STATE OF RHODE ISLAND
PROVIDENCE, SC

PROBATE COURT OF THE
CITY OF PROVIDENCE

In Re Estate of Angela Campopiano Doyle, alias
Decedent

No. 2002- 204

DECISION

This matter is before the Probate Court on the Petition for the allowance of a document purporting to be the Last Will and Testament of the decedent, Angela Campopiano Doyle ("decedent"), who died on, April 23rd, 2002. The will is dated November 7th, 2001; Everett A. Petronio, Sr., the named Executor ("Proponent") and primary beneficiary thereunder, is seeking its allowance[1]. Mr. Petronio is an attorney and has practiced law in Rhode Island for approximately 37 years. He was the decedent's attorney and drafted the will in controversy. An objection to the admission of this will has been made by all of the decedent's heirs at law [2] ("Objectors").

After court approved discovery by the parties, an evidentiary hearing was held in Probate Court on September 19th, 2002 to determine if the November 7th, 2001 will should be allowed.

The Proponent and the two witnesses to the execution of the will, Jacqueline M. Bouchard, Esquire and Arleen Russo[3] testified in support of the will; Ann Kudrowitz, one of the decedent's nieces, testified against its admission. No other Objectors testified. Both sides submitted memos in support of their respective positions.

Pertinent Facts

Attorney Everett Petronio testified at the court hearing that he knew the decedent his entire life, and that his "growing up" home abutted that of the decedent.[4] He also testified that he represented the decedent on many divers matters over the years and had prepared at least one

[1] Patricia Petronio, Mr. Petronio's wife, is left certain tangible property under this will as a specific bequest; the rest and remainder of the estate is left to Mr. Petronio.
[2] The decedent's heirs at law are nieces (Ann Kudrowitz and Eileen DiSanto), nephews (Nicholas DiSanto and Joseph Campopiano) and four (4) great nieces and great nephews (Alesia Payne, Steven Wetzel, Michael Wetzel and Diane Wetzel) who are the children of a deceased niece, Claire Wetzel.
[3] Both Ms Bouchard and Ms Russo are long standing employees of Mr. Petronio.
[4] Mr. Petronio referred to decedent as "Auntie" in his early years and **claimed** some blood relationship with her.

other will for her[5]. In addition, he and his family maintained a close personal relationship with the decedent. He served as best man at her marriage to Edward Doyle in 1976 [6], had the wedding reception at his home and represented both of them over the years and enjoyed a close family-like relationship with her[7]. According to the Proponent, this personal relationship became more pronounced and she became more dependent on him for certain personal services, after two (2) events: the death of her husband in 1993 and an apparent falling out she had with her nephew Joseph Campopiano in late 1995.

Mr. Petronio testified that the decedent was intelligent, opinionated and outspoken; he also opined that she was as "sharp as a tack" at the time she contacted him to revise her will as well as during the entire time he knew her, lived alone after her husband's death, was neat and well groomed, handled her financial matters and kept up with current events. His testimony concerning the decedent's relationship with her family was that it was non-existent since the late 60's, except for her nephew Joseph with whom she had contact with and who went on errands for her after her husband's death up to late 1995 when she apparently had a falling out with him as well. The Proponent arranged for her burial as she had purchased a prepaid contract from Nardolillo's Funeral home. Her personal estate at the time of her demise was approximately $40,000.00.

He testified on cross-examination that her relationship with her nieces and nephews was a source of irritation for her, that she had a falling out with the niece that lived next to her in 1968[8] and refused to have any contact with any of them, except for her relationship with her nephew Joseph up to 1996. Mr. Petronio testified that she was angry and sad at the same time towards her relatives. He testified that she expressed her intent that none of her nieces and nephews be given anything in this will.[9] He testified that he was not surprised when she told him that he was to be the primary beneficiary of her will; he never felt compelled to advise her to go

[5] This will was prepared while the decedent's husband was still alive; Mr. Petronio was left all of the decedent's property in trust to care for her husband, after his death balance and residual to go to Mr. Petronio if he survived or his brother Thomas.
[6] He testified that he couldn't recall any of her family members present at the wedding.
[7] His testimony was that the decedent attended every Petronio family event, including weddings, showers birthday parties, christenings, wakes, and funerals and spent most holidays with him and his family.
[8] Claire Wetzel.
[9] He also was her health care agent and held a durable power of attorney from her.

to another attorney to seek other counsel on this matter or that his actions could be perceived as a conflict of interest and a violation of the Cannons of Professional Responsibility for attorneys.

Ms Bouchard testified that she witnessed the will's execution s on November 7,2001; that the decedent signed the will in her presence and in the presence of the other attesting witness and that they each signed in the presence of one another. She testified that she reviewed the contents of the will with the decedent; that the decedent understood its contents and that it accurately represented what the decedent wished to do with her estate. She stated that over the years she had seen the decedent at the home of the Proponent on many occasions and that she was close to his family. On cross examination, she opined that the decedent appeared to be of sound mind and belief, was neat and well kept and understood what she was doing. She (Ms Bouchard) did not advise her to seek other counsel or that there was a possible conflict of interest created because the will left her attorney most of her property. She testified that she was not paid by the decedent and was a salaried employee of the Proponent.

Ms Russo, the other witness to the will, corroborated the testimony provided by Ms Bouchard relative to the execution and review of the will by the decedent, and the competency of the decedent on the day the will was executed as well as at other times she had seen the decedent.

Ann Kudrowitz, the decedent's niece and one of the Objectors, testified that growing up she and the rest of her family enjoyed a close relationship with the decedent. She also testified that the decedent also had a very close personal relationship with the Petronio family and that her aunt was close to the Proponent and his mother. She denied any knowledge of any blood relationship between her aunt and the Petronio family.

Apparently, in 1968, her sister Claire Wetzel[10] had a dispute with the decedent concerning the real estate she occupied next to the decedent. Thereafter, at her expressed request and behest, contact with all her nieces and nephews was terminated, except for her nephew Joseph. That relationship ended in late 1995, also at the direction of the decedent. Attempts were made by the heirs at law over the years to re-establish normal relations with the decedent, but to no avail[11]. There was no communication with the decedent and her family; Ms Kudrowitz testified that **this was her aunt's decision** and that she did not believe it was fair to her and the

[10] Predeceased decedent in 1998.
[11] The uncontroverted testimony from the Proponent and Ms. Kudrowitz was that this was the decedent's choice.

rest of the family and that the decedent apparently didn't love her or the other family members. She testified on cross-examination that her aunt had a mind of her own and was independent.

The Objectors presented no other evidence or testimony.

Discussion and Findings

The Objectors have made no allegations of fraud against the Proponent, nor does any of the testimony suggest it.

The Objectors herein are seeking the disallowance of the decedent's will based on the following reasons:

- The decedent lacked testamentary capacity to make this will.
- The decedent was unduly influenced by the Proponent to leave her property to him and his wife..
- The Proponent was the decedent's attorney and draftsman of the will[12]. In addition, the attorney who was one of the witnesses to the will is employed by the Proponent[13].

RIGL 33-5-2 provides that an individual must be of "sane mind" to make a will.

Our Supreme Court has set forth the standards to determine an individual's mental competency to make a will. In **Tavenier v McBurney** 308 A2d 518. Summarily stated, they are:

- That the testator must possess sufficient mind and memory to understand the nature of the business of making a will;
- Know and understand the property he has and wishes to dispose of by the will;
- Know and remember the natural objects of his bounty and his relations to them.
- Appreciates and understands these elements in relation to one another.

No direct or circumstantial evidence of a **lack of testamentary capacity** medical or otherwise was offered by the Objectors. Ms Kudrowitz never suggested in her testimony that her aunt was suffering from dementia or other mental disability. She stated that the decedent had a mind of her own, was independent and lived alone since 1993. Objectors argue in their memorandum and by their counsel's cross-examination of Mr. Petronio and Ms Bouchard that

[12] **Rules of Professional Conduct for Attorneys**, **Rule 1.8 (c) Conflicts of interest; Prohibited transactions**. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
[13] **Rule 1.10. Imputed disqualification: General rule.**(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules ...1.8(c)....

the failure of the decedent to include the correct given name of her nephew in Florida[14] and to mention her great nieces and nephews at all in the "disinheritance clause" of her will is conclusive evidence of her lack of knowledge as to who the natural objects of her bounty were. See Tavenier, *supra,* and because of this the court should infer that the decedent lacked testamentary capacity.

Once the issue of testamentary capacity has been raised, the Proponent has the burden of 'going forward' by a fair preponderance of the evidence either directly or circumstantially to prove that the testator possessed the mental capacity to make a will when it was executed. **Judge v Janicki** 374 A2d 547, among other cases. See also **McSoley v McSoley** 91 RI 61.

Mr. Petronio, Ms Bouchard and Ms Russo offered testimony as to the understanding and knowledge of the decedent in making the will and reviewing its contents with Ms Bouchard on the day she executed it, knew her relationship or lack thereof with her family (no contact with most of them for over 30 years, 5 years for her nephew Joseph), what her property was as demonstrated by her split of the tangible property from the rest and residue of her estate and understood how these elements related to one another.

Lay testimony as to mental capacity is admissible provided it is based on personal knowledge and observations of the witness. Id at 81, **McSoley v McSoley** and **Rynn v Rynn** 55 RI 310. I find as a matter of fact that the evidence submitted by the Proponent is more than sufficient to establish that the decedent had the testamentary capacity to make this will. I **do not infer** that her failure to list her great nieces and nephews and to use an incorrect given name for her nephew in the will is dispositive to her not knowing her family and her relationship thereto. To the contrary, since **she chose** not to have any contact with them for over 30 years, the court can easily infer that she didn't mention the great nieces and nephews because she didn't have any kind of relationship with them and that the misstatement of the nephew's given name could have been occasioned by mistake on her part, on the part of the draftsman of the will or because of her lack of contact with him. Next of kin and relatives cannot be said to have any natural right to the estate of the testatrix which can be asserted against the legally executed will of the later merely because they are the heirs at law of the decedent **79 Am Jur 2d** § 67.

[14] The Fourth clause of the purported will of the decedent refers to her nephew Michael Raymond De Stefano instead of his actual given name of Nicholas.

The Objectors seek the disallowance of the will based on the allegation that the Proponent has apparently disregarded Rule 1.8 (c) of the **Rules of Professional Conduct**. The Probate Court is not the proper forum to determine whether an attorney's conduct is in fact a violation of the Rules of Professional Conduct. The **RI Supreme Court Rules, Article III,** Rules 4 and 5 establish the Disciplinary Board and Office of Discipline Counsel and authorize them to pursue actions against attorneys for violation of the Rules of Professional Conduct[15]. The Proponent has suggested that he is related to the decedent as a "cousin" and may be exempt from a violation of **Rule 1.8 (c)** ; the court finds that there is not sufficient evidence submitted to support this premise. There are no known cases or statutes which specifically provide for the disallowance of a will **only** because the attorney/draftsperson of a will violated this Rule of Professional Conduct or similar rules involving a breach of fiduciary relationship by the attorney **Vallinoto v DiSandro** 688 A2d 830 (RI 1997).

The Objectors allege[16] that these actions of the Proponent give rise to the very real possibility that undue influence has been exerted on the decedent by him to obtain the bequests under the will because of the special, fiduciary relationship of trust he had as her attorney and draftsman of her will. No further evidence or testimony to support this premise is provided by the Objectors.

The evidence in this case is comprised of testimony from the Proponent, the two witnesses to the will and one of the nieces of the decedent. It is clear to me and I find as a fact that Mr. Petronio, while not being a blood relative of the decedent, had a special relationship with her that is akin to one related to another. It was more than lawyer client as evidenced by the following:

- that he was the best man at the decedent's wedding;
- his mother was very close to her while she was alive;
- he helped her as she advanced in age;
- He was her heath care agent designee and designated attorney in fact for financial decisions should the need arise;

[15] This is also the proper forum to pursue any alleged professional wrong doing against Ms Bouchard for her roll as a witness to the decedent's will.

[16] The Proponent himself on vigorous cross-examination expressed his regret and embarrassment in putting himself in the position of beneficiary and attorney/draftsman for the will.

- She attended his family functions and spent holidays with his family for many years.
- He shopped with her to select her funeral and was the person responsible for carrying out her burial wishes.

Mr. Petronio's relationship with the decedent was not of recent vintage, nor is there any evidence that he influenced the decedent not to have any contact with her family. To the contrary, Ms Kudrowitz testified that the decedent **had not wanted any contact** with her family, except her nephew Joseph, since 1968 and had no contact with Joseph since 1996. Interestingly to the court, the other local Objector, Joseph Campopiano did not appear to testify against the allowance of the will. Ms Kudrowitz did not aver that Mr. Petronio unduly influenced her aunt; rather she lamented that her aunt chose not to bother with her family. In fact, she testified that she knew her aunt was close to the Proponent and his family.

Undue influence is defined as the substitution of the will of a third party for the free will and choice of the testatrix in making a testamentary disposition. **Caranci v. Howard** 708 A2d 1321(RI 1998) and **Marcinko v. D'Antuono** 243 A2d 104 (RI 1968). One alleging undue influence usually does not have direct evidence of its existence, but must rely on circumstantial evidence and reasonable inferences therefrom. Exactly what is undue influence is a question depending on the facts of each particular case. **25 Am Jur. 2d** Duress and Undue Influence § 31 (1996).

Undue influence has been referred to as a species of constructive fraud, which the courts will not undertake to define by any fixed principles lest the definition itself should furnish a guide to the path by which its consequences may be evaded. **23 Am Jur.2d** Deeds (Undue Influence) § 203. In determining what constitutes undue influence in a particular case, the trial judge ordinarily examines the totality of circumstances, including the relationship between the parties, the physical and mental condition of the testatrix the opportunity and disposition of the person wielding the influence and his or her acts and declarations. **Tinney v Tinney** 770 A2d 420 (RI 2001). The court understands that undue influence is often difficult to prove, since the pressure is usually placed on the recipient covertly by the perpetrator. One alleging it usually does not have direct evidence of its existence, but must rely on circumstantial evidence and reasonable inferences therefrom. **Appolonia v**. **Kenyon** 225 A2d 778 (RI 1967). If a decedent makes an unnatural, unexplained disposition of property by will, when considered with other

factors, it **may** give rise to an inference of undue influence. **Murphy v. O'Neil** 454 A 2d 248 (RI 1983). The party contesting the will must prove undue influence by a preponderance of evidence. **Murphy**, *supra.* **Marcinko,** *supra*. The perpetrator of the undue influence must enjoy a position of trust and confidence with the testator and be instrumental in the testator's execution of the testator's contested will. **Appolonia** and **Murphy**, *supra*. A body of RI cases suggest that an unexplained, unnatural disposition in a will, when considered with other factors can give rise to the drawing of an inference of undue influence. **Lomastro v Hamilton** 76 RI 114 (1949).

The facts of this case do not support a finding of undue influence by the Proponent, even if Rhode Island were to adopt the premise that many other jurisdictions have concerning this fact pattern and require the proponent/attorney to have the burden of rebutting by clear and convincing evidence the inference that his action of drafting the will and being the primary beneficiary establishes undue influence on his part and invalidates the will, so compelling is the evidence in this case against the premise of undue influence. **Franciscans Sisters Health Care v Dean** 448 NE 2d 872 (Ill 1983).

Mere suspicion, surmise or conjecture alone is not sufficient to support a finding of undue influence. **Popko v. Janik** 341 Mass. 212 (Mass. 1960). **Caranci**, *supra*. The fact that Proponent had a fiduciary relationship with the decedent without any other suspicious circumstances is not enough to warrant a finding of undue influence.

The final issue to be addressed is whether the fact that Ms Bouchard, who is an attorney employee of Mr. Petronio and a witness to the execution of the will is akin to Mr. Petronio acting as a witness to the will and therefore makes any bequests to him void. As stated previously, this court will not address any possible violations of the Rules of Professional Conduct by Ms Bouchard. **RIGL 33-6-1** voids any gifts in a will made to an attesting witness. Ms Bouchard is not a beneficiary under the will and her employment does not vicariously void Mr. Petronio's bequest.

The court would be remiss if it did not comment on this obvious ethical lapse by Mr. Petronio. While he apparently did not exert undue influence upon the decedent, this entire affair could have been avoided by following the **Rules of Professional Conduct** and referring the decedent to independent counsel for the preparation of her will or for independent advice concerning its contents to avoid the appearance of any impropriety. Mr. Petronio has been a well-

respected member of the bar for many, many years, a member of the Supreme Court's Disciplinary Board. It is the court's fervent hope that he will, in the future, practice what he no doubt preaches: attorneys are duty bound to comply with the Rules of Professional Conduct. He also must now appear before the Disciplinary Board and face whatever sanctions, fines,etc that may be imposed .

Conclusions

The Court finds that based on all the evidence submitted and testimony from the subscribing witnesses to the will that the decedent had testamentary capacity at the time she executed her will, was over the age of 18 ,was not unduly influenced to make this will, knew the natural objects of her bounty and understood what a will was, what property she owned and how she wished to dispose it.

The last will and testament dated November 7th, 2001 is allowed; Everett A. Petronio, Sr. is appointed Executor and Appraiser; bond is set at $100,000.00 without surety. The objections to the allowance of the will are denied and dismissed.

ENTER:_____ BY ORDER:_____

DATE: DATE: