OAST & HOOK

OAST & HOOK NEWS

February 18, 2011
Volume 18 Issue 7

Offices in
Suffolk and
Virginia Beach, Virginia
Tel: 757-399-7506
Fax: 757-397-1267
Web: www.oasthook.com

NAELA
National Academy of Elder Law Attorneys, Inc.
MEMBER

MEMBER
Special Needs Alliance
Special needs require special lawyers.

INSIDE THIS ISSUE

Editor
Sandra L. Smith,
Certified Elder Law Attorney

CONSERVATORSHIP AND TESTAMENTARY CAPACITY

The Supreme Court of Virginia recently decided a case regarding the testamentary capacity of a person who had been declared legally "incompetent," with appointed conservators, and also addressed the issue of undue influence.

In *Parish v. Parish* (Record No. 092279, January 13, 2011), the decedent, Eugene Parish ("Eugene") suffered a head and spinal cord injury in a 1982 accident. He recovered $3.5 million in a lawsuit related to the injury. Eugene's only child David was eleven months old at the time of the injury. A court in Florida declared Eugene incompetent in 1983 because of encephalopathy, and his wife was appointed as his guardian; she was later replaced by Eugene's mother. Eugene moved to Tennessee in 1989. Eugene's mother agreed to transfer the conservatorship to Eugene's brother David Wayne, and David Wayne's wife, Diane. David Wayne and Diane lived approximately 40 miles from Eugene's nursing facility. A Tennessee court appointed David Wayne and Diane as Eugene's conservators in 2000.

David Wayne assisted Eugene in preparing a Last Will and Testament (the "will") in the fall of 2002. David Wayne testified at trial that "Eugene had informed him 'out of the blue' that he wanted a will." David Wayne acted as a translator for Eugene at Eugene's meeting with the paralegal, and David Wayne was present in the room when the will was executed and witnessed. In his will, Eugene bequeathed 25% of his estate to David Wayne, 25% to Diane, 25% to David, and 25% to other family members. He appointed David Wayne as executor and Diane as substitute executor; neither David Wayne nor Diane notified David that Eugene executed a will.

In 2004, David Wayne and Diane asked David and his wife Jessika to take over as guardians and conservators for Eugene. David and Jessika lived in Virginia, and the circuit court appointed them as temporary conservators in 2004. The court order found that Eugene "is incapacitated to such an extent that he is unable to care for himself, make medical decisions, manage his

estate or understand his debts as they become due." Eugene died in 2006, and David qualified as administrator of his estate. Diane petitioned the circuit court to have David removed as administrator and herself appointed as executor under the will. David filed a counterclaim to impeach the will, claiming that Eugene did not have testamentary capacity because of the encephalopathy and also claiming that David Wayne and Diane subjected Eugene to undue influence. The circuit court found that "Diane had proved by clear and convincing evidence that Eugene had testamentary capacity, and that Eugene was not subjected to undue influence."

The Supreme Court of Virginia first addressed the issue of the effect of adjudications of incompetence, and cited earlier cases in which it had held that "the appointment of a guardian is not prima facie evidence of mental incapacity." The court stated that "[t]he mere fact that one is under a conservatorship is not an adjudication of insanity and does not create a presumption of incapacity." The court reviewed the applicable statutes under Florida, Tennessee, and Virginia law and said that "[n]one of these statutes required a specific factual finding that Eugene was incompetent to such an extent that he could not execute a will under the standard we articulated in *Gilmer* and *Thomason*." The court held that "the circuit court correctly ruled that Eugene's adjudications of incompetence due to encephalopathy and the attendant appointments of conservators did not create a presumption of incapacity." The court then considered the issue of testamentary capacity. Because David did not dispute that the will was duly executed according to Tennessee law, the court said that "the presumption of testamentary capacity applies and the burden of producing evidence shifted to David, the contestant of the will." The court assumed, without deciding, that the testimony of David's witnesses was sufficient to overcome the presumption of capacity. The burden to produce evidence of capacity then shifted back to David Wayne, the proponent of the will. The court reviewed the testimony of those present when the will was executed, because, citing previous decisions, "[I]t is the time of the execution of the will that is the critical time for determining testamentary capacity." Additionally, "[I]n determining the mental capacity of the testator, great weight is to be attached to the testimony of the draftsman of the will, of the attesting witnesses, and of attending physicians." The court reviewed the testimony of those who were present at the time Eugene executed the will, and it concluded that the evidence was sufficient for the circuit court to rule that Diane proved Eugene's testamentary capacity.

The Supreme Court of Virginia reviewed David's claim that the circuit court erred in its finding that David Wayne and Diane did not exercise undue influence over Eugene. The Court cited the factors in *Martin* v. *Phillips*, in which the court observed that in the context of a will, "a presumption of undue influence arises when three elements are established: (1) the testator was old when his will was established; (2) he named a beneficiary who stood in a relationship of confidence or dependence; and (3) he previously expressed an intention to make a contrary disposition of his property." The court said that "the factors regarding persons of advanced age are equally applicable to other testators who have weakness of mind, whether from injury as in this case or from any other cause." The court held "that when a person with such weakness of mind has named a beneficiary with whom the testator stood in a relationship of confidence or dependence, and when the testator either previously had expressed a contrary intention or previously had expressed no intention regarding the disposition of his property, a

presumption of undue influence arises." The court discussed Eugene's relatively young age, and that he did not have significant property until after his brain injury, and held that the age and contrary disposition requirements were inappropriate in determining whether Eugene was unduly influenced by David Wayne. The court noted the statement by the circuit court that even if that court had applied the evidentiary standard of undue influence against Diane and David Wayne, the ultimate outcome would have been the same. The circuit court had noted that here was "no evidence" of undue influence, and that there was evidence that Eugene was stubborn and capable of resisting if he did not want to do something. The court said that the circuit court considered the evidence and weighed the credibility of the witnesses, and it found by clear and convincing evidence (a high standard than required) that Eugene was not subject to undue influence.

The attorneys at Oast & Hook can assist clients with their estate, financial, investment, long-term care, life care, veterans benefits, and special needs planning issues.

Ask Allie

O&H: Allie, we heard about a special animal that may be headed back to the United States from Iraq. Please tell us about him.

Allie: Sure! Smoke is a donkey who met now retired Marine Colonel John Folsom at Camp Taqaddum, outside Fallujah, Iraq, in 2008. A Navy lieutenant helped designate Smoke as a therapy animal, and Col. Folsom, the camp commandant, allowed Smoke to stay. When the 1st Marine Logistics Group had to leave the camp, Smoke was ultimately handed off to a local sheik. Col. Folsom, now head of Wounded Warriors Family Support, a nonprofit organization, has been fighting to relocate Smoke and bring him to the U.S. to work with families of wounded warriors. Col. Folsom was able to track down the sheik and is working with "Operation Baghdad Pups" to bring Smoke to the U.S. Smoke will require a special cargo flight because he cannot travel on a commercial flight like a dog or cat. We hope Smoke is home soon! Time to go and play. See you next week!

Announcement

Oast & Hook will present a free seminar to those who think they could be affected by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. Oast & Hook will present this seminar twice on March 2, 2011, at the Russell Memorial Library, 2808 Taylor Road, Chesapeake, Virginia 23321. The first presentation begins at 10:00 a.m., and the second presentation begins at 4:00 p.m. Make sure your estate plan and your plan for health care are not obsolete. Reserve your seat now. If you have any questions about this seminar or if you would like to register for it, then please phone Oast & Hook's Jennie Dell at 757-399-7506.