Contrary to public perception, the insanity defense is rarely utilized and is rarely successful (Cirincione C, Steadman HJ, McGreevy MS *et al*: Rates of insanity acquittals. . . . *J Am Acad Psychiatry Law* 23:399–409, 1995). Mentally ill offenders have few available options for finding a successful resolution for their alleged crimes and for diversion into treatment instead of lengthy prison sentences (Mentally Ill Offenders in the Criminal Justice System. . . . Washington DC: The Sentencing Project, 2002). Mr. Herriman found himself in an increasing group of people in the United States who paradoxically have fewer legal remedies as a result of mental illness.

Given, his circumstances, Mr. Herriman's legal options were particularly challenging as he approached sentencing. His mental illness and his right to present an affirmative defense obstructed his access to sentence reduction in a way that does not occur for defendants who do not have a serious mental illness. The defense articulated that Mr. Herriman's active psychiatric disturbance during the accused crime and his confession to the police shortly after called into question his sanity. The defense also viewed it inappropriate to permit him to plead guilty given their impressions of his psychiatric state and irrational behavior. The government would not recognize his attempts at cooperation through his confession because he took his case to trial. His counsel believed that an insanity defense represented Mr. Herriman's best opportunity for legal recourse. Given its low likelihood for success, this particular legal defense could not have held out much optimism for him.

The government did not present other opportunities for Mr. Herriman to seek legal relief through mental health diversion. His mental illness appeared to situate him unfairly in a tight legal bind: either pursue what appeared to be a viable insanity defense and hope for treatment rather than punishment or plead guilty despite counsel's assessment of his lack of guilt due to psychiatric impairment and hope to be imprisoned for a shorter period of time because of his cooperation in doing so. The act of trying to accept responsibility and concurrently assert an insanity defense may not seem to mental health professionals as inconsistent as argued by the government and affirmed by the court. Had a prosecution expert agreed with the defense's position, for example, there may have been no factual contest in court and the case would have resembled *Gauvin* more clearly, but the government did not retain an expert to conduct such an evaluation. One could just as easily argue, therefore, that it was the government's decision to take the case to trial that blocked Mr. Herriman from obtaining a downward departure.

Requesting a downward adjustment in sentence following his failed insanity defense may have represented Mr. Herriman's most reasonable remaining legal option. It was denied because of the adversarial process in deciding legal insanity, despite his acknowledgment of the criminal act. The rules about downward departure were clearly not designed with insanity defense situations in mind. Defendants experiencing serious mental illness at the time of their crimes thus seem to be disadvantaged relative to defendants who do not, when both defense and prosecution acknowledge the facts of the criminal act.

Disclosures of financial or other potential conflicts of interest: None.

Retrospective Assessment of Testamentary Capacity: A Gray Zone

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Review of Trial Court's Decision Regarding Testatrix's Second Will and Grounds for Testamentary Incapacity and Undue Influence

In *Estate of Nalaschi*, 90 A.3d 8 (Pa. Super. Ct. 2014), the Superior Court of Pennsylvania affirmed the trial court's decision to allow probate of the decedent's second will. While conceding that the beneficiary under the second will would receive substantial benefit, the court held that the testator had testamentary capacity when he executed his second

will, that he did not have a weakened intellect, and that a confidential relationship did not exist between the testator and beneficiary.

Facts of the Case

Albert Nalaschi died on July 6, 2012, and was survived by his eight children. He had executed his first will (the 2010 Will) in January 2010, naming Eugene as the executor and Louise as the sole beneficiary (children from his second marriage). His second will (the 2011 Will), executed in April 2011, named Attorney Charles Witaconis as the executor and James (son from his first marriage) as the sole beneficiary.

Following Mr. Nalaschi's death, the Register of Wills for Lackawanna County accepted the 2010 Will for probate on July 11, 2012, and issued letters testamentary to Eugene, the executor named in that will. On July 27, 2012, Mr. Witaconis petitioned the Court of Common Pleas, Orphans' Court Division, requesting the revocation of the first will based on the existence of the second will and filed a second petition to compel the probate of the 2011 Will.

In response, Eugene asserted that the 2011 Will was invalid, citing that Mr. Nalaschi lacked testamentary capacity at the time of the execution of the second will and that it was the product of undue influence by James. On June 19, 2013, after hearing the testimony of both parties, the trial court found that Mr. Nalaschi had the testamentary capacity to execute the 2011 Will and that it was not the product of undue influence. The trial court then issued a decree revoking the letters testamentary issued with respect to the 2010 Will and allowing probate of the 2011 Will. Eugene appealed this decision to the Superior Court.

Ruling and Reasoning

The Superior Court of Pennsylvania affirmed the decision of the trial court and ruled that Mr. Nalaschi had testamentary capacity and was not subject to undue influence at the time of execution of the 2011 Will.

Reviewing Pennsylvania law, the court stated that the burden fell on Eugene to prove that, in executing the 2011 Will, the testator "lacked mental capacity, or the will was obtained by forgery, fraud, or undue influence, or was the product of a so-called insane delusion" (*In re Johnson's Estate*, 87 A.2d 188 (Pa. 1952), p 190). In support of his appeal that Mr. Nalaschi lacked testamentary capacity, Eugene argued that Mr. Nalaschi had lost nearly 40 pounds in weight from early 2010 to January 2011, and in March 2010, he had accused his daughter of stealing money from him. In addition Eugene stated that Mr. Nalaschi had stopped taking his medications and at the time of his demise was receiving services from the area agency on aging. Eugene also indicated that in September 2010, Mr. Nalaschi accused another daughter of stealing from him and had missed an appointment with his primary care physician after losing his way to the office. Eugene further stated that a month before the execution of the second will, Mr. Nalaschi had erred by writing a check for $23,000 instead of $2,300, had misspelled his daughter's name and had used his daughters' maiden names in the 2011 Will. Eugene relied on the testimony of Dr. Eugene Turchetti for support of his assertions, who, after reviewing medical records, opined that Mr. Nalaschi had alcohol-related dementia and had not been competent to execute the 2011 Will.

Regarding testamentary capacity, the court noted that the testator "need not have the ability to conduct business affairs" and that "evidence of such state of mind may be received for a reasonable time before and after execution as reflective of decedent's testamentary capacity" (*In re Estate of Agostini*, 457 A.2d 861 (Pa. Super. Ct. 1983), p 867). The court reasoned that the evidence presented by Eugene was insufficient, since testamentary capacity has a low threshold. The court also ruled that the evidence was not from a reasonable time before or after the execution of the 2011 Will and that Eugene relied heavily on the testimony of a doctor who had never actually met the decedent and had only reviewed the records. On the other hand, Mr. Witaconis had provided ample evidence of competence closer to the time of execution of the second will including assessments of capacity by himself and Attorney Zipay in March 2011 as well as testimony from a managing supervisor from the agency on aging and by Mr. Nalaschi's primary care physician from March and April 2011, who stated that there were no concerns about Mr. Nalaschi's competency.

Addressing the second challenge of undue influence, the court defined it as having three components, "(1) the testator suffered from a weakened

intellect at the time the will was executed; (2) there was a person in a confidential relationship with the testator; and (3) the person in the confidential relationship receives a substantial benefit under the challenged will" (*In re Bosley*, 26 A.3d 1104 (Pa. Super. 2011), p 1108). The burden to prove the absence of undue influence by clear and convincing evidence was on Mr. Witaconis (proponent). Given that James was to benefit substantially as the sole beneficiary of the second will, the court reviewed only the first two components.

Citing previous cases, the court stated that a finding of weakened intellect does not require impairment to the degree of testamentary incapacity and that the supporting evidence may be more remote in time from the actual date of the will's execution. Although not clearly defined, weakened intellect was recognized as "typically accompanied by persistent confusion, forgetfulness and disorientation" (*Nalaschi*, p 18). In an attempt to support the presence of forgetfulness and confusion, Eugene provided essentially the same evidence (mostly from 2010) as he presented before. The court ruled in favor of Mr. Witaconis for presenting more direct evidence, which was also more immediate to the time of execution of the 2011 Will.

Reviewing undue influence, the court defined a confidential relationship (*Nalaschi,* p 15) as when

> . . . the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed [*In re Estate of Boardman* 80 A.3d 820 (Pa. Super. 2013), p 823].

> [It] is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power [*In re Estate of Fritts*, 906 A.2d 601 (Pa. Super. 2006), p 608].

Eugene provided evidence suggesting undue influence and alleged that James, while living with and providing care for Mr. Nalaschi, had threatened to leave and place him in a nursing home before the 2011 Will. In contradiction, Mr. Witaconis stated that Mr. Nalaschi was alone when he met with Attorney Zipay and himself. The court, opined that the evidence Eugene offered that James had exerted influence was insufficient. In addition, on the question of weakened intellect, the court ruled that evidence was remote from the date that the 2011 Will was executed and that the trial court had not erred in its finding.

Discussion

The *Nalaschi* case highlights the complexity of testamentary capacity assessments, particularly those that are retrospective. In the absence of the testator, an evaluator is compelled to draw conclusions from medical data and collateral sources. Testamentary capacity is held to a very low standard among the assessments of capacity (Raub J, Ciccone J: The presence of mental illness . . . *J Am Acad Psychiatry Law* 40:287–9, 2012), and there is a presumption of competency. In *Nalaschi*, the evidence of a weight loss of 40 pounds over a year, while of concern, was not necessarily a reflection of his ability to execute a will. That Mr. Nalaschi was found disheveled, hung over, and agitated on certain days also did not necessarily indicate a steady decline in cognitive functioning. Losing his way on one occasion and adding an additional zero on a check may have indicated a clinical decline; however, the evidence was remote and limited.

The medical expert's opinion that Mr. Nalaschi had alcohol-related dementia, while possibly a valid diagnosis, may or may not have affected his capacity on the day that the will was executed. The presence of mental illness, including dementia, does not automatically imply lack of capacity or autonomy (Gutheil TG: Common pitfalls . . . *J Am Acad Psychiatry Law* 35:514–7, 2007). The court, based on the more immediate and in-person assessments by Attorneys Zipay and Witaconis of Mr. Nalaschi's ability to execute a will, credited their testimony over any other distant indication of a cognitive fluctuation.

The case also draws attention to the more complicated prong of assessing undue influence and its inherent requirement of the existence of a confidential relationship. Living with and caring for the testator is not necessarily an indicator of the presence of a confidential relationship. Undue influence must also be distinguished from due influence, when the testator intentionally favors or punishes select heirs (Gutheil, 2007). Making such assessments in the context of complex family dynamics can be particularly challenging.

Disclosures of financial or other potential conflicts of interest: None.