts worth approximately $2,700,000) into a joint account with the proponent. (R. 262a) The proponent now says that none of these findings are supported by evidence in the record, but did not raise these issues in the exceptions filed with the lower court on May 29, 2001.

Pa. Rule of Appellate Procedure 302(a) states that "issues not raised in the lower court are waived and cannot be raised on appeal." If these issues had been raised with the lower court, the lower court would have had an opportunity to reconsider those factual findings, and also consider whether those factual findings were relevant to its ultimate conclusions.

Even if this court considers those factual findings to be erroneous, it would not change the legal conclusions reached by the lower court because the lower court ultimately held that "the Proponent, Mr. Resop, did not establish the authenticity of the 1993 Will by a fair preponderance of the evidence." (R. 265a; emphasis in original.) The date of the decedent's "first meeting" with the proponent, the sale price for the decedent's condominium, and the other transfers to the proponent during the decedent's lifetime are all irrelevant to the question of whether the proponent was able to prove the authenticity of the will.

The proponent also claims that the lower court relied on "such facts outside the record" in determining that the proponent had "unclean hands." (Brief for Appellant, p. 8) That determination was also supported by evidence within the record, as will be demonstrated below (p. 29).

II. The proponent did not preserve the issue of standing in the proceedings in the lower court.

In this appeal, proponent raises for the first time the issue of whether or not Julie K. Palley had standing in the lower court, and whether the estate of Julie K. Palley has standing to oppose this appeal.

Pa. Rule of Appellate Procedure 302(a) states that "issues not raised in the lower court are waived and cannot be raised on appeal."

In paragraph 7 of his answer to the citation to show cause why the objectant's appeal from the decree of the Register of Wills should not be sustained, proponent denied "that petitioner, Julie Palley, is a niece of the decedent," denied "that she is an heir at law of the decedent," denied "that her mother and decedent were sisters," and demanded strict proof of those averments. (R. 33a) At the hearing, the objectant offered to put Ms. Palley on the stand for the purpose of proving her relationship with the decedent, but the proponent conceded that she was the niece of the decedent. (R. 128a-129a.) No other objection was ever raised about the standing of the objectant.

The record also demonstrates that the proponent was aware of the death of Ms. Palley, filing a suggestion of death with the lower court on February 9, 2001 (R. 75a.) However, the standing of Julie Palley (or the personal representatives of her estate) was not raised in the exceptions filed by the proponent on May 29, 2001. (Attachment B to Brief for Appellant, pages 274a and 275a.)

Not only did the proponent fail to raise the issue of standing in the court below, but the proponent objected to, and was able to exclude from evidence, the document on which he now wishes to rely for his argument. The sole basis for the proponent's objection to the standing of the proponent rests with the proponent's claim that there is a 1984 will that should be probated if the contested (1993) will is invalid. At the hearing below, the objectant attempted to introduce the 1984 will into evidence and the proponent objected on the grounds that the earlier will "is neither relevant nor material…" (R. 134a) Counsel for the proponent also pointed out (correctly) that "somebody filed the will down in Naples, Florida, but it was not admitted to probate." (R. 135a) The proponent cannot rely on a document that has never been probated (and might never be probated), never been authenticated, and never been introduced into evidence to support his belated claim of lack of standing.

If the proponent had raised the issue of the objectant's standing in the court below, and if the court had found that the objectant lacked standing, the court could have issued a number of different orders that would have allowed the will contest to continue, such as by allowing beneficiaries named in the

1984 will to intervene in the appeal from the Register, by recognizing Ms. Palley as a trustee under the 1984 will (which would have given her standing; see, e.g., *Thompson Will*, 416 Pa. 249, 206 A.2d 21 (1964)), or by the appointment of a trustee ad litem to represent the interests of the beneficiaries of the 1984 will. Having failed to raise the objection, and therefore denied the court below an opportunity to address the objection, the proponent is justifiably barred from raising the objection now.[1]

III. Whether the lower court denied the proponent due process or abused its discretion in denying the proponent a new hearing when the hearing judge failed to render a verdict after more than three years and a verdict was entered by a judge other than the hearing judge?

A. The objectant was not required to notify the proponent that he had the burden of proof of establishing the due execution of the contested will by two witnesses.

The proponent repeatedly presents the issue addressed by the court below as one of "forgery," and complains that forgery was not pleaded, but it is not necessary to allege forgery in order to require that the proponent of a will provide the proof required by statute.

Pennsylvania law requires that "All wills shall be proved by the oaths of affirmations of two competent witnesses" and "In the case of a will to which the testator signed his name, proof by subscribing witnesses, if there are such, shall be preferred to the extent that they are readily available, and proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness." 20 Pa.C.S. § 3132(1).

There are many cases in which the probate of a will has been refused for failure to comply with the requirements of the statute even though there was no allegation of fraud. See, e.g., *McClure v. Redman*, 263 Pa. 405, 107 A. 25 (1919).

The decree of Judge O'Brien dated December 8, 1997, memorialized the results of a pre-trial conference and established certain pre-trial procedures. Among other things, the decree stated that "it is agreed between the parties that the probate record be introduced by the proponent without further evidence as to the execution of the will." (R. 74a)

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[1] The proponent has also failed to explain how denying the standing of Julie K. Palley and her personal representatives will somehow validate a document that has not been authenticated and allow this court to ignore the requirement of 20 Pa.C.S. § 3132(a) that all wills "shall be proved by the oaths of affirmations of two competent witnesses…."

This stipulation simply confirmed the procedure first approved by the Pennsylvania Supreme Court in *Szmahl's Estate*, 335 Pa. 89 (1939), in which the court held that, notwithstanding the requirement of a trial de novo under the Act of 1917, the proponent of a will could introduce the record of the probate of the will by the Register and, if the contestant offered no additional evidence, the record of the Register was sufficient to sustain the denial of the appeal. However, the court was clear that the ruling was merely procedural, and that the burden of proving the due execution of the will remained upon the proponent of the will.

> "A hearing de novo, as provided by the Act of 1917, means that the orphans' court shall not arrive at a decision on the basis of the testimony offered before the register, but shall hear afresh all evidence that either party may desire to present, *the burden of proof resting throughout upon the proponent to establish the due execution of the will*. The purpose of allowing the probate of the will to be placed in evidence *is merely to establish a prima facie status, and affects only the order of proof*. … The acceptance in evidence of the probate merely shifts to contestants *temporarily* the duty to come forward with evidence, but the proceeding remains at all times a hearing de novo." 335 Pa. at 92-93, (emphasis added).

The proponent in this case has therefore conceded that the "burden rests at all times upon the proponent to sustain the will," citing *Klinger v. Dugacki*, 356 Pa. 143, 51 A.2d 627 (1947)[2]. (Brief for Appellant, p. 18.) See also, *In re Ash's Estate*, 351 Pa. 317, 41 A.2d 620 (1945); *In re Dichter's Estate*, 354 Pa. 444, 47 A.2d 691 (1946).

It is also clear that the proponent knew, or should have known, that the proper execution of the will would be an issue, because the deposition of Linda K. John was taken on August 21, 1997, more than six months before the hearing, and Ms. John testified that she did not see the decedent sign the will, but signed the document afterwards, at the request of the proponent. (Attachment A, p. 3) That deposition obviously raised questions about the execution of the will and the actions of the proponent, and it is inconceivable that counsel for the proponent of the will did not realize that the circumstances surrounding the execution of the will would be an issue.

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[2] Later decisions of the Supreme Court have limited the application of *Szmahl's Estate* and have held that, in challenges to the validity of the will, the burden is on the contestant to prove lack of testamentary capacity, undue influence, or forgery *once execution of the will has been shown*. *Loudenslager Will*, 430 Pa. 33, 37, 240 A.2d 477 (1968), (emphasis added).

Ultimately, the proponent's entire argument is based on the assumption that the objectant could waive the requirements of 20 Pa.C.S. § 3132(1) and that the court could be required to admit a will to probate despite a lack of evidence that the decedent ever signed the will. There is nothing in the statute that allows the requirement of two witnesses to be waived by a party, and the lower court correctly held that it had an independent duty to the decedent to reject any stipulation that might require the probate of a will not adequately proven to be the act of the decedent.

B. The proponent was not subjected to "structural error" and was not denied due process by a delay of almost 3 ½ years between trial and verdict, and by a verdict by a judge other than the judge that presided at the trial.

The proponent cited only one case in support of the claim that the failure to provide a new hearing was a denial of due process, and that case was *U.S. v. Mortimer*, 161 F.3d 240, 241 (3d Cir. 1998), in which the Third Circuit Court of Appeals held that the disappearance of the trial judge during the defendant's closing argument to the jury was a denial of due process because the jury could have inferred that defendant's counsel was "not worth listening to." The Circuit Court found "structural error" even though it admitted in a footnote that the U.S. Supreme Court has found "structural error" in a very limited class of cases, and the present case is not similar to any of the cases in that very limited class.

There is also no support for the claim that a delay between a trial and a verdict automatically entitles one of the parties to a new trial. Although a Pennsylvania statute provides that the decision of a court sitting without a jury "shall be filed … as early as practicable, not exceeding sixty days from the termination of the trial ...,"[3] the Pennsylvania Supreme Court has held that a court's failure to grant a new trial after a seven year delay between the initial trial and the verdict was not an abuse of discretion. *Exton Drive-In, Inc., v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1969), cert. den. 400 U.S. 819. After deploring the delay in the verdict, the Supreme Court went on to say that:

> "Our unhappiness with this delay is not, however, a sufficient ground for ordering a new trial, for such an order would still further defer the end to this litigation. If the facts of this case support the decision as rendered, we would compound the injustice by requiring the parties to return to their pre-1960 positions and begin anew the trial of this case." 436 Pa. at 486.

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[3] Act of April 22, 1874, P. L. 109, § 2, as amended, Act of July 10, 1935, P. L. 640, § 1, 12 P.S. § 689.

Similarly, ordering a new trial in this case would compound the injustice of the delay unless the proponent can show some specific reason or purpose for a retrial.

That the judge who conducted the hearing did not also render the verdict is a more serious objection, but the proponent still has not shown that the lower court abused its discretion in denying a new trial.

There are decisions from this court that have allowed a judge to enter a decision who was not the judge who heard the testimony. For example, in *Com. ex rel. Dion v. Tees*, 180 Pa.Super. 84, 118 A.2d 756 (1955), cert. den. 351 U.S. 914, a habeas corpus petition was heard by one judge, but the decision was made by another judge. This court affirmed the denial of a new hearing, notwithstanding the change in judges.

Similarly, the Pennsylvania Commonwealth Court has held that the transfer of a case from one referee to another was not a violation of due process unless the objecting party could show prejudice. *Izzi v. Workers' Compensation Appeal Board (Century Graphics, Inc.)*, 747 A.2d 1289 (Pa.Cmwlth. 2000).

However, there are other decisions which have held that, where there are factual disputes, a new judge should not enter a verdict without the consent of the parties and a new trial should be ordered in the absence of consent. *Hyman v. Borock*, 211 Pa.Super. 126, 235 A.2d 621 (1967); *Ciaffone v. Ford*, 211 Pa.Super. 472, 237 A.2d 250 (1968); *Labyoda v. Stine*, 295 Pa.Super 122, 441 A.2d 379 (1982).

There is no Pennsylvania rule of court dealing with this issue, but Rule 63 of the Federal Rules of Civil Procedure states that, in a trial without a jury, "a successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden." The Notes of the Advisory Committee confirm that "the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard."

This court should therefore not order a new hearing unless there prejudice to the proponent, and there is no prejudice unless there is a witness whose testimony could change the result in this case and that witness is still available to testify.[4]

The only testimony heard by Judge O'Brien that might be material to the decision in this case is the testimony of the notary public, Annette C. Tufano. The lower court ruled that the proponent have failed to sustain his burden of proving the authenticity of the will by two witnesses, and Ms. Tufano was the only witness who appeared in court to testify regarding the execution of the 1993 will, the testimony of the subscribing witnesses having been taken by deposition. However, and as will be explained in more detail below (p. 16), the credibility of Annette C. Tufano was irredeemably impeached by the inconsistent statements that she had made during her deposition before trial, and by the uncertainty of her testimony at trial and her willingness to change her testimony to fit the facts presented to her. To believe that demeanor evidence would be material to this case, and that a new hearing might result in a different decision, it would be necessary to believe (a) that Ms. Tufano is capable of testifying so convincingly that the court hearing her testimony might be willing to overlook all of the past inconsistencies in her testimonies and (b) that when she testifies for what will be the third time, which will be more than nine years after the execution of the will, Ms. Tufano's memory will be better than it was when she gave her first deposition, four and a half years after the execution of the will.

The only purpose of the new hearing requested by the proponent would be to give Ms. Tufano a third opportunity to try to get her story straight. No rule of law requires this court to order such a futile exercise.

Furthermore, even if the testimony of Ms. Tufano were accepted as credible, she is still only one witness to the execution of the will, and no other witness provided testimony that is sufficient to support the probate of the will. (See discussion below, pp. 18 et seq.)

It was therefore not prejudicial to the proponent, not a violation of due process, and not an abuse of discretion for the lower court to have decided this case on the basis of the written record and without retaking any testimony.

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[4] At the time of trial, Ms. Tufano was residing in Colorado and so not subject to a subpoena by a Pennsylvania court. (R. 181a) It is not known whether Ms. Tufano will be willing to return to Philadelphia for a new hearing, and so it is not known whether Ms. Tufano is "available" to testify.

IV. The lower court did not abuse its discretion by determining the credibility of witnesses it did not observe.

The proponent's argument is entirely misdirected.

The cases cited by the proponent all address the deference to be given the findings of a lower court because that court has had an opportunity to hear and observe the witnesses. See, e.g., *Estate of Glover*, 447 Pa.Super. 509, 669 A.2d 1011 (1996). However, if the lower court did not have the opportunity to hear and observe the witnesses, that does not mean that the findings of the lower court are automatically invalid, but only that the findings of the lower court are not entitled to any deference.[5]

The proponent wishes this court to believe that only a judge who hears the testimony of a witness can determine the credibility of that witness. That argument was specifically rejected by this court in *Com. ex rel. Dion v. Tees*, 180 Pa.Super. 84, 90, 118 A.2d 756 (1955), cert. den. 351 U.S. 914:

> "Appellant cites no authority—and we know of none—which would support his contention that the credibility of a witness can be determined *only* by a court which hears and sees a witness. Of course, that is an advantage but it is not absolutely essential. We—as an appellate court—often pass upon the credibility of witnesses." 180 Pa.Super. at 90, (emphasis in original).

The court therefore rejected the contention that it was error for the judge to have decided a case when he had not heard or seen the witnesses and therefore (allegedly) could not pass on their credibility. 180 Pa. at 90.

Ms. Tufano's testimony was impeached by her prior inconsistent statements, and by her changeable and conclusory testimony at trial, and it was not necessary to hear her or see her to know that her testimony was not worthy of belief.

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[5] In this respect, the proponent has misstated the scope of review. The proponent has stated that the review of this court is limited to "whether the findings of fact rest on legally competent and sufficient evidence." However, the lower court based its adjudication upon a written record and did not take the testimony of any witnesses, and this court is equally competent to form an opinion as to the truthfulness of a witness after examining his or her testimony in connection with the whole record. As a result, this court can conduct a plenary review of the entire record. *Vajentic Estate*, 453 Pa. 1, 6-7, 306 A.2d 300, 304 (1973).

*V. **The proponent did not produce testimony of two competent and credible witness in support of the probate of the will.***

Before beginning a discussion of the testimony of the witnesses regarding the execution of the will, it is important to point out that the documents labeled "Exhibit O-3a" (Record p. 246a), "Exhibit O-3b" (Record p. 253a), and "Exhibit O-3c" are ***not*** copies of the documents that were admitted into evidence by the hearing judge at trial. (R. 139a) The hearing judge allowed the contestant to submit additional excerpts from the depositions of the witnesses, to be marked as exhibit "P-1" (R. 143a and 144a) However, the proponent did not label the additional excerpts as "Exhibit P-1a," etc., but instead sent them to the lower court labeled as "Exhibit O-3a," etc., and has now inserted them into the reproduced record as though they were the objectant's evidence. The difference is significant because, as will be shown below, the original exhibits of the objectant included testimony that was damaging to the proponent and was not included in substituted exhibits prepared by the proponent.

The proponent claims that he produced two competent witnesses to the will, but it is difficult to find those witnesses in the record.

The "self-proving affidavit" attached to the will is proof of the facts stated in the affidavit only if there is no contest as to the validity of the will. 20 Pa.C.S. § 3132.1(a). Furthermore, Linda K. John, whose name appears as a subscribing witness, presented clear and convincing evidence that she did not see the testator sign the will and did not see the other subscribing witness sign the will, but only signed the will and affidavit at the request of the proponent. (Attachment A, p. 3; that testimony was omitted from the substituted Exhibit O-3a, R. 246a-252a)

A. Annette Tufano's testimony was not credible.

The only witness who claimed to remember the execution of the will was the notary, Annette C. Tufano, but her testimony was contradicted by both the testimony of Linda K. John and her own deposition, and her testimony at trial was not credible.

Annette C. Tufano appeared for the proponent at the hearing and contradicted both her own deposition and that of Linda K. John's by testifying that her present recollection was that the decedent signed the will in front of both subscribing witnesses (R. 185a), and that Mark Resop was not present. (R. 184a) This conflicted with her deposition taken only seven months before, during which she testified that she didn't remember how the will was brought to her (Attachment C, p. 3; omitted from proponent's "Exhibit O-3C", R. 257a-260a), she didn't know whether the will was signed in her office

or in Mr. Resop's office (Attachment C, p. 3; R. 258a), she didn't know who brought the will to her to be notarized ("I just happened to look up and there was the paper.") (Attachment C, p. 4; omitted from proponent's "Exhibit O-3C", R. 257a-260a), and, perhaps most importantly, "I had no clue there was even a will." (Attachment C, p. 4; omitted from proponent's "Exhibit O-3C", R. 257a-260a).

In her deposition, Ms. Tufano testified that the decedent did not appear to have any physical infirmities. (Attachment C, p. 2; omitted from proponent's "Exhibit O-3C", R. 257a-260a) At trial, she testified that the decedent had problems with her legs or feet. (R. 183a)

Even in her testimony at trial, Ms. Tufano contradicted herself, based on what "must have" happened. On cross examination, Ms. Tufano testified that she did not think she had written or typed on any page other than the affidavit. (R. 194a) When shown that each page of the will had the names of the witnesses typed in, Ms. Tufano testified that she "more than likely" did type their names in, adding "if their names were not there, then I did type them in." (R. 199a)

It is also interesting to note that, at the hearing in February of 1998, she could not recall what she had said during her deposition in August of 1997, seven months before. (R. 191a).

Taken as a whole, it is clear that Ms. Tufano was willing to change her testimony at any time to fit the physical evidence and her idea of what "must have" happened.

Ms. Tufano testified at her deposition that "I don't really remember if she signed it in my office or in Mark's office, but I know that I would not have notarized it if she wasn't in front either me *or him*, you know." (Attachment C, p. 3; omitted from proponent's "Exhibit O-3C," R. 258a) (Emphasis added.) This is an admission that, if Mark Resop, her supervising branch manager, had brought her a document and asked her to notarize it, she would have done so, whether or not she herself had seen the document signed. This is consistent with the testimony of Linda K. John that the proponent of the will had asked her (Linda K. John) to sign the will as a witness even though she did not see the decedent sign the will (Attachment A, p. 3; omitted from proponent's "Exhibit O-3A," R. 246a-252a), and the testimony of Rebecca K. Howard that she might sign a document as a witness even though she had not seen the person sign the document. (Attachment B, p. 5; proponent's "Exhibit O-3B," R. 255a) As the lower court noted, it is not difficult to imagine why the witnesses might have felt obliged to sign the document without seeing the decedent sign it if the proponent, the direct supervisor in their employment, asked them to do so. (R. 269a)

For all of these reasons, the testimony of Ms. Tufano was unreliable and was properly disregarded.

B. Rebecca Howard was not a competent witness.

The other subscribing witness, Rebecca K. Howard, recalled witnessing documents for the decedent, but did not know what the documents were. (Attachment B, p. 3; proponent's "Exhibit O-3B, R. 254a) She had no recollection of the execution of the will in this case (Attachment B, p. 3; omitted from Proponent's "Exhibit O-3B," R. 253a), and no recollection of witnessing any will for anyone, or anyone ever having a will executed at the bank. (Attachment B, p. 4; omitted from proponent's "Exhibit O-3B," R. 254a)

Ms. Howard therefore provides no direct evidence to prove the authenticity of the will.

A will can sometimes be proven by a subscribing witness's proof of his or her own signature. Cf. 20 Pa.C.S. § 3132(1). However, that method of proof presupposes that the subscribing witness saw the testator sign the document and that the representations in the attestation clause are true. The testimony of Linda K. John shows that the representations in the attestation clause cannot be relied upon, and that it cannot be assumed that a subscribing witness necessarily saw the decedent sign the document.

In this case, Ms. Howard agreed with counsel for the proponent that the decedent would have either been physically present or would have acknowledged signed the document before she (the witness) would have signed it. (Proponent's "Exhibit O-3b," R. 255a-256a). However, there were "a few incidents" where she would see that the person whose signature she was witnessing was in the bank, but might not have seen the actual signature. (Attachment B, p. 5; proponent's "Exhibit O-3b", R. 255a)

At best, Ms. Howard's testimony might lead to the conclusion that the decedent was probably standing nearby when the proponent asked the decedent to witness the document. However, the witness's inability to remember whether she ever witnessed a will (Attachment B, p. 4; omitted from proponent's "Exhibit O-3b," R. 254a) shows that there is still no evidence as to whether the decedent understood that what she was signing was a will.

The proponent also claims that Ms. Howard "was familiar with the decedent's signature" (Brief for Appellant, p. 20) and she did not "question the validity of the decedent's signature on the 1993 Will" (Brief for Appellant, p. 20). But Ms. Howard never claimed to be familiar with the decedent's signature. Before witnesses can testify as to the authenticity of the decedent's signature, their competency to testify must be established. *Ligo v. Dodson*, 301 Pa. 124, 128, 151 A.2d 694 (1930).

The mere fact that the witness observed the execution of some documents, with no evidence that she ever examined the signature of the decedent, is insufficient to qualify her as competent to testify as to the decedent's signature. And Ms. Howard never claimed to have recognized the decedent's signature. The proponent asks this court to infer that the signature is authentic from the silence of a witness, which is ridiculous.

Each of the two witnesses required for the proof of a will must testify as to all facts necessary to complete the chain of evidence in order that no link in it may depend on the credibility of one; so that if one witness was only required the will would be proved by the testimony of either. *McClure v. Redman*, 263 Pa. 405, 412, 107 A. 25 (1919). In this case, the testimony of Rebecca K. Howard is insufficient to stand on its own, and must be disregarded.

C. Linda John was not a competent witness to the will.

The testimony of Linda K. John is the testimony most damaging to the proponent. By her deposition, Ms. John, one of the subscribing witnesses, testified that she did not actually see the decedent sign the will, but found the will on her desk with a note from the proponent, Mark G. Resop, asking her to sign the will, which already had a signature on it for the decedent. (Attachment A, p. 3; omitted from proponent's "Exhibit O-3A," R. 249a) The proponent therefore demonstrates creativity in claiming her as a witness to the will.

Because she testified that she did not see the decedent sign the will and that she herself signed the will afterwards, Ms. John's signature is a nullity and wholly without significance. *McClure v. Redman*, 263 Pa. 405, 407, 107 A. 25 (1919). As the lower court correctly recognized, Ms. John is therefore incompetent as a witness to the will.

The proponent nevertheless claims that Ms. John "was apparently familiar with her [the decedent's] signature from safe deposit box entries and apparently recognized it." (Brief for Appellant, p. 21) As noted above, before witnesses can testify as to the authenticity of the decedent's signature, their competency to testify must be established. *Ligo v. Dodson*, 301 Pa. 124, 128, 151 A.2d 694 (1930). Although the proponent infers that Ms. John was "apparently familiar" with the decedent's signature, she herself never said claimed to be familiar with the signature and never claimed to be able to recognize the signature.

Even if Ms. John (or Ms. Howard) had made such a claim, this court would be justified in disregarding the testimony of a bank employee regarding the signature of one of many customers on the

grounds that the claimed familiarity was "so casual, transitory and scanty" as to be unreliable. Cf., *Trostle Estate*, 52 Lanc. 263, 75 D.&C. 527 (O.C. Lanc. 1951), (testimony of relatives disregarded when relatives claimed to have seen the decedent sign her name on only a few occasions).

It also not clear whether or not Ms. John "apparently recognized" the decedent's signature. In her testimony, Ms. John said that she found the will on her desk one morning and "I did see her [the decedent's] signature was there." (Attachment A, p. 3; omitted from proponent's "Exhibit O-3a," R. 246a-252a) However, the line in the will for the decedent's signature had her name typed underneath. (R. 237a-240a) Therefore, even someone not familiar with the decedent's handwriting would refer to it as "her signature" or "Addy's signature" (R. 250a) just by making the natural assumption that the signature on the line is the signature of the person whose name is under the line. There is no reason to believe that Ms. John actually recognized the signature, or that she was doing anything more than referring to a signature on the document that was in the decedent's name.

It is also not possible to prove a will by the testimony of two witnesses whose testimony are conflicting and contradictory. *McClure v. Redman*, 263 Pa. 405, 412, 107 A. 25 (1919), (will could not be proven by one witness who testified she helped the testator sign the document and another witness who claimed to recognize the signature as the testator's). Annette Tufano testified that the decedent signed the will in the presence of Linda John, while Linda John testified that she did not see the decedent sign the document. The two testimonies are irreconcilable, and the proponent can't use both witnesses to establish the validity of the will, or even adopt part of the testimony of one witness, picking the parts he chooses to believe and rejected the parts he chooses to disbelieve. If Linda John is to believed, then Annette Tufano is not, and vice versa.

The proponent of the will had the burden of proving, by the testimony of two competent and credible witnesses, that the contested will was signed by the decedent. *Szmahl's Estate, supra*. This the proponent failed to do. The lower court was therefore correct in finding that the proponent of the will failed to provide sufficient evidence to sustain the probate of the will.

VI. Even if there were two competent and credible witnesses to the will, the contestant provided sufficient evidence of fraud or undue influence to shift the burden of proof to the proponent of the will.

The issue of whether there were "two competent attesting witnesses" to the will (as alleged by the proponent) is addressed above. However, even if the will could be shown to have been signed by the

decedent, it would still be invalid because the circumstances surrounding the execution of the will raise a presumption of fraud or undue influence which the proponent of the will did not rebut.

A. The evidence that the execution of the will was controlled by the proponent and in secret, shifted the burden of proof to the proponent to show that the decedent understood the nature and content of the alleged will.

One of the subscribing witnesses, Linda K. John, testified that she did not actually see the decedent sign the will, but found the will on her desk with a note from the proponent, Mark Resop, asking her to sign the will, which she did and then returned the signed will to Mr. Resop. (Attachment A, pp. 3-4) According to Ms. John, therefore, the proponent was involved in the execution of the will, and the signature of the decedent had occurred under circumstances that Ms. John could not observe.

The other subscribing witness and the notary were unable to recall the conditions under which the testator signed the will, and their testimony confirms that the proponent could have controlled the execution of the will. The other subscribing witness, Rebecca K. Howard, confirmed that she had on occasion signed documents as a witness when she had not actually seen the document signed. (Attachment B, p. 5) The notary, Annette C. Tufano, could initially state only that she would not notarize a document unless it had been signed in front of *either* her *or the proponent*. (Attachment C, p. 3)[6]

Under circumstances such as these, when the proponent of the will is also the primary beneficiary and has apparently arranged for the will to be signed in secret or without any independent confirmation as to the knowledge or state of mind of the testator, the courts of Pennsylvania have held that the burden of proof is on the proponent to prove that the testator understood the nature and content of the document being signed.

In *Blume v. Hartman*, 115 Pa. 32 (1886), the issue was an allegation of "fraud or undue influence." The son of the testator had prepared a will for his benefit and had arranged for his mother to sign the will in front of witnesses, but there was no evidence that the testator had ever read the will, or that it had ever been explained to her. The court stated that, "Beyond question, if the will had been written by a stranger who was by its terms the principal beneficiary, the burthen [sic] of proving that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the

[6] For reasons previously explained, the contrary testimony of Annette C. Tufano at trial is not worthy of belief and has been disregarded.

estate to be taken by the beneficiary, would rest upon him." *Blume v. Hartman*, 115 Pa. 32, 37 (1886). The court explained further:

> "On the question of undue influence of course there was no evidence of physical force or personal constraint. But of that kind of influence which accomplishes its results by misrepresentations, by deceit, by fraud, we cannot say there was no evidence, the plaintiff, unfortunately perhaps for himself, chose to conduct his proceedings in the procurement and the preparation of the will and in the inducements to his mother to sign it, secretly and by himself alone. ... He is directly responsible, therefore, for every inference which may fairly be made against him as the means he employed to obtain the assent of his mother to the execution of the will in question." 115 Pa. at 39-40.

Blume v. Hartman was cited and quoted with approval in *Estate of Clark*, 461 Pa. 52, 66 (1975), the court even adding emphasis to the last sentence of the above quote.

Blume v. Hartman was also quoted and followed in *Kovel Will*, 14 Fid.Rep. 304 (Allegh. O.C. 1974). In that case, the testimony of the subscribing witnesses was that they had not seen the testator sign the will in question. Acknowledging that there is a presumption of validity, and that the burden is on the contestant to prove undue influence, the court nevertheless concluded that, because the proponent of the will had caused the will to be executed in secret, the burden of proof shifted, and it was incumbent on the proponent of the will to prove that the will was not procured by unlawful means, that the will expressed the will of the testator, and that it was in fact her free and voluntary act. *Kovel Will*, 14 Fid.Rep. at 308-309.

In this case, there is evidence that the proponent arranged for the execution of the will in his favor through the employees under his control. The objectant is therefore entitled to every inference which may be drawn from the circumstances surrounding the execution of the will. *Blume v. Hartman*, 115 Pa. 32 (1886); *Kovel Will*, 14 Fid.Rep. 304 (Allegh. O.C. 1974).

The courts in *Blume v. Hartman* and *Kovel Will* did not attempt to characterize the jurisprudential underpinnings of their decisions, but the decisions should be considered examples of "fraud in the execution" rather than "undue influence."

In the appeal from the Register of Wills, the objectant in this case alleged both fraud and undue influence. Courts in Pennsylvania have considered the two grounds to be similar, but not identical, and have frequently discussed them together. Thus, the Pennsylvania Supreme Court declared in 1870 that "Undue influence is very nearly allied to fraud, yet it may be true that the are not identical, so that while

undue influence comprehends fraud-fraud by no means embraces every species of undue influence." *Boyd v. Boyd*, 66 Pa. 283, 293 (1870).

"Fraud in the execution" exists when a beneficiary under a will intends to and actually does deceive a testator by inducing the testator to sign a will by false statements of fact regarding the nature of the document or its contents. *Glover Will*, 14 Fid.Rep.2d 419, 430, rev'd on other grounds, 447 Pa.Super. 509 (1996).

Fraud may be established by circumstantial evidence and the same rules pertain which apply to proof of undue influence. Aker, *Law of Wills in Pennsylvania*, §9.5J.

Theoretically, fraud is separate and distinct from undue influence because 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, 518, 669 A.2d 1011 (1996). Because fraud is based on false information given to the testator, and not on overcoming the testator's will, it should not be necessary to prove that the testator was mentally weakened to the extent necessary to overcome her will, only that she was susceptible or vulnerable to manipulation through false representations.

In this case, both Tena Warnke and Margaret Ritchie testified that the decedent believed she was in danger of losing her home and her stocks and investments because of the claims of her hospital, and that the decedent believed she could avoid the loss of those assets by following the advice of the proponent of the will. (R. 91a; R. 117a)

There is also circumstantial evidence that the decedent was mislead by the proponent on at least one other occasion because the decedent did not understand the meaning and content of at least one other document, the deed dated January 15, 1993. As explained previously, the decedent left her meeting with the proponent believing that she had deeded her house to the proponent (R. 94a), while the deed itself gave the proponent a remainder interest in the house (R. 244a), and would have been ineffective to protect her house from creditors.[7] If the decedent signed a document she did not

[7]Transfers made with actual intent to hinder or delay any creditor are fraudulent, and therefore ineffective. See, Florida Statutes §§726.105(a) and 726.108. Even more importantly, the Florida Constitution, Article X, Section 3, provides a homestead exemption from forced sale and from any judgment or lien, so the decedent's home should have exempt from any claim by the hospital without any deed or other transactions with the proponent.

understand on January 15 at the request of the proponent, then six days later, on January 21, she could also have signed a will she did not understand at the request of the proponent.

The objectant has therefore established that the decedent was susceptible to fraud by the proponent, and that the proponent had the opportunity to mislead the decedent about the nature of the contents of the will dated January 21. Because the will was signed in secret, and under the control of the proponent, the objectant is entitled to every inference which may be drawn from the circumstances surrounding the execution of the will, and the proponent has the burden of showing that the execution of the will was the knowing and willful action of the decedent. *Blume v. Hartman*, 115 Pa. 32 (1886); *Kovel Will*, 14 Fid.Rep. 304 (Allegh. O.C. 1974). The proponent has obviously failed to sustain that burden, because there is absolutely no evidence that the decedent ever intended to make a will in favor of the proponent. In fact, there is no evidence that the decedent ever intended to sign any will at all.[8]

B. There is sufficient evidence that the decedent was of "weakened intellect" and susceptible to undue influence.

A contestant may prove undue influence by circumstantial evidence, and shift the burden of proof to the proponent of the will, by proving only three things, so that "where (1) a person in a confidential relationship (2) receives the bulk of the testator's property (3) from a testator of weakened intellect, the burden of proof is upon the person occupying the confidential relationship to prove affirmatively the absence of undue influence." *Estate of Clark*, 461 Pa. 52, 59-61 (1975); *Cuthbertson's Appeal*, 97 Pa. 163, 171 (1881).

There is no dispute but that the proponent received the decedent's entire estate (and so received "the bulk of the testator's property"), and the issue of whether or not the proponent was the decedent's "trusted banker" and therefore in a confidential relationship to the decedent, is discussed below, at page 29. But the proponent claims that there was no evidence of "weakened intellect." (Brief for Appellant, p. 27)

At trial, the objectant produced clear and convincing evidence that the decedent was "weak in mind," which can arise from "age, bodily infirmity, great sorrow, or other cause tending to produce such

[8] Even the witness most favorable to the proponent, Annette C. Tufano, never said that the decedent acknowledged or understood that she was signing a will. Ms. Tufano stated only that "She came into my office and asked if I would notarize a document for her. And when I noticed it was a will…." (R. 185a)

weakness, though not sufficient to create testamentary incapacity." *Cuthbertson's Appeal*, 97 Pa. 163 (1881). (*Cuthbertson's Appeal* was cited with approval in *Estate of Clark*, *supra*.) In *Hurst Will*, 406 Pa. 612, 618 (1962), the court stated that "The evidence clearly justifies the finding that during the period the will was executed she suffered from shock and grief caused by her son's recent death and was in a state of bodily infirmity and greatly weakened mentally." In *Estate of Keiper v. Moll*, 308 Pa.Super. 82, 88 (1982), the court noted that the "decedent's health was failing, he lost his wife, was diagnosed as having inoperable cancer and leaned increasingly on appellants when making decisions and administering his business affairs."

In the present case, the decedent had a lot to worry about in January of 1993. According to the testimony of Tena Warnke, the decedent's sister, with whom she had been "close," had died in 1991. (R. 100a). Like the decedent in *Heffner Will*, 19 Fid.Rep. 542 (Montg. O.C. 1969), the decedent in this case had chronic sores on her legs that caused her pain. During 1992, she also lost weight and was having a lot of problems with her legs, and so went to the hospital two or three times for outpatient surgery. (R. 101a) In fact, she had substantial problems with her feet, and pain in her feet because of circulatory problems, the entire time Tena Warnke knew her. (R. 104a) She discussed her breast cancer with her friend and neighbor, Margaret Ritchie. (R. 115a-116a) Finally and most importantly, the decedent worried about her home and her money. Tena Warnke testified that the decedent was concerned that the hospital was going to put a lien on her house. (R. 91a) Margaret Ritchie also testified that the decedent was "so afraid and you have to be careful and people are going to steal your money and she was concerned she was going to end up with nothing." (R. 116a) The decedent was "very upset and didn't like the nurses and the hospital" and "was afraid that they were going to sue her and get all of her money she had worked so hard for." (R. 117a) The extent of the decedent's fear is evidenced by the fact that she was willing to transfer her assets to another person, the proponent, rather than risk losing any of them to the hospital.

The actions of the decedent also show that she was prone to acting on whims or emotions, often irrationally. "[Weakened intellect] is one which in some circumstances can determine the trust and act upon it, but which in other circumstances does not function in a normal or rational way, thus producing actions or decisions based on emotion, whim, suggestion of others or some other illogical or even unascertainable reasons." *Heffner Will*, 19 Fid.Rep. at 546-547. According to statements made by the decedent to Margaret Ritchie, the decedent wasn't going to pay the hospital bill because "she didn't like the nurses and the hospital." (R. 117a) Having made one emotional and irrational decision, the

decedent then compounded it by becoming afraid that the hospital would take her home and other assets, and deciding to transfer them to the proponent.[9]

The depositions of the witnesses to the will, and the notary on the will, suggest that the decedent did not seem to be under any mental defect. However, Tena Warnke, who was closest to the decedent and knew her best, testified that the decedent did not always know what she was doing. (R. 106a)

The knowledge of a testator is also relevant to a finding of weakened intellect. In *Boyd v. Boyd*, the testator who was the victim of undue influence was described as "exceedingly illiterate-able to write his name, perhaps to read, but not much more." *Boyd v. Boyd*, 66 Pa. 283, 294 (1870). "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." *Heffner Will*, 19 Fid.Rep. 542, 546-547 (Montg. O.C. 1969); *Paolini Will*, 13 Fid.Rep.2d 185 (Montg. O.C. 1993). Although several witnesses testified that the decedent seemed knowledgeable about investments, there was also testimony that the decedent was unsure about matters of real estate. The proponent admitted that the decedent consulted with him about a buyer for her condominium, apparently not trusting herself to judge whether a bank president was a suitable buyer. (Exhibit O-6, R. 133a) According to Margaret Ritchie, the decedent "could not believe how much rent she was going to get" for her business property, meaning that the decedent did not understand the value of her own property. (R. 116a) And, according to the testimony of Tena Warnke, the decedent did not understand the meaning of the deed she signed, because she believed that she had deeded the property to the proponent (R. 94a), while she had actually conveyed only a remainder interest, retaining a life estate for herself. (Exhibit O-2, R. 244a)

The mental weakness of the decedent should not be evaluated in the abstract, but in relation to that of the proponent, a bank manager. "[Weakened intellect] 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

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[9] The proponent's brief refers to the testimony that the decedent believed she should transfer her home to the proponent in order to avoid a hospital bill as "improbable." (Brief for Appellant, p. 26) That is a concession that the statements made by the decedent to Tena Warnke and Margaret Ritchie were irrational, because that irrationality is the only thing that would make their testimony "improbable."

proponent or beneficiary it must be regarded as weakened since there could be no equal dealings between the two parties." *Heffner Will*, 19 Fid.Rep. 542, 546-547 (Montg. O.C. 1969); *Paolini Will*, 13 Fid.Rep.2d 185 (Montg. O.C. 1993). The decedent was frightened, the proponent was not. The decedent was unsure of the rights of the hospital to put a lien on her home, or take her assets, and believed that the proponent was "very, very clever" about those things. Those are not equal bargaining positions. Cf., *Rebidas v. Murasko*, 450 Pa.Super. 546, 554 (1996).

There is also circumstantial evidence that the proponent possessed power over the decedent and had actually exercised that power. "General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefited stands in a confidential relationship to the testator." *Boyd v. Boyd*, 66 Pa. 283, 293 (1870). Tena Warnke testified that the decedent went to see the proponent in middle or late January to get the proponent's help in preventing the hospital from putting a lien on her house (R. 91a), that the decedent went into the proponent's office and talked to him (R. 93a), and that the decedent left the bank believing that she had solved her problem by deeding her house to the proponent. (R. 94a) In fact, the decedent did sign a deed dated January 15, 1993, conveying a remainder interest in her home to the proponent. (Exhibit O-2, R. 244a) In other words, the decedent went to the proponent to seek his advice and the result of his advice was that the decedent signed a deed conveying valuable property rights to the proponent. There is, therefore, evidence that the proponent both could and did influence the decedent's behavior to his own advantage.

To summarize, there was evidence that the decedent was elderly, suffering from pains and sores in her legs, worried about losing her home and her savings to a claim by the hospital that had treated her (and that she had irrationally decided not to pay), unsure of her legal rights, and not always understanding the documents she signed. There was also evidence that the decedent signed the January 15 deed at the request of the proponent and without understanding its purpose or effect. This evidence is sufficient to demonstrate that the decedent was suffering from "weakened intellect" and susceptible to undue influence. *Cuthbertson's Appeal*, 97 Pa. 163 (1881); *Estate of Clark*, 461 Pa. 52, 59-61 (1975).

C. The Court's conclusion that the proponent was decedent's "trusted banker" is supported by the record.

The claim by the proponent that there is insufficient evidence in the record that the proponent was the decedent's "trusted banker" borders on the frivolous.

There is direct evidence of statements by the decedent that the decedent looked to the proponent as an advisor, and trusted his advice. In Tena Warnke's testimony about the decedent's concern that the hospital was going to place a lien on her home and the decedent's desire to see the proponent, Tena Warnke testified that the decedent said "I believe Mark can help me." (R. 91a) Margaret Ritchie, a friend and neighbor of the decedent, testified that the decedent told her that "Mark Resop was very, very bright about how to hide those assets," and that she (the decedent) was putting everything in his name temporarily to keep it from the hospital. (R. 117a) Therefore, according to the statements made by the decedent to her friends, she trusted the proponent enough to transfer all of her assets to him, and that he would return the assets to her at an appropriate time.

The proponent himself admitted in his answers to interrogatories that the decedent had asked a prospective buyer of her condominium to meet with the proponent, and had asked him what he thought of the prospective buyer. (Exhibit O-6, R. 133a)

Other witnesses testified that the decedent would go into the decedent's office and talk with him when she visited the bank. Linda K. John testified that "[W]hen she would come into the branch she may just stop in his office and they would talk" but not every visit. (Attachment A, pp. 2-3) Rebecca K. Howard testified that they had a "business relationship but I know there was a friendship also" and that "I know she came into the bank and she always made it a point to stop in his office and visit but I don't know of any financial transactions." (Attachment B, p. 4) There is therefore no question but that the decedent knew the proponent as the manager of the bank where she did her banking and spoke with him frequently.

There is also no question but that a banker is in a confidential relationship with his customers. In *Estate of Kieper v. Moll*, 308 Pa.Super. 82, 454 A.2d 31 (1981), the court found that a "natural confidence" existed between the decedent and Lloyd Moll, "a trust officer at a local bank, and the decedent could easily have assumed his affairs would be administered with his best interests in mind. In fact, decedent automatically turned to Lloyd Moll when arranging for the sale of his residence." 308 Pa.Super. at 86. In the present case, the proponent is also a bank officer in whom the decedent "could

have easily assumed" that her affairs would be administered "with [her] best interests in mind." Furthermore, like the decedent in *Estate of Kieper*, the decedent in the present case turned to the manager of her bank, the proponent of the will, for advice about selling her condominium. (Exhibit O-6, R. 133a)

In *Estate of Levin*, 11 Fid.Rep.2d 337 (Chest. O.C. 1991), the court held that an employee of a bank who had "befriended" the decedent and was "someone on whom she could rely" caused the bank to be in a confidential relationship with the decedent. 11 Fid.Rep.2d at 338-339.

In this case, there is ample evidence that the decedent both *could* have trusted the proponent as the manager of the branch where she banked and that the decedent *actually sought and relied* on his advice. There was therefore ample evidence that the proponent was the decedent's "trusted banker" and that the proponent was in a "confidential relationship" with the decedent for purposes of establishing that the will for his benefit was obtained by undue influence.

D. The record contains clear and convincing evidence that the proponent had "unclean hands."

The conclusion of the lower court that the proponent had "unclean hands" was also supported by evidence within the record.

In the exercise of the limited jurisdiction conferred on it by statute, the Orphans' Court must apply the rules and principles of equity. One of those principles, that "he who comes into equity must come with clean hands," applies to matters within the Orphans' Court jurisdiction. The Pennsylvania Supreme Court has therefore held that the action of an attorney in preparing a will to his own benefit, and then arranging for the execution of the will by his client without witnesses, was "unconscionable," "shocks the conscience of this Court," and must result in the denial of probate for the will. *In re Estate of Pedrick*, 505 Pa. 530, 545-546 (1984).

Estate of Pedrick was cited by the Superior Court in the rescission of an irrevocable trust prepared by an attorney (and trustee) for the grantor who was "unsophisticated in this domain and, as he testified, was 'easy' with people," the court concluding that "We glean from our review of the testimony that when his brother died, [the grantor], understandably, was overwhelmed; he acquiesced to those he perceived as more knowledgeable, and relinquished to them those matters he did not understand. [The grantor] did not know any better; [the lawyer/trustee] did." Rebidas v. Murasko, 450 Pa.Super. 546, 554 (1996).

Although the proponent of the 1993 will is not a lawyer, the circumstances are otherwise identical. There was clear and convincing evidence that the proponent arranged for the decedent to sign a deed to give him her condominium upon her death, and also arranged for the execution of a will that would give him the decedent's entire estate upon her death. But the proponent was the decedent's trusted banker and should have acted in the decedent's best interests and not taken advantage of the decedent for his personal gain, just as lawyers are prohibited from self-dealing with clients under the Rules of Professional Conduct.

Further, the testimony of Linda K. John was that the decedent arranged for her to sign the will and the self-proving affidavit to the will without actually seeing the decedent sign the will. (Attachment A, p. 3) The proponent of the will therefore submitted the will to the Register of Wills and petitioned for the probate of the will based on an affidavit *which the proponent knew to be false*. This fraud on the court is shocking, and the lower court was acting entirely within its equitable powers to deny the proponent any relief or opportunity to benefit from his succession of unconscionable actions.

CONCLUSION

As the court below observed, there is a "malodorous aroma" in this case.

The proponent of the will received first a remainder interest in the decedent's residence and then the decedent's entire estate through documents signed at his bank by employees under his supervision, and there was evidence that the proponent was directly involved in the execution of the will. When the will was contested in the court below, the proponent failed to produce credible testimony of two witnesses to the validity of the will, as required by law, and failed to produce any evidence whatsoever that the decedent ever intended to sign a will in his favor.

The proponent now asks this court to deny the evidence of the lower court or, in the alternative, to grant a new hearing for him to try to prove what he could not prove (or did not try to prove) at the first hearing. For the reasons set forth in this brief, those requests should be denied and the decree of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on March 4, 2002, two true and correct copies of the foregoing Brief for Appellee were sent by United States first class mail, postage prepaid, to:

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ATTACHMENT A

TESTIMONY OF LINDA K. JOHN

Excerpts from deposition taken August 21, 1997, by Kelley Price, for Julie K. Palley, and Thomas E. Reynolds, for Mark G. Resop.

By Kelley Price:

[Beginning page 4, line 7.]

Would you state your full name for the record, please?

Linda K. John.

And your address?

5437 23rd Place Southwest, Naples, Florida. Want the zip code?

Sure.

34117.

[Beginning page 6, line 22.]

How long did you work with Nations Bank?

Almost 15 years.

[Beginning page 7, line 11.]

When you transferred to the Pavilion office in 1988 what were your duties there?

Opening new accounts, back up for safe deposit, customer inquiries. We did have some lending duties, had to do loans at times, and I think that is about all.

[Beginning page 9, line 8.]

How many years would you say you worked at the Pavilion with Mr. Resop as your branch manager?

Approximate -- I don't know -- two years. I don't know.

[Beginning page 10, line 7.]

Now, did you know Adelaide Briskman?

Yes.

Can you tell me when you first met Adelaide Briskman?

I couldn't give you a year. I would say more than two years, approximately.

And how did you meet Adelaide Briskman?

She would come into the branch quite often. Lived nearby and walked in with her little cart and her dog. Visited the branch quite often.

Is this the Pavilion branch office?

Correct.

[Beginning page 11, line 3.]

Did you ever work with Adelaide Briskman as a customer of the bank?

Yes.

What did you help her with, just on a normal course of a visit?

She would call in or she would come in and ask the balance information on -- if a certain check had cleared, helping with safe deposit box. Pretty much is it.

Can you describe Adelaide Briskman for me during the time that you knew her? What did she look like?

A petite little old lady, always wore slippers, had sever leg like ulcers. I mean, she always looked like she was in pain with her legs usually bandaged up or black and blue or -- I mean, they just looked painful.

She would come in with her little poodle and we knew that she did not drive and the only way to get to the branch at the time that I first met her was by walking from her home to the branch, and she usually came in with a little shopping cart from Walgreens that she had gotten and -- to let her use. And that is --

[Beginning page 12, line 1.]

Can you describe her personality during the time that you dealt with her?

She was a spunky, little old lady. She seemed to have a real strong knowledge of her investments. She was very mindful of interest rates and buying and selling investments. She seemed to be very knowledgeable, and kept track. It sounds like she kept track of everything.

I recall one time where she was just -- she was upset with someone not giving her the exact information she needed in order to record something in her records.

[Beginning page 13, line 4.]

Do you know if Adelaide Briskman had any family or friends either inside of Florida or outside of Florida?

I knew that she had family up north and Tena Warnke was a very close friend of hers and helped her out a great deal due to her not being able to drive around, and helped her getting to doctors offices or picking up medicine, going to the grocery stores. Something that she couldn't handle.

[Beginning page 14, line 4.]

Do you know if Mr. Resop ever assisted with Adelaide's Briskman's affairs at the bank?

Yes.

Can you tell me what you know about that, please?

[Hearsay testimony deleted.]

[W]hen she would come into the branch she may just stop in his office and they would talk. I don't know what else he would do for her.

Did Adelaide Briskman generally speak with Mr. Resop on every visit to the bank that you are aware of?

I couldn't say that it would be every visit, no.

Would it be on a majority of the visits to the bank?

I guess so. I don't know. She talked a lot with Tena. Would make sure that if Tena was there that she would speak with her quite a bit.

[Beginning page 18, line 5.]

Okay. I'm going to show you what we've had marked as Plaintiff's Exhibit 1. And for the record, this is the Last Will and Testament of Adelaide Briskman dated January 21, 1993. Can you tell me what if your signature appears anywhere on this document?

Yes, on all four pages.

Okay. So the signature that appears on all four pages is your signature?

It looks like it, yes.

Do you recall signing this document?

I recall signing one document. It's been so long ago, and it was a strange situation so I do recall signing or witnessing Adelaide's signature.

I came in one morning and what I could recall is I thought there was one sheet of paper at my desk with the body of the document with yellow sticky notes over the body of it. And I did see that her signature was there. I don't recall if Rebecca's signature was below hers already signed, but my -- a note was on this piece of paper when I came in -- Linda, please witness and get back to me, and this was in Mark's handwriting, so I knew it was to be signed and given back to him.

Did you sign that document?

Yes.

Okay, and on the first page of this document I see typed below it says witness, Linda K. John. Did you type that in?

No.

At the time that you signed this document, was Adelaide Briskman's signature already on it?

Yes.

Did you see Adelaide Briskman sign anything called the Last Will and Testament in your presence?

No.

Did you see Linda -- strike that. Did you see Rebecca K. Howard sign the Last Will and Testament for Adelaide Briskman in your presence?

No.

[Beginning page 20, line 1.]

Did you see Annette Tufano ever notarize the Last Will and Testament of Adelaide Briskman?

Did I see her notarize it, myself?

Right.

No.

And do you recall if the notary block by Annette Tufano was signed by the time you signed the document?

Yes, it was.

Did Annette Tufano watch you sign this document?

No.

Did anyone watch you sign this document?

No.

[Beginning page 20, line 18.]

And after you signed it, what did you do with it?

I gave them back to Mark.

ATTACHMENT B

TESTIMONY OF REBECCA K. HOWARD

Excerpts from deposition taken August 29, 1997, by Thomas E. Reynolds, for Mark G. Resop.

Questioning by Thomas Reynolds:

[Beginning page 4, line 8.]

All right. Would you please state your full name and your current residence address?

Rebecca K. Howard. The address is 660 Paprika, P A P R I K A, Circle and it's Uniontown, Ohio 44685.

[Beginning page 7, line 7.]

And do you remember your date of hire at Nations Bank?

I believe December 9th, 91.

And was that at the Pavilion's branch that you started?

At the time I was hired it was actually NCNB and it was a building located across from where the Pavilion is located currently and that's where I started.

What did you do there?

I was a teller.

So you worked at Nations Bank as a teller and at some point in time Nations Bank -- was there a merger of banks?

No -- it was NCNB and CNS merged and formed Nations Bank.

Do you remember approximately when that was?

I am not sure. It was either 92 or -- I don't recall.

Okay. In any event you were working for NCNB and then there was a merger and you just stayed on as an employee of Nations Bank?

Correct.

When did you move over to the Pavilion's branch of Nations Bank?

Probably -- I would say the end of 92, beginning of 93. I don't recall because after I left the NCNB I worked at a different branch at the Coastland Mall for a while.

[Beginning page 9, line 20.]

What did you do when you were at the Pavilion branch?

I was a teller.

Who was your immediate supervisor when you moved there?

Mark Resop.

[Beginning page 10, line 4.]

Now, when you were working at the Pavilion branch did you ever come into contact with Adelaide Briskman?

Yes, I did.

And how was it that you came into contact with her?

Well, she would run her transactions occasionally through my window.

Okay. Meaning your teller window?

Right. Correct.

And how frequently would she be in the bank?

Once or twice a week.

[Beginning page 11, line 4.]

And what type of business would she do at the bank through you?

Just regular deposits into her accounts. I don't remember exactly, like specifics.

[Beginning page 11, line 23.]

Could you describe Ms. Briskman's physical appearance for me?

I just remember shorter, frail -- not frail -- like skinny, gray hair. That's about all I can remember.

Did you become friendly with her over the course of the year that you dealt with her?

I knew her when she walked into the branch and I would greet her, not real personal with her but I knew who she was.

[Beginning page 12, line 17.]

Did it seem to you that she knew -- let me start that one over again. Did it seem to you that she was aware of her monies and her different accounts?

Yes.

Would you say then that she was generally knowledgeable about her financial affairs as far as you could tell?

Yes.

Did you ever observe anything, hear anything or otherwise determine anything that would lead you to believe that Ms. Briskman was mentally incompetent or had diminished mental capacity?

No.

Was she in your opinion mentally alert?

In my opinion, yes.

The whole time that you knew her?

Um-hum, yes.

[Beginning page 14, line 6.]

Okay. I am probably making it more complicated than it needs to be. I know that you were a teller at the bank and she would come in and you would help her out with her various accounts and what I am asking you is did you provide any other services to her at the bank other than helping her out with her accounts?

I witnessed a few of the -- some of her signatures on some documents.

[Beginning page 15, line 3.]

Ms. Howard, let me show you what has been marked as the Respondent's Exhibit Number 1 to this deposition. That's the document entitled Last Will and Testament of Adelaide Briskman and ask you is that your signature on the first page of the document?

Yes, it is.

If you will turn to the second page, is that also your signature on page 2?

Yes.

And if you will turn to page 3 for me, is that your signature on page 3?

Yes.

And, finally, if you will turn to page 4, is that also your signature on page 4?

Yes.

Do you recollect the circumstances surrounding you signing this document?

No.

[Beginning page 18, line 9.]

Okay. Now, for the moment, forgetting about either of the documents that we have marked as exhibits to the deposition, do you ever recollect witnessing any documents at the bank for Adelaide Briskman?

Yes.

Do you remember what those documents were?

No.

What were the circumstances surrounding your witnessing those documents if you can recollect? And by that I mean would Ms. Briskman bring the documents to you and ask you to witness them or would somebody else bring the documents to you?

She would come into the office.

She being Ms. Briskman?

Ms. Briskman would come into the office with the documents, not necessarily approaching me first but approaching usually a platform person and then they would approach me to come over and witness the document with them.

Do you remember on how many occasions that may have occurred?

No.

Again, you don't remember what types of documents you may have witnessed?

No. No.

[Beginning page 20, line 10.]

Do you know if anyone else other than yourself at the bank witnessed documents for Adelaide Briskman?

I don't know for sure. I am not sure.

If I could get you to take a look at Respondent's Exhibit 1 to the deposition again for me, do you know where you were physically when you signed that document?

I don't recall.

Do you have any recollection whatsoever of anything surrounding the execution of that document by anyone?

No.

[Beginning page 22, line 1.]

Okay. Again, for purposes of this questioning, ignoring Exhibits Number 1 and 2, do you have any recollection of ever having witnessed a will while you were working at the Pavilion branch?

No.

Do you recollect anyone ever having a will executed at the Pavilion branch while you were there even though you may not have been a witness to the will?

No.

[Beginning page 25, line 1.]

Were your conversations with Ms. Briskman limited solely to the transactions that you would be doing for her?

Yes.

What as you recollect -- let me start that one over again. How would you describe the relationship between Adelaide Briskman and Mark Resop while you were at the Pavilion branch?

It was more of a -- there was a business relationship but I know there was a friendship also.

Okay.

I don’t know if you need me to --

Yes, ma'am. I am going to get you to expand on that a little bit for me. First of all, let me ask you about the business relationship. Did Mr. Resop handle some of her transactions or her financial affairs at the bank?

I don't recall any of that. I know she came into the bank and she always made it a point to stop in his office and visit but I don't know of any financial transactions.

Okay. Now, you say they had a friendship in addition to the business relationship. Tell me what you know about the friendship.

I was under the understanding that he was her neighbor and I know he did many things for her, took care of her, ran errands for her, took her places that she needed to go whether it was the grocery store or to get her hair done.

[Beginning page 31, line 16.]

As far as you can recollect every time you witnessed a document did the person whose signature you were witnessing sign the document in your presence?

There were a few incidents where I would see the person's signature that I was witnessing was there at the bank but as far as the actual signature I might not have seen that.

ATTACHMENT C

TESTIMONY OF ANNETTE C. TUFANO

Excerpts from the deposition taken August 29, 1997, by Thomas E. Reynolds, for Mark G. Resop.

Questioning by Thomas E. Reynolds:

[Beginning page 4, line 2.]

Q: Okay. Would you give me your full name and your current residence address?

A: I'm Annette C. Tufano, 2400 17th Avenue, Number 203-C, Longmont, Colorado.

[Beginning on page 6, line 7.]

Q: When did you move over to the Pavilion Office of Nations Bank?

A: I think it was 19 -- I'm not sure of the year. '93, I think.

Q: And what position did you have at that point?

A: I was a loan officer.

Q: Did you make all types of loans or just commercial loans?

A: Just commercial loans.

Q: Did you have any other duties at the bank other than as a commercial loan officer?

A: Not really. No.

Q: Was Mark Resop at the Pavilions Office of Nations Bank when you went there?

A: Yes.

Q: What capacity was he serving in at that time?

A: Manager. He was the manager.

Q: The branch manager?

A: Uh-huh. The branch manager.

[Beginning on page 7, line 6.]

Q: Did you know Adelaide Briskman?

A: I knew her as a customer --

Q: Okay. And --

A: -- not as a person -- I mean, personally.

[Beginning on page 7, line 23.]

Q: Okay. Explain to me, in general terms, the nature of your contact with Adelaide Briskman after you moved to the Pavilions Office of Nations Bank.

A: I just -- she was there quite a lot. And I had my own office, so I would see her out there. And she would sometimes come back in the lunch room -- and a very lovely lady -- and would bring her little poodle dog. And she was just like part of the bank, actually.

Q: So you knew her on sight?

A: Yeah. Oh, absolutely.

Q: And could you tell me approximately how many times a week Ms. Briskman would come into the Pavilions Office of Nations Bank?

A: I really don't know exactly, but maybe once or twice a week or something.

[Beginning on page 8, line 22.]

Q: Okay. Did you have contact with Adelaide Briskman typically when she would come into the bank?

A: Maybe "hello," you know, like any other customer.

Q: Okay. Did you provide any services to her in your capacity as a loan officer?

A: Not as a loan officer, no.

Q: Did you provide any services to her in any other capacity?

A: Oh, I might have gotten her a glass of water or something. She was just a sweet, little old lady. Everybody loved her.

Q: Could you describe her physical appearance for us?

A: She was a typical older lady, you know. I presumed probably in her 80s. I'm not sure. Just normal.

Q: Did she appear to you to have any physical infirmities?

A: Not to my knowledge, no.

Q: Did you ever see or hear or otherwise observe anything at any time that would lead you to believe that Adelaide Briskman had diminished mental capacity?

A: No, sir.

Q: Did you have any business contact with her when she was in the bank?

A: No, not me.

Q: Okay. Did she say or do anything or did anyone else say or do anything that would lead you to believe that Adelaide Briskman was not aware of her own financial circumstances?

A: Absolutely not.

Q: Do you believe that she was fully aware of what her financial circumstances were?

A: She appeared to be pretty alert, you know, for her age, you know.

Q: Did Adelaide Briskman have any type of relationship with Mark Resop while you were at the Pavilion Office?

A: Relationship? What do you mean? I'm sorry.

Q: Well, did she appear to have a business relationship with him or a social relationship or were they friends or any kind of relationship at all?

A: I don't think it was a relationship. She was just friendly with everybody, you know, in general, you know.

Q: Was she friendlier with some of the employees there more so than with the other employees?

A: Not to my knowledge, no, you know.

Q: Did she appear to be more friendly with Mark Resop than with any of the other employees?

A: No, not really.

[Beginning on page 11, line 19.]

Q: Ms. Tufano, let me show you what has been marked as Respondent's Exhibit Number 1 to the deposition -- and it's a document entitled Last Will and Testament of Adelaide Briskman -- and ask you: On page 4 of that document, is that your signature and a copy of your notary stamp?

A: Yes, sir.

Q: Okay. Do you have any recollection of the circumstances surrounding Ms. Briskman's execution of that document?

A: Such as? What do you mean?

Q: I mean, can you remember where it occurred and what the circumstances were?

A: She signed it at our branch, and I notarized it.

[Beginning on page 14, line 6.]

Q: Okay. How was it that the -- that Ms. Briskman came to sign this document? I mean, did she bring it into your office or how did that occur?

A: First of all, it's been four and a half years. I don't remember exactly how it was brought to me. I just remember notarizing her signature. I don't, really, as a notary pay attention to what the document says because that's not my job. My job is to notarize the signature. I don't really remember in detail, you know, exactly what happened. I do know that I would not notarize something unless she was there.

Q: Meaning Ms. Briskman?

A: Yes.

Q: Okay. I'm trying -- what I'm trying to get at is if you have any recollection of the actual signing of the will by Ms. Briskman. Did she come into your office or was it someplace else in the bank?

A: I don't really remember if she signed it in my office or in Mark's office, but I know that I would not have notarized it if she wasn't in front of either me or him, you know. Honestly, it's been four and a half years --

Q: I understand.

A: -- so I don't truly remember if it was done in my office or his office. But I do know that I would not have notarized it unless she was there.

[Beginning on page 15, line 25.]

Q: Okay. Would -- was Rebecca K. Howard present when Ms. Briskman signed the will?

A: The way that I remember it is I had two people in front of me to witness. And I don't remember Rebecca, for some reason, and I don't know why. Probably because I knew Linda, you know, more than I knew Rebecca. Being a loan officer, I wasn't really in contact with the teller area too much. So I think we just called upon somebody that was available, and maybe it was Rebecca. I just don't remember.

[Beginning on page 18, line 6.]

Q: Okay. Did Adelaide Briskman sign her will in your presence?

A: Yes, sir.

Q: Did she also sign it in the presence of the two witnesses?

A: Yes. Yeah, because I wouldn't have done it in any other way.

Q: Okay. And did the two witnesses sign their names in the presence of Adelaide Briskman?

A: As far as I know, yes. It's been four and a half years.

Q: Okay. And you say that you would not have notarized the will unless Adelaide Briskman had signed it in your presence and the two witnesses had signed it in her presence, as well?

A: Yes.

Q: Okay. Maybe I have already asked you this question -- and if I have, I apologize -- but do you recollect who brought the will to you or who asked you to notarize the will?

A: You know, it's been four and a half years, but -- and I was probably very busy. I remember having -- you know, that I was busy doing paperwork, and I just happened to look up and there was the paper. I really don't remember who brought it to me. I don't really recall.

Q: Okay. Did Adelaide Briskman say anything to you about the will when she signed it?

A: No.

Q: Did either of the two witnesses say anything to you about the will when they signed it?

A: I had no clue there was even a will.