8-18-2011

In re Estate of Conway Respondent's Brief Dckt. 38430

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF KATHLEEN R. CONWAY, DECEASED	)	
TANYA WOODEN,	)	SUPREME COURT
	)	DOCKET NO. 38430-2011
Petitioner-Appellant,	)	
vs.	)	
W. CECIL MARTIN, Personal Representative of the Estate of KATHLEEN R. CONWAY and DEAN VIERS,	)	
Respondent-Respondents on Appeal,	)	
and	)	
TANYA S. VIERS,	)	
Respondent,	)	
and	)	
BRUCE BOYDEN, Chapter 7 Trustee,	)	
Intervenor-Appellant.	)	

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County, acting in its appellate capacity of Nez Perce County Magistrate Court Case No. 2009-1231

Honorable Carl B. Kerrick, District Judge Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

OTHER AUTHORITY

TABLE OF CASES AND AUTHORITIES CONTINUED

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a decision of the Nez Perce County District Court action in its appellant capacity, affirming a decision of the Magistrate Division of the District Court determining that the Will of Kathleen R. Conway dated May 21, 2004, was validly executed and that said Kathleen R. Conway had testamentary capacity at the time of such execution.

B. COURSE OF PROCEEDINGS

Kathleen Conway died on March 15, 2009. On June 9, 2009, Respondent Cecil Martin filed with the Court a Will signed by the decedent, Ms. Conway, on May 21, 2004. On June 10, 2009, Mr. Martin was appointed personal representative in informal probate proceedings, and the May 21, 2004, Will was admitted to informal probate. On June 15, 2009, Appellant, Ms. Wooden, filed a Notification of Competing Will. On June 24, 2009, Ms. Wooden filed a Petition for Formal Probate of Will claiming that the May 21, 2004, Will was invalidly executed as a result of lack of testamentary capacity and undue influence. Ms. Wooden asked that a Will purportedly executed by Kathleen Conway on January 25, 2001, be formally probated. On November 24, 2009, Cecil Martin filed his Response to Ms. Wooden's Petition for Formal Probate of Will, denying that the purported Will of Kathleen R. Conway was validly executed. The original of said purported Will was never filed with the Court.

On November 30, 2009, a trial was held on the issue of whether Ms. Conway had testamentary capacity to execute the May 21, 2004, Will and whether that Will was a product of

undue influence. On January 8, 2010, the trial court orally announced its findings of fact and conclusions of law in open court, denying Ms. Wooden's claims. On February 5, 2010, judgment was entered ordering that the Will of Kathleen R. Conway dated May 21, 2004, was validly executed and that said Kathleen R. Conway had testamentary capacity at the time the Will was executed.

Ms. Wooden appealed the magistrate court's decision to the district court on March 4, 2010. After briefing, oral argument was held on September 14, 2010. The District Court issued its opinion and order on November 29, 2010, affirming the magistrate court's determination. Ms. Wooden timely filed a Notice of Appeal to the Idaho Supreme Court.

On August 25, 2010, Ms. Wooden filed a petition for Chapter 7 relief with the United States Bankruptcy Court, Eastern District of Washington. On April 25, 2011, Mr. Martin filed his to Motion to Dismiss Ms. Wooden's appeal for lack of interest and not being a real party in interest. Said Motion was denied and the Court ordered no further briefing on this issue.

On June 2, 2011, the Supreme Court granted a Motion to Intervene filed by Chapter 7 Trustee, Bruce Boyden. Bruce Boyden served as the Trustee in the bankruptcy proceeding filed by Ms. Wooden. Pursuant to this Court's Order, the parties filed a Motion to Augment the Record with the docket from Ms. Wooden's bankruptcy case. That augmentation included a May 12, 2011, order by U.S. Bankruptcy Court Judge Patricia Williams allowing Ms. Wooden and Mr. Boyden to continue pursuit of her claim in this matter.

C. STATEMENT OF FACTS

On February 5, 2004, a Petition for Guardianship and Conservatorship was filed for Kathleen R. Conway by Altha Bish, Ms. Conway's landlady. On February 25, 2004, Cecil Martin and Kathye Ingram, two of Ms. Conway's three children, filed a Cross-Petition for Guardianship and Conservatorship for their mother. On March 31, 2004, pursuant to a stipulation between the parties, an Order of Limited Guardianship and Order Appointing Conservator was entered wherein Cecil Martin was appointed the guardian of Kathleen R. Conway. The guardianship was limited and provided as follows:

> This shall be a limited guardianship in that the guardian shall discuss with Kathleen R. Conway all decisions regarding her health and well-being, including, but not limited to, her place of residence and her medical and/or other professional care. Kathleen R. Conway shall be allowed to participate in making said decisions to the extent of her ability with due consideration being given to her wishes...." (Pltf. Exh. 9)

The Order further provided that Tresco Trust & Estate Services be appointed conservator of the Estate of Kathleen R. Conway. Letters Testamentary and Letters of Conservatorship were subsequently entered by the Court in compliance with this Order on March 31, 2004.

During the trial of this present matter, Ms. Wooden offered into evidence various supporting documentation and pleadings related to the guardianship/conservatorship, but the Court initially sustained Cecil Martin's objection to these proffered exhibits (Pltf. Exh. 1, 3, 6 and 7) on the grounds that they included hearsay and were not relevant. In his final decision, Judge Merica allowed these exhibits to be admitted for the limited purpose of completing the record as to what information Ms. Wooden's expert, Dr. Kevin Kracke, utilized in reaching his

opinion. The Court specifically found that these exhibits were not admitted for the factual evidence of the matters contained thereof. (R. Vol. 1, p. 112, p.5, l. 23-25; p. 6, l. 1-13)

In early April of 2004, Cecil Martin took Ms. Conway to visit attorney Michael Wasko. He took his mother to Mr. Wasco as "he was a familiar name, and kind of a hometown country-type lawyer I felt my mom could relate to." (Tr. Vol. 1, p.153, l. 9-25; p. 154, l. 1-3) Mr. Martin attended the first 15 to 20 minutes of the meeting between Ms. Conway and Mr. Wasko. Mr. Wasko was made aware that Mr. Martin was the guardian of Ms. Conway. (Tr. Vol. 1, p. 154, l. 23-25) Mr. Wasko mentioned the guardianship in the Will that he subsequently prepared for Ms. Conway. (R. Vol. 1, p. 27) Mr. Martin then left the room while Mr. Wasko and Ms. Conway discussed her estate plan. After meeting with Ms. Conway, Mr. Wasko prepared the Will and then met with Ms. Conway in Caldwell, Idaho, in early May of 2004. As a result of such meeting, changes were made to the Will. After making such changes, Ms. Conway executed the Will in Caldwell, Idaho, on May 21, 2004, with Mr. Wasko and Perry Justice acting as witnesses.

Late in the summer of 2004, Mr. Martin contacted Mr. Wasko's office inquiring as to the status of his mother's Will as he was concerned that the Will had not been executed. It wasn't until that time that Mr. Wasko informed Mr. Martin that a Will had, in fact, been completed. (Tr. Vol. 1, p. 156, l. 18-25; p. 157, l. 1-13)

A photostatic copy of a Will of Kathleen Conway, dated January 25, 2001, was referred to in the trial. However, the original of such Will was never produced nor was any evidence presented at trial as to the existence of the Will. The 2004 Will reduced the share of the Ms. Wooden from 20% of Kathleen Conway's estate to approximately 1.43%. Mr. Martin's share

was increased from 20% of the estate to 30%. However, the share of his two children was reduced from 6.7% of the total estate to 2.86% of the estate. The net increase to Mr. Martin and his children was 6.16% of Ms. Conway's estate. Ms. Conway died on March 15, 2009, and this case was commenced.

II. ARGUMENT

ISSUE 1: THE MAGISTRATE CORRECTLY CONSIDERED AND APPLIED THE LAW REGARDING THE PRESUMPTION OF UNDUE INFLUNECE

Ms. Wooden contends that the trial court failed to follow the presumption of undue influence as it relates to parties who occupy the dual role of fiduciary and beneficiary. Idaho Courts have held that "where parties occupy the dual role of fiduciary and beneficiary, or where the fiduciary has been actively involved in will preparation or as witnesses, Idaho law creates a rebuttable presumption of undue influence." *Matter of Estate of Roll*, 115 Idaho 797, 799, 770 P.2d 806, 808 (1989). Ms. Wooden asserts that the Magistrate Court incorrectly applied this presumption. The Court was aware of, and did discuss the presumption when an individual occupies both roles. (R. Vol. 1, p. 116, l. 23-25 of p. 21; l. 1-25 of p. 22; l. 1-4 of p. 23)

In re Randall's Estate, 64 Idaho 629 at 649, 132 P.2d 763, 772 (1942), defines a fiduciary relationship as follows:

> Whenever the relations between two persons are such that one is completely dependent and relies upon and necessarily reposes confidence in the other, a fiduciary or confidential relation exists and the law implies a condition of superiority held by the one over the other so that in every transaction between them in the nature of a deed, gift, contract, or the like by which the superior party obtains a possible benefit, the existence of undue influence and the invalidity of

> the transaction is presumed and the burden of proof is cast upon the one who receives the benefit to show by clear evidence that he or she acted with entire fairness and the other party acted independently with full knowledge and of his own volition free from undue influence.

While Mr. Martin is a fiduciary by virtue of his legally imposed position with his mother, it would be hard to argue this position but for the guardianship. Here, Ms. Conway was not completely dependent upon, did not rely upon, and did not necessarily repose confidence in Mr. Martin. The court which presided over the guardianship ordered a limited guardianship. Ms. Conway lived independently and remotely from Mr. Martin. Ms. Conway's wishes were ordered to be taken into consideration. A conservator was appointed to manage Ms. Conway's finances. This was all taken into consideration by the trial Court (R. Vol. 1, p. 117, l. 1-17 of p. 24)

Regarding the fiduciary duty Mr. Martin owed to Ms. Conway, the trial court recognized that there is a presumption of undue influence when an individual occupies dual roles of fiduciary and beneficiary, and then considered the evidence presented which rebutted the presumption. As stated in *Matter of Estate of Roll*, 115 Idaho 797, 770 P.2d 806 (1989):

> In Idaho, undue influence is recognized where sufficient evidence has been presented that indicates a testator's (testatrix's) free agency has been overcome by that of another. *King v. MacDonald*, 90 Idaho 272, 279, 410 P.2d 969, 973 (1965), citing *In re Eggan's Estate,* 86 Idaho 328, 386 P.2d 563 (1963) and *In re Lunder's Estate,* 74 Idaho 448, 263 P.2d 1002 (1953). Moreover, where parties occupy the dual role of fiduciary and beneficiary, or where the fiduciary has been actively involved in will preparation or as witnesses, Idaho law creates a rebuttable presumption of undue influence. *See* I.C. §15-2-501, et seq. Thereafter, the burden rests with the proponent to rebut that presumption.
>
> To rebut the presumption, the proponent must come forward with that quantum of evidence that tends to show that no undue influence existed. Once that burden has been met, the matter becomes one for the trier of fact. The existence of undue

> influence will be determined accordingly, and on appeal such determination will only be disturbed if not supported by substantial, competent evidence.

115 Idaho at 799, 770 P.2d at 808.

Mr. Martin invites the Court to review the *Matter of the Estate of Roll* for the factual distinctions. In *The Estate of Roll*, the Will was a handwritten document witnessed by the primary beneficiary of the Will. No attorney was involved. The decedent was blind and almost deaf. Nonetheless, the jury found that the Will was valid. The verdict was affirmed by the Supreme Court. In the current case, Mr. Martin took his mother to an attorney he had limited contact with. He was not present during any of the conversations regarding changes in the Will whereby a portion to the Personal Representative and his two sisters was increased and the share of Ms. Wooden and the grandchildren of the decedent was decreased. There were no other specific instances of alleged undue influence presented by Ms. Wooden. The final changes to the Will, except for Ms. Wooden, were not significant.

Substantial and competent evidence was presented to the Court showing that there was no undue influence. It is hard to prove a negative. Mr. Martin's proof was in the limited role in played and his testimony that he did not know what his mother wanted. He was neither aware of the contents of the 2004 Will nor its execution until months after its execution. The Court also considered the elements of undue influence as set out in *Gmeiner v. Yacte*, 100 Idaho 1, 592 P.2d 57 (1979): (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence. In determining there was no undue influence, the Court took into consideration that at the time the

will was drafted, Ms. Conway was in good health, was living alone, was able to conduct her day to day business, she had only minimal contact with Mr. Martin, and she received independent advice from a disinterested attorney. (R. Vol. 1, p. 17-18) As stated above, Mr. Martin did not know that the will had even been changed, and the resulting change to the will was not unnatural or unexpected. On the other side of the proof, only the timing of the Will and the fact that Mr. Martin took his mother to a attorney she had not previously known were presented. Ms. Wooden's position must be that the result speaks for itself. That is not the law. The fact that Ms. Conway was a ward, does not mean that she lacked testamentary capacity. As set forth in Idaho Code 15-5-408:

> An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person.

Because the Magistrate recognized the presumption, considered the substantial and competent evidence, and determined there was no undue influence, the decision should not be disturbed.

ISSUE 2: STATEMENTS BY DECEDENT ARE INADMISSIBLE HEARSAY AND APPELLANT IS NOT COMPETENT TO TESTIFY REGARDING THOSE STATEMENTS

Ms. Wooden states that the Magistrate Court erred in not allowing statements made by Ms. Conway to Ms. Wooden into evidence because the statements were hearsay or not otherwise relevant. Ms. Wooden's position is that the statements were not hearsay because they were not offered to prove the "truth of the matter asserted." I.R.E. 801(c). The statements concerned alleged discussions about Ms. Conway's feelings about her children. The purpose of seeking to

have the statements admitted was to prove that Ms. Conway had negative feelings toward her children at that time, and to bolster the appellant's claim against the estate. The statements were clearly hearsay, and the Magistrate did not err in keeping the statements out of evidence.

Ms. Wooden relies on *King v. MacDonald,* 90 Idaho 272, 279, 410 P.2d 969, 972 (1965) in support of the argument that these statements should have been admitted.

> 'The existence of undue influence or deception involves incidentally a consideration of the testator's *incapacity to resist pressure* and his *susceptibility to deceit,* whether in general or by a particular person. This requires a consideration of many circumstances, including his state of affections or dislike for particular persons, benefited or not benefited by the will; of his inclinations to obey or to resist these persons; and, in general, of his mental and emotional condition with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue.'

Id. At 279, 410 P.2d at 972, *quoting* 6 Wigmore, Evidence §1739 (3d ed. 1940). In *King,* the Court allowed into evidence statements made by the decedent before and after the execution of her will and codicil.

> Ordinarily these statements would be inadmissible if not part of the *res gestae.* 4 Jones, Commentaries on Evidence §1615 (2d ed. 1926). However, declarations of a testator pertaining to his mental condition may be admissible to prove his inability to resist the influence of others. Declarations not confined to the time of the execution of the will, including these made both before and after, may be received provided they are not too remote to throw light upon the mental condition of the testator at the time of execution of the will.

Id. at 278-79, 410 P.2d at 972. In *King,* the statements allowed into evidence dealt with the decedent's "capacity to resist pressure and her susceptibility to deceit." *Id.* at 279, 410 P.2d at 972.

In the case at hand, while Ms. Wooden was testifying she was asked whether Ms. Conway would speak about her children. After answering affirmatively, Ms. Wooden was then asked specifically what Ms. Conway would say about her children. At that point, an objection on the basis of hearsay was made. (Tr. Vol. 1, p. 20, L. 13) The trial court sustained the objection on the basis of hearsay as well as relevance. (*Id.* at p. 20, l. 17-22; p. 22, l. 8).

The circumstances of the case at hand are distinguishable from those in *King.* In *King,* the Court allowed statements that testator Maggie Cameron made to others regarding her friend, Julia Bezold. Bezold was accused of asserting undue influence over Ms. Cameron:

> Such statements by Maggie are illustrated by: Christine Cameron's testimony that in 1949 Maggie told her that Julia was going to have Maggie's estate and that in 1958 Maggie told her that the 1957 will was silly; Anna Papineau's testimony that Maggie told her that Julia made the will the way she wanted it and that it wasn't the way Maggie wanted it; and Anna Cameron King's testimony that in 1950 Maggie told her that Julia wanted the money bad enough to kill her for it.

King, 90 Idaho at 279, 410 P.2d at 972. The *King* statements referred to the testator's estate and the will itself.

In the case at hand, Mr. Martin objected on the basis of hearsay when Ms. Conway's niece was asked about statements Ms. Conway would make about her children in general. Further, the questions counsel posed to Ms. Wooden addressed Ms. Conway's behavior in the time leading up to a competency hearing that was held three months prior to the date that Ms.

Conway executed the 2004 Will. The question was not posed for purposes of determining whether Ms. Conway was unable to resist the influence of her children, but instead, it was elicited for purposes of setting forth behavioral changes of Ms. Conway that Ms. Wooden witnessed. (Tr. Vol. 1, p. 21, l. 21-23) The Court permitted Ms. Wooden to testify to Ms. Conway's behavioral changes without allowing the hearsay statements.

The *King* Court determined that declarations of a testator pertaining to her mental condition may be admissible to prove his inability to resist the influence of others. However, the *King* decision does not take away the trial court's discretion regarding the admission of hearsay statements. In the case at hand, the question posed to Ms. Wooden was a fairly broad question about Ms. Conway's feelings toward her children. The question did not address whether Ms. Conway was unable to resist any undue influence brought upon her by Mr. Martin. Further, the trial court allowed Ms. Wooden to testify regarding Ms. Conway's behavioral changes, albeit without reiterating statements Ms. Conway made about her children. Thus, the magistrate court did not err in excluding testimony of statements made by the decedent, Ms. Conway, to her niece, Ms. Wooden, regarding her feelings toward her children.

ISSUE 3: DOCUMENTS FILED IN GUARDIANSHIP PROCEEDINGS ARE INADMISSIBLE HEARSAY AND NOT RELEVANT

Ms. Wooden argues that certain documents which had been filed with the court which presided over Ms. Conway's guardianship and conservatorship proceeding should have been judicially noticed by the Magistrate Court in the present proceeding. The Court did take notice of the fact that a Limited Guardianship and Conservatorship had been imposed. The documents

the Court did not allow into evidence were not "adjudicative facts"– the information in the documents was not "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." I.R.E. 201(b). The evidence Ms. Wooden sought to introduce were the physician's report, the visitor's report and the affidavit of Megan Lowe.

Judicial notice of adjudicative facts is addressed in *Trautman v. Hill,* 116 Idaho 337, 775 P.2d 651 (Ct. App. 1989).

> This Court may take judicial notice of adjudicative facts, those not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questions. I.R.E. 201. This notice may be taken at any stage in the proceedings, at the trial or appellate level.

The proffered evidence was hearsay and contained opinions which the guardianship Court considered in determining if a guardianship or conservatorship was warranted, but the documents are not facts in and of themselves. They certainly are not facts beyond reasonable controversy.

Further, the documents are not relevant for the purposes the appellant seeks to have them admitted — to establish that Ms. Conway's lacked testamentary capacity. Idaho Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Idaho Code § 15-5-101(a)(1) makes it clear that incapacity, as it relates to guardianships and conservatorships is a legal, not medical, disability. Indeed, a showing of incapacity is not required for the appointment of a conservatorship. I.C. § 15-5-401.

The guardianship statutes recognize that every individual has unique needs and differing abilities and that the public welfare should be promoted by establishing guardianships that permit incapacitated persons to participate as fully as possible in all decisions affecting them. *See* I.C. § 15-5-303(a). A court appointing a guardian for an incapacitated person must encourage the development of maximum self-reliance and independence by making appointive orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations. *See* I.C. § 15-5-304(a).

The Court imposed a limited guardianship, and specifically stated that Ms. Conway was to be consulted regarding decisions which would affect her. The documents pertaining to the guardianship do not have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The evidence was properly excluded.

ISSUE 4: THE COURT CORRECTLY CONSIDERED TESTIMONY OF ATTORNEY REGARDING DETERMINATION OF TESTEMENTARY CAPACITY

Appellant contends that the Magistrate should not have relied on the testimony of Ms Conway's attorney, Mr. Wasko, as to Ms. Conway's testamentary capacity. Mr. Wasko was not testifying as an expert witness, and in fact, as early as 1908, the Courts in Idaho have stated that it is permissible for a lay or non-expert witness to testify as to the sanity or competency of a person to make a will. *See* *Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441(1908) and *Schwarz v. Taeger*, 44 Idaho 625, 258 P. 1082 (1927).

The Idaho Court in *In re Heazle's Estate*, 74 Idaho 72, 257 P.2d 556 (1953) provided a thorough discussion of what evidence supports a finding of testamentary capacity. Citing several other courts and jurisdictions, the Court in *Heazle* stated:

> Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases. This court has held that 'if a man is able to transact business, * * * he is clearly competent to make a will, but he may be competent to make a will and still not be able to transact business.' *Schwarz v. Taeger*, 44 Idaho 625, at page 630, 258 P. 1082, at page 1084.
>
> 'Testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them.' 1 Page on Wills, Life. Ed., § 132, p. 268.
>
> '* * * mind enough to understand the ordinary affairs of life, the nature and extent of his property, who comprised the objects of his bounty and how he was disposing of his property by the instrument he was executing.' *Gardine v. Cottey*, 360 Mo. 681, 230 S.W.2d 731, 746, 18 A.L.R.2d 1100, at page 1119.
>
> 'In general the requisite is that the testator must at the time of making his will have sufficient mentality to enable him to know what property he possesses and of which he is making a testamentary disposition, to consider and know who are the natural objects of his bounty, and to understand what the disposition is that he is making of his property by his will.' *In re Johnson's Estate*, 308 Mich. 366, 13 N.W.2d 852, at page 855.

74 Idaho at 76, 257 P.2d at 558.

In ruling on Ms. Conway's capacity to execute a will, the Court considered evidence from witnesses that had contact with Ms. Conway at, or near, the time of execution who testified Ms. Conway knew what she was doing, and she was functioning in a competent manner. The Court considered that Ms. Conway was living independently at the time she executed the will,

and that Mr. Wasko was convinced she knew the nature and extent of her property, who comprised the objects of her bounty and how she was disposing of her property. The Court found that it was clear Ms. Conway wanted to change her will based on Exhibit 500 which indicated that she wanted her three children to share equally in the larger part of her estate, and that Ms. Wooden not inherit at the same level as her children. Finally, the Court considered the nature of the will itself, and found that there was nothing unusual about having the children of Ms. Conway inherit equally, and that the niece of Ms. Conway inherit at a different level than her children.

> In its inquiry into the capacity of the testatrix, the court may examine the purported will itself, and draw therefrom any inferences as to the mental capacity of the deceased, justified by its contents. Where the will appears on its face to be a rational act, rationally performed, it is presumed to be valid. (Citations omitted.)

Heazle, Id.

Ms. Wooden makes much of Mr. Wasko's failure to have an opinion as to "a reasonable degree of professional certainty" as to Kathleen Conway's testamentary capacity. Neither the trial court, nor this author, have found this standard. Mr. Wasko's opinion was based on years of experience and was unequivocable.

Because determinations of testamentary capacity are questions of fact, and the Magistrate relied on substantial and competent evidence, the finding of testamentary capacity should be affirmed.

ISSUE 5: ANY ERRONEOUS FINDINGS ARE HARMLESS

The Court did make findings which were not accurate. The Court was not correct in stating that Tanya Viers was a co-guardian. Cecil Martin was the only appointed guardian of Kathleen Conway. However, while the Court makes this statement, nowhere in the Court's decision is there an indication that the decision was influenced by a co-guardianship. The Court specifically says that the entire trial was centered on Mr. Martin. In other words, all testimony at trial had to do with the argument that Mr. Martin was able to influence his mother by virtue of the fiduciary relationship. The Court did not rely on any testimony whatsoever as to Ms. Viers' role in this, nor did the Court, at any time in its decision, state the fact that there was a co-guardianship relieved Mr. Martin of his fiduciary responsibilities. The entire decision by the Court is devoid of any thought that the fact that there was a co-guardianship would have influenced the Court's decision.

Ms. Wooden alleges that Mr. Wasko did not inquire into Ms. Conway's understanding the extent of her property at the date her will was executed. Mr. Wasko did testify at trial that Ms. Conway was aware of the extent of her property. In Mr. Wasko's response to the questions that he was asked, he did not say that he had not asked Ms. Conway about the extent of her property. Instead, he stated that he did not recall asking about the extent of her property. Mr. Wasko did not say that he did not inquire as to Ms. Conway's property. (Tr., p. 81, l. 5-10) However, later in his testimony, Mr. Wasko did state that he had discussed Ms. Conway's assets on at least two occasions. (Tr., p. 122, l. 7-18) Mr. Wasko testified he had a continuing conversation with Ms. Conway regarding her assets. The court had the opportunity during Mr.

Wasko's testimony to determine the credibility of any statements which could be deemed inconsistent and determined that Mr. Wasko was aware of the extent of her property. (R., Vol 1., p. 113, l. 17-22 of p. 11)

Mr. Martin's share of the estate goes from 20% to 30%, as do the shares of each of his sisters, but the shares of his children, are reduced from 6.7% to 2.86%. The net to Mr. Martin is not as significant as it would appear. What is important is that throughout the decision the Judge found that Mr. Martin did not have any idea what his mother was asking for and did not know what she had determined until after the will had been executed for several months. All parties can agree that the change to the Ms. Wooden is significant. However, Ms. Wooden is still recognized as a recipient of Ms. Conway's estate even though she is not a direct descendant. As the court found, there is still a recognition of the relationship between Ms. Conway and Ms. Wooden.

III. CONCLUSION

From the beginning of this case, this case has been about two intertwined issues – did Kathleen Conway have testamentary capacity and, if so, was her Will influenced by her guardian and son, Cecil Martin. When the Limited Letters of Guardianship were issued, the Court took into consideration that Ms. Conway should have a role in making decisions which affected her. Cecil Martin took his mother to Mike Wasko, an attorney with whom he had a limited relationship and who was experienced in estate planning. Mr. Wasko was informed that a guardianship had been ordered for his mother and stayed with Mr. Wasko and his mother while

questions were asked from which Mr. Wasko could determine, in his experience, if he felt Ms. Conway was competent. Mr. Martin then left the room and did not learn of the contents of his mother's Will until months after it had been executed. There was uncontested testimony that Mr. Martin did not discuss what his mother desired with her. His sole act was taking his mother to an attorney. At that point, he stepped out of the picture and allowed the attorney to take over. Mr. Wasko then made the determination, in his experience, that Ms. Conway had testamentary capacity. He met with her on three occasions. He was satisfied that she knew who her children were and the nature of her property. He knew that guardianship had been established. Mr. Wasko did state that had he known more about the grounds for the guardianship, he may have inquired further. However, he did state to the Court that, in his opinion, that Ms. Conway was competent. The Court had the opportunity to weigh Mr. Wasko's testimony. The Court also had the opportunity to weigh Dr. Kracke's testimony. As part of the weighing of Dr. Kracke's testimony, the Court found that the record was completely devoid of anything to indicate that Mr. Martin had contact with his mother after the initial meeting with Ms. Wooden. The Court specifically found that Mr. Wasko acted independently, that Ms. Conway was allowed by the guardianship to have input into her decision-making, that she had mild to moderate dementia, that she was able to live on her own and there was no testimony as to any other physical limitations. The Court specifically found that the Will was not a product of undue influence. The decision of the trial court, which had the opportunity to view and weigh the testimony of live witnesses, was supported by substantial evidence in the record and should not be second guessed. The decision of the trial court should be upheld.

DATED this 15th day of August, 2011.

JONES, BROWER & CALLERY, P.L.L.C.

By: _____

Garry W. Jones, Attorney for W. Cecil Martin, Personal Representative of the Estate of Kathleen R. Conway

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2011, a true and correct copy of the foregoing RESPONDENT'S BRIEF was served by the method indicated below, and addressed to the following:

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XX FIRST CLASS MAIL
_____ HAND DELIVERED
_____ OVERNIGHT MAIL
_____ FACSIMILE TRANSMISSION

GARRY W. JONES