

STATE OF RHODE ISLAND
PROVIDENCE, SC

PROBATE COURT OF THE
CITY OF PROVIDENCE

In Re Estate of Mary Esther Furtado, alias
Decedent

No. 2000-408

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, Mary Esther Furtado, who died on November 16th, 2000. The will is dated August 11th, 2000 and its allowance is being sought by Kenneth A. Souza the named Executor and one of the beneficiaries¹ thereunder. Make a Wish Foundation, one of the charitable beneficiaries under this will, also entered its appearance in support of its admittance.

An objection to this will was filed by one Dorothyann Graham², the sole beneficiary of a prior will made by Ms. Furtado on February 9th, 1999. Ms. Graham was given standing to challenge the will that is the subject of this controversy by this court despite the fact that she is not an heir at law of the decedent, because she was able to produce an executed photo copy of this 1999 Will and she therefore had an interest in the within case.

It should also be noted that in this court has appointed Kenneth A. Souza as Custodian for the decedent's estate, pending its decision, to insure that estate assets are not wasted, etc.³

After extensive discovery by the parties, an evidentiary hearing was held in Probate Court on March 22d, 2001 to determine if the August, 2000 will should be allowed. The Petitioner and Objector also submitted memos in support of their respective positions.

Pertinent Facts

¹ Kenneth Souza is left \$15000.00 under this will as a specific bequest; the remainder and apparently most of the estate is left to various charities.

² Ms Graham was a tenant in the decedent's home, occupying the second floor for approximately six (6) years prior to her death.

³ RIGL 8-9-10.

The Objector has stipulated that her objection to the allowance of the August 2000 will is **not based** on the incompetence of the decedent or on fraud being perpetrated upon her, but solely upon Mr. Souza's alleged undue influence on the decedent in the making and execution of this will.

By way of background, it should be noted that for many years the decedent was the next door neighbor of Mrs. Amelia Souza, the Petitioner's mother, who served as her Conservator for approximately 20 years. The Petitioner was also well acquainted with her and prepared her income tax returns for many years, including her 1998 and 1999 return. Apparently, the decedent considered Mrs. Souza and her son Kenneth as extended family members.

The decedent was no stranger to Probate Court; in March, 1999, based on her Petition and wishes, relative medical information and the request of the Conservator, this court dismissed the Conservatorship case.

Attorney Anthony Buglio testified at the court hearing that Ms. Furtado was referred to him by Attorney Thomas Bruzzese in early 1999 to accomplish this result, as well as to prepare a will and health care advance directive for her. In the will dated February 9th, 1999⁴, Ms Furtado left her entire estate to the Objector herein and appointed Ms Graham her agent to make health care decisions for her if she ever was unable to do so for herself. Attorney Buglio testified that he and Attorney Bruzzese initially met with Ms Furtado to discuss her estate plan and, after he prepared the will, both witnessed its execution. He did not have a long-standing lawyer/client relationship with her; sometime shortly before August 4, 2000, he was again contacted by Ms Furtado to make some changes to her estate plan. Subsequently, he and Mr. Bruzzese met with her at her home to revise her estate plan; on August 11th, 2000, the within will was executed by Ms Furtado and witnessed by the two aforementioned attorneys⁵. No other individuals were present at this time and according to Attorney Buglio, the decedent **complied with all of the statutory requirements** for making a will as did he and the other witness to the will; Ms Furtado also ripped the 1999 will into pieces⁶. Mr. Buglio testified that he did not know Kenneth Souza and

⁴ There is uncontroverted testimony from Mr. Buglio and the Objector herself that she (Ms Graham) was present in the decedent's apartment when she signed this 1999 will and knew its contents.

⁵ At this time, the decedent also executed a durable power of attorney for financial purposes and a health care directive appointing Mr. Souza as her attorney in fact.

⁶ RIGL 33-5-10

never represented him; his initial contact with him occurred between August 4 and August 11 when he verified with him that he (Mr. Souza) would be willing to act as Executor and Attorney in Fact for Ms Furtado. The two attorneys were the only persons present at the consultations in 2000 with the decedent.

Attorney Thomas Bruzzese testified that he knew the decedent many years as neighbors to his family and himself; he also knew the Souza family in the same way. He did not ever represent Kenneth Souza; this was the only matter that he had represented Ms. Furtado.

He testified that he was a witness to both wills (1999 and 2000); his recollection was that Ms Furtado destroyed the 1999 will and complied with all the statutory requirements for executing a new will on August 11th, 2000, as did he and Mr. Buglio, as witnesses to this will. He also stated that Mr. Souza never contacted him on behalf of the decedent.

Kenneth Souza testified he knew Ms Furtado for many years and that he prepared her tax returns as her accountant. During 1999, he testified that he met with the decedent two or three times to prepare her taxes and would from time to time see her in the neighborhood. He denied knowing the contents of any of her wills and also testified that he did not discuss estate plans with her. He denied any involvement in the preparation or services his mother provided Ms Furtado as her Conservator. In 2000, he testified that he met approximately three or four times with Ms. Furtado; twice for the preparation of her tax returns for 1999 in March and April and again in the summer (late July or early August) at her request, to sign Joint account bank cards. His testimony was that both he and his mother had a friendly relationship with Ms Furtado.

Mr. Souza also testified in rebuttal to certain testimony given by the Objector concerning alleged "yelling" by him at the decedent; he testified that he had a discussion with Ms Furtado concerning her cashing a lottery check and reporting the income of approximately \$5000 on her tax return for Ms Graham's fiancé (an individual referred to as "Bunky"). Mr. Souza stated that because of this, Ms Furtado owed an additional amount of taxes to the IRS and State, that her Medicaid benefits could be affected, and that her real property tax freeze with the City could be in jeopardy. He confronted the individual responsible for this and demanded that \$1200 be paid to Ms Furtado to reimburse her for the effects of this transaction, but did not know if the money was paid in full, although Bunky said he previously paid her approximately \$200.00 +.

Dorothyann Graham, the Objector to the allowance of this will, testified that she was a friend and tenant of the decedent for 5 years prior to her death. She testified that she assisted the

decedent in her every day basic living tasks and accompanied her on shopping trips⁷ and the like. She also wrote all of her checks for her and assisted her in her banking. She received no compensation for any of her assistance and did not expect to be paid for it; she was present when the decedent executed her 1999 will, leaving her estate to her. She also testified that the decedent occasionally referred to "taking care" of Ms Graham in her will. She denied knowing about the confrontation with her fiancé that Mr. Souza testified to, but did indicate that he had used Ms Furtado to obtain his winnings from the Lottery.

She related an incident that occurred on August 1st 2000 concerning a confrontation between Mr. Souza and Ms Furtado. She testified that the doors to Ms Furtado's apartment and hers were often left open during the day and that on this day she heard him screaming at Ms Furtado to "get **her name** off everything". Apparently, Ms Graham believed Mr. Souza was referring to her, although no evidence or testimony was submitted concerning this. She also stated that she had taken notes concerning this confrontation and referred to them during her testimony. Ms Graham testified that the decedent had, for some period of time after the termination of the Conservatorship⁸ expressed dismay at the lack of attention that Mr. Souza and her mother were giving her. She also testified that Ms Furtado was "afraid" of Mr. Souza. She also stated that she was unaware of the new estate plan that Ms Furtado made in August 2000, until the police authorized Mr. Souza to secure Ms Furtado's apartment on the day she died and her subsequent call to Attorney Buglio regarding the decedent's will.

Discussion and Findings

The parties stipulated to testamentary capacity and the absence of fraud. The only issue raised before this court is undue influence. 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). Here, Ms Graham alleges that Kenneth Souza has somehow substituted his will for that of Ms Furtado in the making of her will on August 11th, 2000. As proof of this, she alleges and relies on the following events:

- that the decedent was sorry that Mrs. Souza, her former Conservator, and Mr. Souza were not paying a lot of attention to her as they had in the past;

⁷Apparently, the decedent suffered from Cerebral Palsy and had limited mobility. Ms Graham testified that she helped Ms Furtado arrange for the acquisition of a scooter to get around, among other types of assistance she provided her.

- and that according to her recollection, Mr. Souza told the decedent shortly before she met with her attorney in August 2000 to get her name (Ms Graham) "off everything".

Apparently, the "everything" referred to the 1999 will, leaving all Ms Furtado's estate to her.

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 credible testimony from Attorney Buglio in this case as to the actions of the decedent in terminating her conservatorship is very telling; it seems incongruous to the court that the decedent would go to the expense and effort to have a 20 year relationship with Mrs. Amelia Souza as her conservator terminated, make a will leaving all her estate to "new" friend, relatively speaking, and then a little over a year later lament this fact and allegedly make the will in issue to regain Mrs. Souza's attention and good will. There has been no suggestion or testimony that the dispositions of the 2000 will are unusual or unnatural, leaving most of the decedent's estate to charity, except for a \$15000 specific bequest to Kenneth Souza.

The party contesting the will must prove undue influence by a preponderance of evidence. **Murphy, 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**. In this case, the only business connection between the decedent and Mr. Souza was the fact that he prepared her tax return and was upset that an individual had apparently taken advantage of her in cashing a lottery ticket, with all its adverse financial ramifications. The Objector submitted no credible testimony to support any other fiduciary relationship between Mr. Souza and the testator; to the contrary, she, herself, enjoyed a trusted relationship with Ms. Furtado. She wrote her checks, took her on errands, and helped her 5 or 6 hours a day with her personal needs. No testimony was presented connecting Mr. Souza to the execution and making of the 2000 will by the decedent. Both Mr. Buglio and Mr. Bruzzese testified that they were contacted by the

⁸ March 23rd, 1999

decedent in 1999 (Mr. Bruzzese) and in 2000 (Mr. Buglio). Mr. Buglio spoke with Mr. Souza only once after his initial 2000 conference with Ms Furtado while Mr. Bruzzese testified that he never discussed his representation of Ms Furtado with Mr. Souza

Mere suspicion, surmise or conjecture alone is not sufficient to support a finding of undue influence. **Popko v. Janik** 341 Mass. 212 (Mass. 1960). The incident of yelling at the decedent by Mr. Souza as complained about by Mrs. Graham may very well have taken place. It is mere speculation on her part to assume that this one incident and the apparent desire of the decedent to be close with Mrs. Amelia Souza and Kenneth are probative and support a finding of undue influence against Mr. Souza.

Conclusions

The Court finds that based on all the evidence submitted and testimony from the subscribing witnesses thereto, that the last will and testament dated August 11th, 2000 is allowed, and that the decedent properly destroyed and revoked the 1999 will. Kenneth A. Souza is appointed Executor and Appraiser; bond is set at \$400,000.00 without surety. The objection to the will is denied and dismissed.

The other relief sought by the Objector is not properly before this court. It appears to be in the nature of a claim against the estate and must be processed pursuant to RIGL 33-11 *et seq.* Therefore, the relief requested is denied.

ENTER: Martinelli, Judge

BY ORDER: Rollins, Deputy Clerk