NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

IN THE MATTER OF THE ESTATE OF: LORRAINE GABRIEL, DECEASED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: MICHELE GABRIEL, Appellant	:	No. 3234 EDA 2012

Appeal from the Decree, October 1, 2012,
in the Court of Common Pleas of Delaware County
Orphans' Court Division at No. 544-2010

BEFORE: FORD ELLIOTT, P.J.E., WECHT AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED APRIL 24, 2014**

Appellant, Michele Gabriel ("Petitioner"), appeals from the order entered by the Orphans' Court, which dismissed her petition for citation ***sur*** appeal from the register of wills, in probating the March 16, 2010 will of Lorraine Gabriel ("Decedent"). Petitioner is the daughter of Decedent who died on May 29, 2010, leaving her entire estate to her son, Walter Gabriel ("Respondent"). We affirm.

A factual and procedural history follows. In March of 2010, Decedent was suffering from the end stages of COPD (Chronic Obstructive Pulmonary Disorder).[1] Decedent's primary care physician, Dr. Tomi McCann, testified

[1] COPD is a chronic obstructive airway disease. It is caused by destruction of the lung tissue so that it is difficult for the patient to become oxygenated, and it is difficult for them to exhale carbon dioxide as well. (Notes of testimony, Vol. II, 1/6/12 at 176.)

that she was her doctor from February of 2007 until her death. (Notes of testimony, Vol. II, 1/6/12 at 175-176.) Dr. McCann explained that COPD is a generalized term; it is composed of emphysema and chronic bronchitis. (***Id.*** at 176-177.) Dr. McCann stated Decedent was afflicted with both. (***Id.*** at 177.) As a result, Decedent suffered from generalized weakness, fatigue, and issues with concentration and nutrition. (***Id.***)

In February of 2010, Decedent was hospitalized for a two-week period. Her condition was severe and life-threatening. (***Id.*** at 181.) Upon Decedent's discharge from the hospital, a BiPAP[2] mask was prescribed for her to assist her breathing function. (***Id.*** at 183.) Decedent was instructed to wear the BiPAP mask for five hours throughout the day as well as while she slept. (***Id.*** at 186-1878.) Dr. McCann testified that the use of the BiPAP mask would improve Decedent's condition and raise her cognitive functions. (***Id.*** at 183.)

Decedent was placed under the care of hospice on March 13, 2010; Respondent moved into Decedent's home on March 14, 2010 and became her primary caregiver. (Notes of testimony, Vol. II, 1/10/12 at 232.) Prior to March 14, 2010, Petitioner's daughter Ashley lived with Decedent.

[2] Bi-Level Positive Airway Pressure. The device forms a tight seal around the patient's mouth with straps to hold it on their face. There is tubing that connects it to another machine, so that a certain amount of pressure is applied when the patient takes a breath to try to keep the airways open in order to get oxygen deep into the lungs. (***Id.*** at 183.)

Respondent testified that he believed Ashley's behavior[3] to be inappropriate, and he told Ashley to move out. (***Id.*** at 252-253.) In fact, Respondent testified he and Ashley did not spend one night in the house together. (***Id.*** at 253.) Respondent was named as Decedent's agent on her healthcare power of attorney on March 15, 2010 (C-4).

Prior to Respondent moving in with her, Decedent had arranged a meeting with Attorney Drew Dorfman. The initial contact with Dorfman was made in February of 2010 by Donald Barna, Jr., the nephew of Decedent. (Notes of testimony, Vol. I, 1/6/12 at 117.) Attorney Dorfman testified he told Barna that either Decedent or one of her children should call him to set up the appointment. (***Id.***) Subsequently, Decedent called Dorfman and set the appointment for March 15, 2010 to discuss some "family issue." (***Id.*** at 119-120.) Dorfman further testified he received a call from Respondent either the day before or the Friday before asking to change the appointment to the next day, March 16th, because of car problems. (***Id.*** at 120.)

Respondent drove Decedent to Attorney Dorfman's office on March 16, 2010. Dorfman talked to Decedent privately for approximately one and one-half hours. (***Id.*** at 130.) According to Attorney Dorfman, Decedent informed him she wished to execute a new will. They discussed Decedent's

[3] According to Respondent, on March 15, 2010, Ashley arrived at the house at 3:15 a.m. "under the influence." (***Id.*** at 253.) Respondent also testified that he found six empty half-gallon bottles of Vodka in a black duffle bag in Ashley's room. He also discovered three bottles of wine in the freezer along with multiple brands of beer and liquor in the garage. (***Id.*** at 254.)

family, her assets, and current events so that he could assure himself that Decedent was of sound mind. (***Id.*** at 127-128.) Decedent informed Attorney Dorfman that she did not want Petitioner's boyfriend, Frank Focht, sharing in her estate. (***Id.*** at 127.) According to Attorney Dorfman, Decedent told him that she did not like Focht at all; she did not like the way Focht treated Petitioner. (***Id.*** at 126.) Decedent also believed Focht and Petitioner had taken a loan out in her name. (***Id.***)

Dorfman and his two assistants testified that Decedent was alert and genial on March 16, 2010. Dorfman testified Respondent did not participate in the estate planning process or the execution of the will; in fact, Respondent was never in the office while he spoke to Decedent. (***Id.*** at 124-125.) Dorfman testified he drafted the will on March 16th according to Decedent's wishes. Decedent reviewed the will and made corrections to grammar. Decedent then signed the will, and Dorfman's two assistants acted as witnesses.

After the execution of the new will on March 16, 2010, Decedent and Respondent went to the home of her sister, Patricia Barna, and brother-in-law, Donald Barna, Sr. According to Barna, Sr., sometime in mid-2007, Decedent had given him her will and asked him to hold it for her for safekeeping. (***Id.*** at 123.) Barna, Sr., testified that on March 16, 2010, he, his wife, Decedent, and Respondent had tea that afternoon and the visit lasted about two hours. (***Id.*** at 125-126.) Barna, Sr., further testified that

outside the presence of Respondent, Decedent asked him to throw away her previous will because she had made a new will. (***Id.*** at 129, 132.) Barna, Sr., threw the 2007 will in a wastebasket and later threw it out with the trash. (***Id.*** at 130.) According to Donald Barna, Sr., Decedent appeared sound mentally. (***Id.*** at 126-127, 131-132.)

Respondent lived with Decedent from March 14, 2010, until her death on May 29, 2010. During this time, Petitioner continued to visit Decedent. According to Respondent, he encouraged Petitioner to have Decedent spend weekends at Petitioner's home.

On June 9, 2010, Respondent was issued letters testamentary as the executor of decedent's estate. Petitioner appealed to the Orphans' Court of Delaware County which resulted in hearings being held on January 6, 2011, and January 9-10, 2012. On March 27, 2012, the Orphans' Court issued a decree and accompanying decision containing findings of fact and conclusions of law which granted Respondent's motion for a compulsory non-suit on the issue of undue influence and lack of testamentary capacity. On April 3, 2012, Petitioner filed motions to remove the non-suit, for judgment notwithstanding the verdict, or in the alternative, for a new trial. The Orphans' Court denied the motions.

Petitioner filed an appeal to this court appealing the decree dated May 21, 2012, which denied her exceptions. Petitioner was ordered to file a concise statement of errors complained of on appeal; she timely complied.

The Orphans' Court requested this court to relinquish jurisdiction and remand. By order dated September 25, 2012, the case was remanded. Further proceedings were conducted, and on October 1, 2012, the Orphans' Court issued a decree with an accompanying decision containing 274 Findings of Fact and Conclusions of Law, which again denied Petitioner's appeal from the order of the register of wills which admitted the testamentary writing dated March 16, 2010, to probate as the Last Will and Testament of Decedent. Petitioner filed exceptions, and on October 17, 2012, the Orphans' Court denied those exceptions.

Petitioner filed a timely notice of appeal and was ordered to file a concise statement of errors complained of on appeal. Petitioner complied and raised 40 issues for appellate review. On appeal, Petitioner raises the following six issues:

> 1. By the court in effect denying the motion for compulsory non suit of the proponent, Walter Gabriel, (by not granting same) was this a finding by the Court that the contestant, Michelle Gabriel had established the elements of the three prong test, identified in Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975), that is: that the Contestant satisfied her burden of going forward and of persuasion with clear and convincing evidence, to establish that the will had been procured through undue influence established by *indirect* evidence, to wit: 1) that the will gave to the Proponent a substantial benefit; 2) that the Proponent enjoyed a confidential relationship with the Decedent; and 3) that the Decedent was of weakened intellect; and to make out a prima facie case by *direct* evidence that the

will was procured through undue influence practiced by proponent, Walter Gabriel and render the following conclusions of law, made by the court in its order, erroneous as a matter of law:

a. The Decision of the Trial Court, Conclusion of Law no. 16 which found that Petitioner/Contestant failed to establish the existence of a confidential relationship between the Respondent/Proponent and the Decedent by clear and convincing evidence;

b. The Decision of the Trial Court, Conclusion of Law no. 17, which found that Petitioner/Contestant failed to establish that Decedent suffered from a weakened intellect.

2. By the court in effect denying the motion for compulsory non-suit of the proponent, Walter Gabriel, (by not granting same) did the burden shift to the proponent of the will to establish by clear and convinc[ing] evidence that: decedent did *not* suffer a weakened intellect, that proponent did *not* enjoy a confidential relationship with decedent, and that proponent did *not* receive a substantial benefit through the will; as identified in Estate of Clark, 461 Pa. 52, 334 A.2d 628 (1975).

3. Did proponent Walter Gabriel fail to sustain his burden to overcome the presumption of undue influence afforded to contestant when the motion for compulsory non suit was not granted, to establish with clear and convincing evidence *the absence* of undue influence by the test established in Clark, *supra*., to wit: (1) lack of substantial benefit, (2) lack of confidential relationship, (3) medical testimony or clear and convincing evidence that decedent Lorraine Gabriel was not of weakened intellect?

4. Did proponent Walter Gabriel fail to sustain his burden to establish with clear and convincing evidence that proponent, Walter Gabriel *did not* exercise undue influence over his mother, decedent, Lorraine Gabriel, by failing to put on any evidence or clear and convincing evidence that he did not exercise an overmastering influence over a weak mind of decedent Lorraine Gabriel sufficient to overcome by a preponderance the evidence that he did exercise an overmastering influence over a weak mind of decedent Lorraine Gabriel? Did the entirely false and erroneous findings of fact made by the court upon which the Final Decree was based, render the Final Decree in error?

5. Was the court's refusal to permit rebuttal evidence, specifically as to the affection the decedent Lorraine Gabriel had for Frank Foscht, to rebut the testimony of Donald Barna that Lorraine Gabriel supposedly claimed that "she didn't want that SOB (Frank Foscht) to get anything", and the fact that decedent, Lorraine Gabriel was physically incapable of dressing herself nor making herself breakfast on the morning of March 16, (the date of the will) to rebut the testimony of the proponent, Walter Gabriel who testified that on the morning he took her to attorney Dorfman's office to make out and sign the will, "She was already dressed, took her medicine, made her bowl of Rice Krispies with bananas, and was ready to go out the door. Had her coat even on her chair", prejudicial to the contestant, and render the Final Decree in error?

6. Was not the testimony of attorney Dorfman, the scrivener of the will, that Lorraine Gabriel told him at the time that prepared and signed the will prepared for her by him, that she had four grandchildren when she actually had seven grandchildren, and that her daughter

> was not even mentioned in the will, establish that she did not know the objects of her bounty and clear and convincing evidence by itself, that Lorraine Gabriel suffered from a weakened intellect at the very time she made out and signed her will?

Petitioner's brief at 6-9 (emphasis in original).

Preliminarily, we observe that "The statement of the questions involved must state concisely the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail." Pa.R.A.P. 2116. "Although the page limit on the statement of questions involved was eliminated in 2013, verbosity continues to be discouraged." Pa.R.A.P. 2116, comment. "The appellate courts strongly disfavor a statement that is not concise." ***Id.*** Due to the verbosity and confusing nature of Petitioner's above-referenced issues, we will attempt to address Petitioner's main points of contention.

> Our review in [a will contest] is limited to determining whether the findings of fact . . . rest on legally competent and sufficient evidence, and whether an error of law has been made or an abuse of discretion committed. It is not our task to try the case anew. The rule is particularly applicable "to findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony."

Burns v. Kabboul, 595 A.2d 1153, 1161 (Pa.Super. 1991) (citations omitted).

With regard to burdens of proof in a situation where the contestant of a will claims undue influence by the proponent of the will, our supreme court stated:

> The resolution of a question as to the existence of undue influence is inextricably linked to the assignment of the burden of proof. Once the proponent presents evidence of the formality of probate, a presumption of lack of undue influence arises; the effect is that the risk of non-persuasion and the burden of coming forward with evidence of undue influence shifts to the contestant.

In re Estate of Clark, 461 Pa. 52, 59, 334 A.2d 628, 631 (1975).

A contestant who claims that there has been undue influence upon the testator of a will has the burden of proving such undue influence. ***In re Estate of Stout***, 746 A.2d 645, 648 (Pa.Super. 2000). "A prima facie case of undue influence is established where (1) a person in a confidential relationship (2) receives the bulk of the testator's property [***i.e.***, substantial benefit] (3) from a testator of weakened intellect." ***Id.*** (quotation omitted). "If the will contestant is able to establish these three requirements by clear and convincing evidence, then the burden of proof shifts to the proponent of the will to establish lack of undue influence." ***Id.*** If a party contesting a will fails to prove any element of undue influence by clear and convincing evidence, the claim necessarily fails. ***In re Estate of Glover***, 669 A.2d 1011, 1016 n.4 (Pa.Super. 1996).

In her first argument, Petitioner contends that the Orphans' Court's failure to explicitly grant Respondent's motion for compulsory nonsuit was an

effective denial of same. We believe the record indicates otherwise. In its October 1, 2012 decision, the Orphans' Court concluded:

> 16. The Petitioner/Contestant failed to establish the existence of a confidential relationship between the Respondent and the Decedent by clear and convincing evidence.
>
> 17. The Petitioner/Contestant failed to establish that the Decedent was possessed of a weakened intellect on March 16, 2010 by clear and convincing evidence.
>
> WHEREFORE, the Respondent's Motions for a Compulsory Non-Suit of the Issue of Undue Influence and Lack of Testamentary Capacity are GRANTED and the Order of the Register of Wills of Delaware County admitting to probate a certain writing of March 16, 2010 as the Last Will and testament of Lorraine M. Gabriel and issue Letters Testamentary thereon to Walter F. Gabriel is AFFIRMED.

Orphans' Court decision, 10/1/12 at 43. Based on the above, the Petitioner did not carry her burden and the Orphans' Court granted Respondent's motion for a compulsory nonsuit. Therefore, Petitioner failed to state a ***prima facie*** case of undue influence.

We will next consider Petitioner's challenge to the Orphans' Court's conclusion that she did not carry her burden of establishing the element of a confidential relationship between Decedent and Respondent for purposes of Petitioner's ***prima facie*** case of undue influence. We conclude initially that the Orphans' Court did not commit an abuse of discretion or an error of law in making this determination.

With regard to the confidential relationship element of the undue influence test, we have stated:

> 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 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).

Basile v. H & R Block, Inc., 777 A.2d 95, 101 (Pa.Super.2001). Recognizing a wide array of relationships that might create such a discrepancy, our courts have been circumspect in limiting the circumstances under which a confidential relationship might be deemed to arise. ***See Young v. Kaye***, 443 Pa. 335, 279 A.2d 759, 763 (1971) (cautioning that confidential relation "is not restricted to any specific association of persons nor confined to technical cases of fiduciary relationship but is deemed to exist whenever the relative position of the parties is such that one has power and means to take advantage of or exercise undue influence over the other"). Thus, our courts have recognized consistently that the relationship may be indicated whenever a party in a superior position engenders the other's trust "and purports to act or advise with the other's interest in mind." ***Basile***, 777 A.2d at

> 102 (quoting ***Frowen v. Blank***, 493 Pa. 137, 425 A.2d 412, 418 (1981)).

Owens v. Mazzei, 847 A.2d 700, 709-710 (Pa.Super. 2004).

Instantly, Petitioner argues a confidential relationship existed between Respondent and Decedent. In support of her argument, Petitioner points to the fact that Respondent became Decedent's attorney-in-fact over her health and person.

The record shows Respondent was given a durable power of attorney for health care decisions. A durable power of attorney ("DPOA") is authorized to make only health care decisions, and even then, the principal must be incapacitated or otherwise unable to make her own decisions before the DPOA has the authority to act. Any concern that an agent will abuse his position for financial gain is not present in the relationship between a DPOA and his principal.

In this case, Respondent's mother, Decedent, was seriously ill. The fact that she made her son, who was living with her, her DPOA does not raise any red flags. Moreover, there is nothing in the record to support any claim that Respondent had power of attorney over Decedent's financial matters. ***Compare Burns***, 595 A.2d at 1163 (where this court held that evidence of the existence of a confidential relationship includes, for example, evidence that "the testator gave the proponent power of attorney over his life savings" and evidence that the "proponent was either the scrivener of the will or present at the dictation of the will.").

Petitioner also argues that Respondent isolated Decedent from the outside world thereby establishing a confidential relationship. The Orphans' Court found it credible that Respondent was responsible for curtailing visits of people who were friends of decedent. (***See*** Decision, 3/27/12 at 41.) The Orphans' Court also found that Respondent acted surly with the hospice workers and Clair Stewart (Decedent's friend) on at least one occasion. (***Id.***) However, the court specifically found "that the Petitioner took the Decedent to her home for dinners and overnight visits after the Respondent moved in with the Decedent on March 14, 2010 and these visits were encouraged by the Respondent." (***Id.***) As such, Petitioner's claim of Decedent being isolated by Respondent fails in light of the finding that Respondent encouraged the visits with Petitioner. Petitioner does not contradict this finding.

Simply put, Petitioner failed to present evidence that Respondent occupied a position of advisor or counselor to Decedent. The evidence proffered indicated only that Respondent was Decedent's son who stayed with Decedent for a relatively short period of time, ***i.e.***, March 14, 2010, until her death on May 29, 2010. The appointment with Attorney Dorfman was set up before Respondent arrived to live with Decedent. Decedent was in hospice care from the time Respondent moved in. While there was testimony from Decedent's friends that painted Respondent in a critical light, Respondent did not prevent Petitioner from seeing their mother.

Based on the above, we cannot say that the Orphans' Court erred or abused its discretion by concluding Petitioner failed to present sufficient evidence of a confidential relationship between Respondent and Decedent. Since we have determined that the trial court did not err or abuse its discretion by concluding that Petitioner did not establish a confidential relationship between Decedent and Respondent, we need not address Petitioner's challenge to the Orphans' Court's finding that Decedent did not suffer a weakened intellect. This is because all three elements of the undue influence test must be present to establish a ***prima facie*** case. ***Estate of Glover***, ***supra***.

Even if Petitioner had established the confidential relationship prong of the undue influence test, she failed to establish Decedent suffered from a weakened intellect. With regard to the requirement of weakened intellect, this court has held that "in cases where the appellate courts have found the requirement of weakened intellect satisfied, the testator/testatrix was in ill-health and suffering from confusion, forgetfulness and disorientation." ***Estate of Glover***, 669 A.2d at 1015. "Evidence of physical infirmities . . . is not enough, alone, to establish weakened intellect." ***Id.***

In the instant case, Petitioner relies on the testimony of Dr. McCann who opined that she did not believe Decedent knew what she was doing on March 16, 2010, due to oxygen deprivation. However, Attorney Dorfman and his assistants testified that Decedent was alert and pleasant on

March 16th. These witnesses, unlike Dr. McCann, observed Decedent firsthand on March 16, 2010. The Orphans' Court found this evidence credible, and on review, we may not disturb the trial court's credibility determinations. ***Estate of Fritts***, 906 A.2d 601, 606 (Pa.Super. 2006). As the trial court's determination is supported by evidence of record, we may not disturb it. ***Id.***

Next, we address Petitioner's claim regarding rebuttal evidence. A trial court's decision to grant or deny rebuttal evidence is viewed under an abuse of discretion standard. ***Mitchell v. Gravely International, Inc.***, 698 A.2d 618, 620 (Pa.Super. 1997). "Rebuttal is proper where facts discrediting the proponent's witnesses have been offered." ***Schoen v. Elasser***, 315 Pa. 65, 66, 172 A. 301, 302 (1934). Rebuttal evidence is also proper where it is offered to discredit the testimony of an opponent's witness. ***Ratti v. Wheeling Pittsburgh Steel Corp.***, 758 A.2d 695, 708-709 (Pa.Super. 2000) (citations omitted). Rebuttal evidence is not admissible, however, to contradict a witness on a collateral matter; that is, one bearing no relationship to the issue on trial. ***Gustison v. Ted Smith Floor Products, Inc.,*** 679 A.2d 1304, 1310 (Pa.Super. 1996), citing ***Commonwealth v. Johnson***, 536 Pa. 153, 159, 638 A.2d 940, 942-943 (1994).

In the instant case, Petitioner contends the Orphans' Court refused to allow her to present rebuttal evidence to refute Respondent's claim that on the morning the contested will was signed that Decedent "dressed, had

taken her medicine, made herself rice krispies with bananas and was ready to go out the door." Petitioner claims it would not have been possible for Decedent to do the above.

Attorney Dorfman and Barna, Sr., both described Decedent on March 16, 2010. Attorney Dorfman met Decedent for the first time on March 16th, the day he prepared her will and witnessed its execution. Attorney Dorfman was asked if he made an observation of Decedent's physical appearance, and he responded, "She appeared to be in her late 60s. She was neatly dressed. She was groomed nicely. That's about it. I don't recall anything -- she may have had an oxygen tank with her. I don't recall." (Notes of testimony, Vol. 1, 1/6/12 at 121.)

Barna, Sr., also testified regarding his observations of Decedent on the afternoon of March 16, 2010. He noted that Decedent walked 50 feet into his house from where her vehicle was parked. (***Id.*** at 126.) When asked if Decedent appeared to be confused in any way, he responded, "No. no. She looked pretty good." (***Id.***) He was asked if he had any question about Decedent's mental abilities during her conversation with him, and he answered, "No, not at all." (***Id.***) Barna, Sr., also testified that when he gave Decedent the 2007 will, she attempted to tear it up but was unable to do so because "her hands were like in splints or something." (***Id.*** at 129.)

The record indicates that at the conclusion of Respondent's case, Petitioner was called as a rebuttal witness. She was asked by her counsel if

Decedent could have gotten herself out of bed, dressed and washed herself, combed her hair, or eaten Rice Krispies by herself? (Notes of testimony, Vol. 2, 1/10/12 at 300.) Respondent's counsel objected and the objection was sustained. (***Id.*** at 303.) The court stated: "[Y]ou are asking for an opinion. You're not asking for factual observation of what occurred on the 16th." (***Id.***) Petitioner did not see Decedent that day, and two people who did see and talk to Decedent that day gave unequivocal testimony regarding her physical appearance and mental ability. Clearly, the Orphans' Court found the testimony of Attorney Dorfman and Donald Barna, Sr., credible, and we may not disturb this determination. ***In re Estate of Rosser***, 821 A.2d 615, 618 (Pa.Super. 2003), ***appeal denied***, 574 Pa. 761, 831 A.2d 600 (2003). We see no error here.

Petitioner also argues she should have been permitted to present rebuttal testimony concerning Decedent's affection for her boyfriend, Frank Focht. Petitioner did not elicit testimony from her own witnesses during her case-in-chief. During Respondent's case, on direct examination, Attorney Dorfman was asked, "[D]id she express any opinion one way or the other about her like or dislike of Frank?" (Notes of testimony, 1/6/12 at 126.) Attorney Dorfman responded:

> She didn't like him at all. And she was -- she didn't like the way he treated her daughter. And she was concerned about several financial irregularities that she felt had occurred, specifically one which she felt that they had taken a loan out in her name.

> . . . .
>
> [Counsel for Respondent]: What was her fear with regard to Frank and the estate of Lorraine?
>
> [Attorney Dorfman]: The fear was that whatever she might have given to Michelle or to [her grandson] that Frank was going to control and use for his own benefit. And she didn't like the way -- she wasn't confident that he would look out after Michelle or [her grandson].

Id. at 126-127. On cross-examination, no questions were asked regarding Frank Focht.

Barna, Sr., was asked on direct examination if he ever had a conversation with Decedent with regard to Frank Focht, and he responded, "Yes, in the latter part of 2009." (Notes of testimony, Vol. 1, 1/10/12 at 133-134.) Barna, Sr., stated that Decedent said to him, "I don't want to see that SOB get anything." (***Id.*** at 138.) He testified "I assumed that there were problems between [Petitioner] and Frankie. I don't know what they were. I don't." (***Id.***) On cross-examination, no questions were asked regarding Frank Focht.

Petitioner now argues her rebuttal testimony would have shown that Decedent and Frank Focht enjoyed a loving relationship. (Petitioner's brief at 69.) The Orphans' Court ruled that it would not allow Petitioner to testify about a benevolent feeling that Decedent had toward Frank Focht as it was not proper rebuttal. (Notes of testimony, Vol. 2, 1/10/12 at 292.) The court

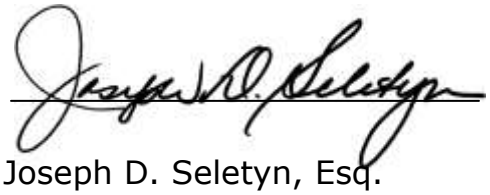
stated unless Petitioner could rebut the fact the conversation took place between Barna, Sr., and Decedent, it would not allow it. (***Id.*** at 296.)

It is not clear why Petitioner did not present testimony concerning the relationship between Frank Focht and Decedent during her case-in-chief. Petitioner clearly was aware that Decedent's feelings for Frank Focht were the primary reason alleged for Decedent changing her will, and we agree with Petitioner that she should have been permitted to rebut Respondent's evidence with her testimony. ***Ratti***, ***supra***. We conclude, however, that the Orphans' Court's refusal to permit rebuttal evidence was, at most, harmless error. ***See American Future Systems Inc. v. Better Business Bureau of Eastern Pennsylvania***, 872 A.2d 1202, 1212 (Pa.Super. 2005) (holding that, to constitute reversible error, a ruling must not only be erroneous, but also harmful or prejudicial to the complaining party), ***affirmed***, 592 Pa. 66, 923 A.2d 389 (2007). Clearly, the Orphans' Court made its decision based on credibility of the witnesses who appeared and testified. The court was well aware that any testimony from Petitioner regarding the relationship between her boyfriend, Frank Focht, and her mother, Decedent, would naturally be favorable. Accordingly, we conclude any error for failing to allow the rebuttal testimony of Petitioner is harmless.

Thus, we can find no abuse of discretion on the part of the Orphans' Court in finding no undue influence and approving the will of March 16, 2010.

Decree affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/24/2014