

**COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**No. 549 AP of 2014
Control No. 141265**

Estate of PARTICIA ANN SUAREZ, Appeal From Register

OPINION SUR DECREE

OVERTON, J.

Before this Court is the appeal of Amanda Suarez and Erica Suarez challenging the validity of the codicil probated by the Register of Wills on November 7, 2013. The main issue raised by the contestants was whether the codicil should be declared invalid due to the undue influence of Executrix, Mary Tomassetti, and the lack of testamentary capacity of Patricia Ann Suarez at the time of her execution of the codicil. For the reasons set forth below, the contestants have failed to meet their burden of proof and their appeal is denied.

Facts and Procedural History

Patricia Ann Suarez died testate and unmarried on October 21, 2013. She was survived by her two daughters Amanda Suarez and Erica Suarez.

On April 16, 2011, Patricia Ann Suarez signed a Will leaving her Estate to her to children in equal shares and naming her sister Mary Tomassetti as Executrix. (Exhibit P-2). The Will also stated that her children's shares were to be kept in trust until they reached the age of 18. *Id.* Specifically, the Will stated that each child was to receive half of the principal amount at age 18 and the other half at age 21. *Id.*

Patricia Ann Suarez, Appeal From Register



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On October 6, 2013, fifteen days before her passing, Patricia Ann Suarez executed a codicil which amended her April 16, 2011 Will in a number of ways. (Exhibit P-3). Notably, the codicil revised the ages at which the children could access the principal of their trusts. *Id.* Under the codicil, the children were not permitted to receive the first half of the principal until age 25 and the second half at age 30. *Id.* Additionally, Patricia Ann Suarez appointed her sister and her mother, Elizabeth Cunningham, to “handle [the] trust,” presumably to act as trustees over the trusts established for Amanda Suarez and Erica Suarez. *Id.* Decedent also made many specific bequests. *Id.* The codicil bequeathed \$10,000 each to Joseph Tomassetti and Kristen Tomassetti, the children of Mary Tomassetti. *Id.* It also stated that Mary Tomassetti was to receive one-third of Decedent’s retirement account, with the balance to be divided in equal shares among her daughters’ trusts. *Id.* Finally, the codicil stated that Mary Tomassetti was to receive her 2008 Chevy Malibu, Elizabeth Cunningham was to receive Decedent’s interest in the 3725 Ronnald Drive¹ property, and her children were to receive her interest in equal shares of both the Waldemire Drive² property and the Pocono Mountain house³. *Id.*

On November 7, 2013, the Register of Wills admitted Decedent’s April 16, 2011 Will together with her October 6, 2013 Codicil. On November 7, 2013, the Register of Wills also granted Letters Testamentary to Mary Tomassetti. On April 22, 2014, Amanda Suarez and Erica Suarez filed an appeal of the Register’s decision to probate the codicil.

In challenging the Register’s decree, Amanda Suarez and Erica Suarez assert that their mother was not of sound mind on the date of the execution of the Codicil because she was suffering from end-stage lung cancer and had at least ten brain lesions. (Petition for Citation Sur Appeal from Register ¶ 2(a)). They also assert that she was not capable of signing the Codicil

¹ This property is located at 3725 Ronnald Drive, Philadelphia, PA 19154.

² The specific address was not presented in the testimony or in the Exhibits.

³ The specific address was not presented in the testimony or in the Exhibits.

because the day before it was signed, she was under heavy morphine sedation and was not cognitive and disoriented to time, person, and place. (Petition for Citation Sur Appeal from Register ¶ 2(b)). Furthermore, they assert that Mary Tomassetti, Elizabeth Cunningham, and/or her boyfriend Gary Kustra exerted undue influence over Decedent by exploiting their confidential relationships with her. (Petition for Citation Sur Appeal from Register ¶ 2(b)). Mary Tomassetti filed an answer denying these allegations. (Answer to Petition for Citation Sur Appeal ¶ 3). The Court held hearings and received testimony on the appeal from October 6-8, 2015.

At the hearing, Amanda Suarez and Erica Suarez presented seven witnesses⁴, including non-treating physician Dr. Jeffrey A. Brown, M.D., J.D., M.P.H., FAPA, LFAOA. The contestants' first witness was Decedent's sister, Mary Tomassetti, who was called on cross-examination. She testified that she did not have a relationship with her nieces Amanda and Erica Suarez due to family discord. (N.T. 10/06/2015, 18:10-19:3). She also testified that as a result of that discord in 2000, her relationship with Patricia Ann Suarez dissolved. (N.T. 10/06/2015, 19:6, 20:20). However, she testified that she reconciled with her sister in 2008 when their mother was in the hospital. (N.T. 10/06/2015, 22:10-22). She stated that eventually they grew very close, and she became Power of Attorney and Executrix of her sister's Will. (N.T. 10/06/2015, 23:2; 24:1-2). She stated that her sister had made her own decisions throughout her lung cancer treatment until the last day of her life. (N.T. 10/06/2015, 27:22).

Mary Tomassetti also testified to the events leading up to the drafting and signing of the codicil. After Patricia Ann Suarez's transfer to hospice care on October 4, 2013, Ms. Tomassetti stated that the codicil was prepared on October 6, 2013. (N.T. 10/06/2015, 42:23; 45:18-19).

⁴ This Court notes that notary, Barbara Borghise, was not available to testify, as she passed away in 2014. (N.T. 10/06/2015, 62.14-19).

She testified that while they were alone, her sister told her what amendments she wanted to make to her Will. (N.T. 10/06/2015, 46:25-47:18). Ms. Tomassetti stated she located the original Will for reference and then typed up the codicil on her computer that same day. (N.T. 10/06/2015, 46:9-49:16). She recalled that while she did not have the notes from that day, she did write down her sister's wishes before she prepared the codicil. (N.T. 10/06/2015, 51:18-23). She stated that when she returned with the codicil, she and her sister went over the contents to make sure it was what Decedent wanted. (N.T. 10/06/2015, 73:18-20). She further testified that she was not in the room when the codicil was signed and that only the witnesses and the notary were in attendance when Decedent signed the codicil. (N.T. 10/06/2015, 61:1-7).

The next witness was Dr. Jeffrey A. Brown, M.D, an expert in the psychiatric and medical aspects of terminal metastasized brain cancer. (N.T. 10/06/2015, 91: 12-14). He was not a treating physician. (N.T. 10/06/2015, 115:25). He thoroughly and knowledgably testified about the medications Decedent took and the side-effects she experienced as a result of her lung cancer that metastasized to the brain. (N.T. 10/06/2015, 94:21-145:16). He stated that the medications she was taking had the potential to cause hallucinations, abnormal thinking, and lethargy, among other side-effects. (N.T. 10/06/2015, 113:18-24). He testified that many of the medications she received caused "cognitive disorientation" and that those medications were still in her system when she signed the codicil. (N.T. 10/06/2015, 132: 11-20).

He also testified about the events surrounding the signing of the codicil. He noted that the medical records did not mention the codicil at all. (N.T. 10/06/2015, 119: 10-14). He also noted that the records indicated Decedent had recently reunited with her daughters after a five-year period of estrangement. (N.T. 10/06/2015, 123:23-25). He opined that Decedent's reunion with her daughters was inconsistent with her "disinherit[ing]" them. (N.T. 10/06/2015, 124:9-

11). He also noted that he could not testify as to Decedent's state of mind on October 6, 2015 because there were no social worker or nurse notes on that date. (N.T. 10/06/2015, 150:8-22). While he could not testify with certainty, he stated that he could infer that Decedent's condition was the same on October 6, 2013 as it was on October 4, 2013 and October 7, 2013, when documentation other than visit summaries were available. (N.T. 10/06/2015, 150:14-19).

Dr. Brown also stressed that orientation has four spheres and that Decedent was only oriented to two spheres from October 4, 2013 to October 21, 2013 – that is, she was oriented to person and place, but not time and situation. (N.T. 10/06/2015, 157:1-18). Finally, he noted that on October 7, 2013, Decedent was oriented “times three,” which was an improvement upon her unconscious state on October 4, 2013. (N.T. 10/06/2015, 166:8-12). He ultimately opined, “Ms. Suarez did not have the cognitive capacity to fully understand her situation to know what she was doing whenever she did ... the codicil.” (N.T. 10/06/2015, 168:1-4).

The next two witnesses were Amanda Suarez and Erica Suarez. Amanda Suarez stated that before her mother entered into hospice care, her mother was “in good spirits” and that she was “going to fight” the illness. (N.T. 10/07/2015, 22:7-13).

Amanda Suarez recalled that her mother did not mention anything to her about the Will, and that she was not aware that her mother signed a codicil until after her mother's funeral. (N.T. 10/07/2015, 38: 13-15; 49: 5-12). She testified that on October 6, 2013, she was not in her mother's hospice room for the whole day continuously. (N.T. 10/07/2015, 43:8-13). Specifically regarding her mother's condition on October 6, 2013, she stated her mother was not responsive. (N.T. 10/07/2015, 46:23). She did note however that her mother's condition improved around October 9, 2013 because she was able to hold conversations with her at that time. (N.T. 10/07/2015, 47:10-21).

Erica Suarez testified that in the first few days of hospice care, her mother was not very responsive, but was able to say “yes” or “no.” (N.T. 10/07/2015, 117:20-25). She testified that her mother improved in the middle of her hospice stay but did not recall the dates. (N.T. 10/07/2015, 102:2-9). She also stated that she never saw her mother sign any documents while in hospice. (N.T. 10/07/2015, 107:8-10). She recalled on one occasion, she woke up, observed that her mother’s door was closed, and heard voices inside. (N.T. 10/07/2015, 106:16-109:21). She stated that she would not describe her mother as “alert” on October 6, 2013. (N.T. 10/07/2015, 118:12-24).

Contestants next presented the testimony of Kathleen Fenerty, one of the witnesses to the signing of the codicil. She testified that in the year before Decedent’s hospital stay, she and Decedent had many conversations about Decedent’s illness and how Decedent was maintaining good spirits. (N.T. 10/07/2015, 135:17-137:5). She stated that on October 6, 2013, before the codicil was signed, she was in the room with the other witness, Dorothy Stambaugh, the notary, Barbara Borghise, and Decedent’s boyfriend, Gary Kustra, and she asked Decedent if she could identify the month and date to ensure her lucidity. (N.T. 10/07/2015, 146:13-15). She stated she and Decedent also discussed the Thomas Kinkade paintings that were around the room to see if Decedent could remember them all. (N.T. 10/07/2015, 149:14-17). Ms. Fenerty testified that after the discussion she was satisfied as to Decedent’s lucidity. (N.T. 10/07/2015, 149:17). Ms. Fenerty recalled that Mr. Kustra read the codicil to Decedent and then she signed the document without assistance. (N.T. 10/07/2015, 146:22-25; 150:3-4). Ms. Fenerty testified that she was the next person to sign and that she left after the document was notarized. (N.T. 10/07/2015, 160:10-11; 163:3).

The second witness Dorothy Stambaugh also testified to the events of October 6, 2013. Before the signing of the codicil, she stated that she discussed a landlord-tenant matter with Decedent, and that Decedent wrote down some steps for Ms. Stambaugh to take. (N.T. 10/07/2015, 185:14-18). She then testified that Mr. Kustra read the codicil to Decedent and that she, Ms. Fenerty, and Ms. Borghise all signed the document which was notarized by Ms. Borghise. (N.T. 10/07/2015, 186:1-10).

The contestants' final witness was Decedent's mother, Elizabeth Cunningham, who was called on cross-examination. Ms. Cunningham stated that on October 6, 2013, she was surprised at the "rebound" her daughter had made because she was sitting up conversing with others. (N.T. 10/08/2015, 43:14-19). She testified that Decedent was "normal" on October 6, 2013 and that she discussed different topics including her cats and happier times. (N.T. 10/08/2015, 30:11; 46:20-25).

After the contestants rested their case, Respondents presented the testimony of two nurses and Decedent's friend Patricia Hosgood. Registered Nurse Kelly Caputo testified that on October 6, 2013, Decedent was "forgetful, alert, [and] oriented to person and place," meaning that she knew who her family was, who the nurse was, and that she was in the hospital. (N.T. 10/06/2015, 209:16-24). Nurse Caputo added that Decedent was lethargic when she first arrived, but became more alert. (N.T. 10/06/2015, 210:15-17). She added that Decedent had her "ups and downs," and that she was "always arousable enough to answer yes or no questions." (N.T. 10/06/2015, 210:17-20). When questioned about being familiar with the orientation category of being oriented to situation, Ms. Caputo indicated that she did not recognize that category. (N.T. 10/06/2015, 231:15-21). Registered Nurse Katherine Mandia did not recall the specific events of October 6, 2013.

Ms. Hosgood testified that Decedent was “remarkable” on October 6, 2013, and that she was sitting up and having coherent conversations with people. (N.T. 10/08/2015, 43:4-16; 46:3-4). Ms. Hosgood also recalled that Decedent had expressed that she was missing a previously scheduled trip to the Poconos that day because she was in the hospice facility. (N.T. 10/08/2015, 44:11-14).

Discussion

A. Contestants Failed to Establish Undue Influence

Once the proponent of a will proves that the formalities of execution have been followed, a presumption of validity arises when the will is probated. *Burns v Kabboul*, 595 A.2d 1153,1162 (Pa. Super. 1991). The burden shifts to the person contesting the will to prove that the testator lacked mental capacity or that the will was obtained by undue influence. *In re Estate of Nalaschi*, 90 A.3d 8, 11 (Pa. Super. 2014); *See also In re Bosley*, 26 A.3d 1104, 1107 (Pa. Super. 2011). In order to constitute undue influence sufficient to void a will, there must be “imprisonment of the body or mind...fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion, to such a degree as to prejudice the mind of the [testatrix], to destroy [her] free agency and to operate as a present restraint upon [her] in the making of a will.” *In re Ziel's Estate*, 359 A.2d 728, 733 (Pa. 1976) (internal citations omitted).

A contestant who claims that there has been undue influence has the burden of proving, by clear and convincing evidence, that (1) the testatrix was of weakened intellect; and that (2) a person in a confidential relationship with the testatrix (3) received a substantial benefit under the will. *In re Clark's Estate*, 334 A.2d 628, 632 (Pa. 1975); *See also Estate of Reichel*, 400 A.2d 1268, 1273 (Pa. 1979); *Ziel*, 359 A.2d at 734; *Burns*, 595 A.2d at 1162; *In re Estate of Angier*, 552 A.2d 1121, 1123 (Pa. Super. 1989); *In re Koltowich's Estate*, 457 A.2d 1302, 1303-04 (Pa.

Super. 1983). Once the contestant's burden is met, the burden then shifts to the proponent to show the absence of undue influence. *Ziel*, 359 A.2d at 734; *Burns*, 595 A.2d at 1162.

Because undue influence has been described as “subtle, intangible, yet recognizable by human experience,” it may be proven by circumstantial evidence. *Ziel*, 359 A.2d at 734; *In re Estate of Luongo*, 823 A.2d 942, 964 (Pa. Super. 2003). However, “opportunity, suspicion and conjecture do not create or amount to proof of either a confidential relationship or undue influence and cannot carry the cause.” *Luongo*, 823 A.2d at 964; See also *In re Thompson's Estate*, 126 A.2d 740 (Pa. 1956); *In re Quein's Estate*, 62 A.2d 909 (Pa. 1949).

Weakened Intellect

The Supreme Court of Pennsylvania has cautioned that a showing of weakened intellect in the context of a claim of undue influence need not amount to testamentary incapacity. *Clark*, 334 A.2d at 634; *Bosley*, 26 A.3d at 1112. When proving a testatrix was subjected to undue influence, her mental condition at the moment she signs a will is not as significant as it is when reflecting upon testamentary capacity. *Owens v. Mazzei*, 847 A.2d 700, 707 (Pa. Super. 2004). Consequently, weakened intellect will generally be proven through evidence more remote in time from the actual date of the will's execution. *Id.* Additionally, “more credence and weight may be given to the contestant's remote medical testimony.” *Clark*, 334 A.2d at 634.

While Pennsylvania courts have not established a bright-line test to establish the existence of weakened intellect to a legal certainty, they have recognized that it is typically accompanied by “persistent confusion, forgetfulness and disorientation.” *Nalaschi*, 90 A.3d at 14; See *In re Estate of Fritts*, 906 A.2d 601, 607 (Pa. Super. 2006). For example, weakened intellect was found when competent evidence showed that the decedent had been “out of touch”

with reality and had been found living “in filth.” *Estate of Lakatosh*, 656 A.2d 1378, 1385 (Pa. Super. 1995).

In the instant case, the contestants did not prove that Patricia Ann Suarez suffered from weakened intellect. In fact Mary Tomassetti testified to the fact that Patricia Ann Suarez made her own decisions until the end and understood the events at the time of the execution of the codicil and afterward. (N.T. 10/06/2015, 27:19-25). The Court notes that even though Patricia Ann Suarez came into the hospice facility on October 4, 2013 in an unconscious state (Exhibit P-1, p. 30), the medical records indicate that she was alert and oriented to person on October 5, 2013 (Exhibit P-1, p. 58), alert and oriented to person and place on October 6, 2013 (Exhibit P-1, p. 79), alert and oriented to person, place, and time on October 7, 2013 (Exhibit P-1, p. 82), and alert and oriented to person and place on October 8, 2013 (Exhibit P-1, p. 104). Her increase in cognitive ability was buttressed by Nurse Caputo’s testimony that Decedent had her ups and downs (N.T. 10/06/2015, 210:17), Dr. Brown’s testimony about her improvement on October 7, 2012 (N.T. 10/06/2015, 166:8-12), and Erica Suarez’s testimony that her mother improved in the middle of the hospice stay (N.T. 10/07/2015, 102:2-9).

Also, both Ms. Fenerty and Amanda Suarez testified to the fact that in the period of time before the hospital stay she was in good spirits and remained positive. (N.T. 10/07/2015, 22:7-13; 135:17-137:5). The Court appropriately weighed the non-treating physician’s opinion that Decedent suffered from cognitive disorientation resulting from the medications she had taken near the time of the execution of the codicil. (N.T. 10/06/2015, 132: 11-20). However, that opinion was against the weight of the evidence which indicated that she was not disoriented. There was no indication in the record that Patricia Ann Suarez experienced persistent confusion or that she was “out of touch” with reality. Therefore, because of the lack of clear and

convincing evidence, the Court does not find that Patricia Ann Suarez suffered from weakened intellect.

Confidential Relationship

A confidential relationship exists whenever “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 [for] in both [situations] an unfair advantage is possible.” *Estate of Ziel*, 467 Pa. at 542, 359 A.2d at 734; *Owens*, 847 A.2d at 709. The existence of a close family relationship, such as sister to sister, is not per se evidence of a confidential relationship. *Moreland v. Metrovich*, 375 A.2d 772, 775 (Pa. Super. 1977). However, Pennsylvania courts have found that the existence of power of attorney given by one person to another over the former’s entire life savings is an indication of a confidential relationship. *Clark*, 334 A.2d at 633-34; *Foster v. Schmitt*, 239 A.2d 471, 474 (Pa. 1968); *Lakatosh*, 656 A.2d at 1383.

Here, it is clear Mary Tomassetti stood in a confidential relationship with Patricia Ann Suarez. Not only was she Decedent’s sister, but she was also her power of attorney. (N.T. 10/06/2015, 23:2; 24:1-2). The record also indicates that she was named as the Executrix to her sister’s April 16, 2011 Will and that she was named as a trustee over Decedent’s daughters’ trusts in both the Will and the Codicil. (Exhibit P-2 at ¶ SIXTEENTH; N.T. 10/06/2015, 64:23; 65:10). Finally, she drafted the codicil. (N.T. 10/06/2015, 46:25-47:18). Therefore, the Court finds ample evidence to support a confidential relationship between Mary Tomassetti and Patricia Ann Suarez.

Substantial Benefit

“Substantial benefit” has not been specifically defined by Pennsylvania courts, and whether one receives a substantial benefit is determined on a case-by-case basis. *In re Estate of LeVin*, 419 Pa.Super. 89, 615 A.2d 38, 41–42 (1992). Cases that have found a substantial benefit include factual circumstances where the confidant had unfettered control, extensive powers, absolute discretion, or extensive decision-making powers over the testator's estate. *See In re Estate of LeVin*, 615 A.2d at 42-43 (concluding that substantial benefit accrued to executor/trustee who had authority to dispose of the remainder of the testator's \$1.5 million estate as the executor/trustee saw fit and to whomever the executor/trustee chose). However, it is important to note that when analyzing whether the proponent gained a substantial benefit, where there is a blood relationship between the testatrix and the beneficiaries of her estate, “[t]hat fact alone forms a sufficient, independent basis” for the bequest. *In re Estate of Stout*, 746 A.2d 645, 649 (Pa. Super. 2000).

The contestants failed to prove that Mary Tomassetti had received a substantial gift. Mary Tomassetti received nothing under the April 16, 2011 Will, other than her reasonable compensation for her duties as a fiduciary. (Exhibit P-2 at ¶ SIXTEENTH (F)-(H)) Under the Codicil, Ms. Tomassetti received one-third of her retirement accounts and a 2008 Chevy Malibu. (Exhibit P-3). While this is necessarily an increase from what Ms. Tomassetti received under the Will, the Court notes that her share under the Codicil is far from “the bulk” of the Estate. *See Clark*, 334 A.2d at 632; *see also In re Estate of Simpson*, 595 A.2d 94, 98 (Pa. Super. 1991) (finding no substantial benefit where the proponent only received 25% of the testator’s estate). Furthermore, Ms. Tomassetti credibly testified to the fact that she reconciled with her sister after a period of discord and that they grew very close. (N.T. 10/06/2015, 23:2). Furthermore, there

was no evidence presented that showed that Ms. Tomassetti initiated discussions about revising the Will or that she had suggested any changes. The Court does not find that the testatrix's bequests to her sister after their relationship greatly improved to be indicia of a "substantial benefit," as their familial relation independently supports the bequests. *Stout*, 746 A.2d at 649.

Ultimately, the contestants failed to present clear and convincing evidence that Mary Tomassetti destroyed her sister's agency or that she controlled her sister's body or mind through fraud or misrepresentations. *See Ziel*, 359 A.2d at 733. While the contestants did prove the second element of undue influence, they were unable to prove the Patricia Ann Suarez suffered from weakened intellect or that Mary Tomassetti received a substantial benefit. Therefore, because the contestants failed to show Decedent's weakened intellect by clear and convincing evidence, this Court finds that the codicil was not invalid as a result of undue influence.

B. Contestants Failed to Establish Lack of Testamentary Capacity

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of her bounty, the general composition of the estate, and what she wants done with it, even if memory is impaired by disease. *Reichel*, 400 A.2d at 1270; *Nalaschi*, 90 A.3d at 12-13. As previously stated, when analyzing lack of testamentary capacity, the Court must look to the testator's capacity at the time she signed the testamentary document. *Owens*, 847 A.2d at 707.

Despite the contestants' assertions that their mother was not alert on October 6, 2013 and the doctor's opinion that Patricia Ann Suarez did not understand what she was doing when she signed the codicil (N.T. 10/06/2015, 168:1-4), the Court finds the testimony of asserting the contrary to be credible. Many witnesses credibly testified that in addition to having discussions about the contents of the codicil on October 6, 2013, they had conversations with Decedent about paintings, vacations, and landlord-tenant matters. Decedent's mother stated that she was

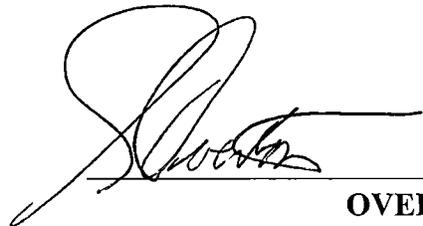
“normal” on October 6, 2013. (N.T. 10/06/2015, 210:17). Finally, Ms. Fenerty described how she was satisfied as to Testatrix’s alertness and awareness. (N.T. 10/07/2015, 149:17). Ms. Stambaugh described asking Decedent how she felt and how her mood was before the signing of the codicil. (N.T. 10/07/2015, 185:12-14). Therefore, the Court did not find substantial evidence to support a finding of a lack of testamentary capacity.

Conclusion

Based on the record, the contestants failed to meet their burden of clear and convincing evidence that Decedent’s codicil was the result of undue influence and/or lack of testamentary capacity. The appeal of the decision of the Register of Wills to probate the October 6, 2013 Codicil along with the April 16, 2011 Will is hereby denied as set forth in a separately issued Decree which will bear even date with this Opinion.

BY THE COURT:

Date: 11/3/15



OVERTON, J.

Lawrence A. Avallone, Esquire
Richard Costigan, Esquire
Brandon Riley, Esquire