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STATE OF MINNESOTA

IN COURT OF APPEALS
APPELLATE COURT CASE NUMBER A06-0171

In Re the Estate of John J. Sullivan,
a/k/a John Joseph Sullivan

RESPONDENTS', JOHN J. POLSKI, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN JOSEPH SULLIVAN, AND CAROL SULLIVAN, BRIEF

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STATEMENT OF LEGAL ISSUES

I. Was it error for the Trial Court to accept, over the objection of the Appellant, the Settlement Stipulation reached by all other parties?

Trial Court Held: **The Stipulation met the criteria outlined in Minn. Stat. §524.3-1102 (3) and approved the agreement over the objection of the Appellant.**

II. Did the Trial Court error by not requiring a Trial on the merits regarding the underlying challenge to the Decedent's Codicil?

Trial Court Held: **There was a good faith legal claim to challenge the Codicil, but resolution of those issues became moot upon the Court's acceptance of the Settlement Stipulation.**

III. Did the Trial Court error in not allowing the Appellant, the 64 year old daughter of the Decedent, to receive a family allowance pursuant to Minn. Stat. §524.2-404?

Trial Court Held: **The Appellant did not qualify for a family allowance.**

IV. Did the Trial Court commit other errors in the proceedings including: (a) discontinuing the requirement of a bond for the Personal Representative; (b) allowing an attorney involved in drafting the Will and Codicil to represent a party in the proceeding; (c) not granting the Appellant's request for reconsideration or a new Trial?

Trial Court Held: **Discontinuation of the bond was appropriate, that an attorney who drafted the Will and Codicil could appear on behalf of a party, and that there was no basis for reconsideration or a new Trial.**

STATEMENT OF FACTS AND CASE

PROCEDURAL HISTORY

On July 13, 2001, the Decedent, John J. Sullivan, executed a Will which was drafted by his attorney, Charles Krekelberg, of Fergus Falls, Minnesota. This Will, among other things, created two testamentary trusts: the John J. Sullivan Trust and the John J. Sullivan Residuary Trust. The Will indicates that the John J. Sullivan Trust was designed to qualify for the marital deduction allowable under Federal Estate Tax provisions in effect at the time of the Decedent's death. In other words, among other things, the John J. Sullivan Trust was designed to avoid estate tax. That trust enured to the benefit of the Decedent's spouse.

The John J. Sullivan Residuary Trust was created with the residue of the Decedent's estate after application of the primary trust. This residuary trust divided income of the trust between the Decedent's spouse and children. That residuary trust, as outlined in the July 13, 2001 Will, authorized the Decedent's trustee, in his sole discretion, to pay to or apply for the benefit of any of the Decedent's children sums from the principal of the residuary trust as the trustee deemed necessary or advisable to care for or support the Decedent's children.

The original Will named John J. Polski as trustee. Mr. Polski was the long time accountant of the Decedent.

The Decedent's health began to fail. During this time frame, Nancy A. Sullivan, the Appellant herein, was making requests for financial assistance or loans from the Decedent. The Decedent's spouse sent to the Appellant a letter dated May 22, 2003 (Appellant's Appendix, Page 88). This letter, directed to the Appellant, advised the Appellant of health and financial concerns regarding the Decedent.

On July 30, 2003, the Decedent executed a Codicil to his July 13, 2001 Will. This Codicil essentially modified the provisions of the John J. Sullivan Trust by expanding the potential size of that trust to accommodate any increase in the trust which would qualify for favorable inheritance tax consideration. Essentially, the Codicil was designed to save the Decedent's estate inheritance tax. The remaining provisions of the Codicil reaffirm the provisions of the July 13, 2001 Will.

The Decedent's medical condition continued to deteriorate, and on October 22, 2003, the Decedent's spouse filed an emergency guardianship petition seeking emergency guardianship authority over the Decedent. The Petition for General Guardianship of the Person and Conservatorship of the Estate of the Decedent was filed on October 30, 2003, and ultimately, those petitions for guardianship and conservatorship were granted.

On February 27, 2004, the Decedent died. It is undisputed that the last estate document involving the Decedent is the July 30, 2003 Codicil.

On March 15, 2004, the Appellant filed a demand for notice of any actions in Probate Court involving John J. Sullivan.

On July 28, 2004, a Petition for Formal Probate of the Will and Codicil was filed with the Probate Court. On August 25, 2004, an objection was filed to the Will and Codicil by Tim Sullivan, a child of the Decedent. Eventually, the objections were expanded to included Michael J. Sullivan and Patricia P. Sullivan, children of the Decedent. The objection to the Will and Codicil, among other things, contended that the Decedent lacked testamentary capacity at the time of the execution of the Will and/or Codicil and further alleged that the Will and/or Codicil was created as a result of improper and undue influence on the Decedent.

At no time did the Appellant file an objection to the Will or Codicil. It is clear that the Appellant joined in the objection to the enforceability of the Codicil, but she filed no specific objections thereto.

John J. Polski was appointed as Personal Representative of the Decedent's estate. The children challenging the Will and Codicil, other than the Appellant, were represented by attorney, John Minge. The Appellant was represented by attorney, R. John Bartz until his withdrawal on December 22, 2005.

The children challenging the Will and Codicil entered into negotiations with the Personal Representative for resolution of issues attendant to the Will contest. Ultimately, those individuals were able to enter into a written stipulation to resolve all issues involved in the Will contest. This stipulation was reduced to writing and a Notice of Hearing to Approve the Stipulation was served upon all interested parties on August 16, 2005. Shortly after receiving the Notice of Hearing to Approve the Stipulation, the Appellant, through her attorney, filed a Petition Objecting to the Approval of the Settlement Agreement. This petition also sought family maintenance or support under Minn. Stat. §524.2-404. This petition was ultimately supported by an affidavit executed by the Appellant on September 8, 2005 which outlined her physical condition and her basis for a claim for family allowance.

The Decedent's spouse, Carol Sullivan, filed an objection to the Petition for Family Allowance dated September 7, 2005. Among other things, this objection claimed that any sums previously received, by the Appellant, from the Decedent, prior to his death, were not payments in the form of support but were, in fact, loans. The objection included copies of letters sent by the Social Security Administration to John J. Sullivan requesting clarification of information

regarding funds extended to the Appellant. It is clear from these documents that the determination of the status of the funds provided to the Appellant by the Decedent were an important consideration in the analysis of whether the Appellant would qualify for social security benefits. Apparently, if those sums constituted loans, they would not affect the availability of social security benefits. An inquiry was specifically made by the Social Security Administration as to the nature of those financial transfers. In a letter dated May 15, 2002, a claims representative of the Social Security Administration sent a letter to John J. Sullivan indicating that the Appellant, Nancy Sullivan, had characterized the transfers as loans and was seeking confirmation from John J. Sullivan as to that status.

On September 12, 2005, a hearing was held to determine issues surrounding the stipulation and the Appellant's request for family allowance. The Court received testimony from the Appellant who was also subjected to cross-examination.

On November 17, 2005, the Trial Court issued an Order Approving the Settlement Agreement and Findings of Fact, Conclusions of Law, Order for Judgment and Judgment regarding both approval of the settlement agreement and issues surrounding the Appellant's claim for family maintenance. In the Order and Findings, the Trial Court approved the settlement agreement of the parties over the Appellant's objection and denied the Appellant's request for family maintenance.

Notices of Entry of the Order Approving the Settlement Agreement and Findings regarding separate maintenance were filed on November 23, 2005. As noted earlier, Attorney Bartz withdrew from representation of the Appellant on December 22, 2005. On December 22, 2005, the Appellant, *Pro Se*, filed a document entitled "Petition for Reconsideration Motion"

with the Court. On December 23, 2005, the Trial Judge, Thomas M. Stringer, sent a letter to the attorneys and Nancy Sullivan advising the parties that the Court had received Ms. Sullivan's December 22, 2005 letter entitled "Petition for Reconsideration Motion." The Court noted for the Appellant that the Court would treat the letter as a request for reconsideration, and a request for a new Trial and extension of the time necessary to hear the otion for a new trial. The Court, in the December 23, 2005 letter, sought input from any of the parties as to their position regarding Ms. Sullivan's requests.

The Appellant responded on January 5, 2005 stating the grounds on which she felt a new trial was appropriate.

On January 9, 2006, Judge Stringer directed a letter to the Appellant with copies to attorneys informing the Appellant that he was denying her request for reconsideration and denying her request to extend the time necessary to file a motion for a new trial. With that January 9, 2006 letter, the issues before the Trial Court were effectively ended. On January 20, 2006, the Appellant filed her Notice of Appeal, and this Appeal follows.

ARGUMENT

I. THE TRIAL COURT'S ACCEPTANCE OF THE SETTLEMENT STIPULATION OVER THE OBJECTION OF THE APPELLANT WAS AN APPROPRIATE APPLICATION OF MINN. STAT. §524.3-1102 (3).

DISCUSSION

The Decedent's wife and Personal Representative sought admission of the Decedent's Will and Codicil to probate. Timothy, Michael and Patricia Sullivan filed petitions objecting to the admission of the Will and Codicil to probate. The Appellant, Nancy Sullivan, did not file an objection to admission of the testamentary documents to probate. It is clear that the Appellant objected to the Codicil during the probate proceedings.

Tim, Michael and Patricia Sullivan, through their attorney, entered into a stipulation with the Personal Representative and the Decedent's spouse to resolve all the issues attendant to their controversy regarding the admission of the Will and Codicil to probate. As a result, the procedures for approving that settlement or compromise are outlined in Minn. Stat. §524.3-1102 which states:

> The procedure for securing court approval of a compromise is as follows:
>
> (1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.
>
> (2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.
>
> (3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

Minn. Stat. §524.3-1101 identifies the effect of a stipulation and states:

> A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest.

In the present case, the Court determined that the provisions of acceptance of the stipulation as required in Minn. Stat. §524.3-1102 (3) had been met. The Court specifically found that there had been a good faith Will contest and that the agreement of the parties was just and reasonable.

The Appellant contends that the Court should not have accepted the terms of the stipulation because she opposed it. This Court must determine whether, under the facts and circumstances of this case, the Court had the legal and factual authority to accept the stipulation of the parties over the objection of the Appellant.

The underlying purpose of Minn. Stat. §524.3-1102 is to prevent dissipation of an estate and avoid wasteful litigation. In re the Estate of Schroeder, 441 N.W.2d 527 (Minn.App. 1989). Minn. Stat. §524.3-1102, Subd. 1 requires that the compromise be set forth in writing. It is clear, in the context of this case, that the proposed agreement was set forth in writing.

The next portion of Subdivision 1 requires that the agreement "be executed by all competent persons...having beneficial interests or having claims which will or may be affected by the compromise." The initial question which must be addressed by this Court is whether the Appellant, who failed to execute the stipulation, is a person having a beneficial interest affected by the compromise.

Minn. Stat. §525.712 indicates that an individual may appeal a probate ruling if they are a party aggrieved by the probate Order. In re the Estate of Overton, 417 N.W.2d 653 (Minn.App. 1988). It is clear that the Appellant has standing to raise the issues she has brought before the Appellate Court. However, that does not resolve the issue of whether the Appellant is a party having a "beneficial interest which will be affected by the compromise." Essentially, the Trial

Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Order Accepting the Compromise found that the Appellant was not an individual affected by the compromise.

The Appellant's objection to the compromise essentially focuses on the fact that as a result of the compromise, the trustee of the Sullivan Residuary Trust would no longer have the authority to pay out inequitable sums between the siblings. Under the provisions of the residuary trust, as contained within the Decedent's Will of 2001 and reaffirmed in his Codicil of 2003, the trustee had the authority to:

> apply for the benefit of any child of mine or child of any deceased child of mine from time to time such sums from the principal of this RESIDUARY TRUST as my Trustee, in its sole discretion deems necessary or advisable, to provide for his or her or their (as appropriate) proper care, support, maintenance, health, education, general welfare, reasonable luxuries, (comparable to the standard of living to which he or she or they have been accustomed) including assistance in building or purchasing a home or entering into or managing a business or profession. Such payments need not be equal between my respective children and the children of deceased children. *emphasis added* (2001 Will of the Decedent, Appellant's Appendix Pages 16 and 17).

The Appellant contends that the settlement agreement of the parties modified the provisions of the residuary trust in that Paragraph 6 of that stipulation directed that the trustee could make no distributions of principal or interest from the residuary trust except if such distributions were equal between the children. The Appellant apparently contends that this modification in the authority granted the trustee in the Will, versus the authority granted in the stipulation, makes her an individual whose beneficial interest was negatively affected by the stipulation thereby giving rise to the requirement that she must be a signator to the settlement agreement.

The Trial Court found that the Appellant misconstrued the meaning of the residuary trust. In Paragraph 5 of the Court's Conclusions of Law, the Court specifically found,

> Nancy bases her objection/contest to the will on an unfounded expectation that in the original will she is entitled to receive a larger sum of money from the Residuary Trust. The decedent's will provides that the trustee, in his discretion, may pay to or apply for the benefit of any child to provide for his or her or their proper care, support, maintenance, etc., and that such payments need to be equal between the children. This clause does not provide Nancy Sullivan with a guaranteed expectation to receive a greater sum of money than any of her siblings.

It appears from this quote that the Trial Court thought that the original Will required equal distributions between the parties' children. However, a review of Paragraph 6 of the Court's Conclusions of Law, states in pertinent part as follows:

> The proposed Settlement Agreement excludes said clause regarding the trustee's discretion to pay to a child of the decedent unequal amounts of money from the residuary trust, but does provide that each child of the decedent shall receive an equal distribution from the estate.

It is clear from this section of the Order, that the Court was well aware that the original trust provisions allowed for an unequal distribution. However, the Court specifically found that, "This clause does not provide Nancy Sullivan with a guaranteed expectation to receive a greater sum of money than any of her siblings."

The Trial Court found that while there was authority within the original residuary trust to give any of the children a greater sum, there was no guarantee that they would receive a greater sum. The authority to make that decision was clearly within the discretion of the trustee and under the terms of the trust solely within his discretion. As a result, the trustee would ultimately decide whether any of the children would receive a greater share. The trustee participated in the settlement agreement. By the trustee's consent to the settlement agreement, the trustee was

clearly indicating his intention to give to each of the children equal shares of the principal and interest of the residuary trust. As a result, the Appellant could have no real expectation to receive an unequal distribution from the trust. As such, the stipulation of the parties did not negatively affect the Appellant, and therefore, she was not required to execute the stipulation.

Under Minn. Stat. §524.3-1102, a procedure is created by which a Court will determine whether a stipulated settlement to resolve a Will contest will be accepted by the Court. Section 3 of that statute directs that a Court address two factors: (a) whether there is a good faith will contest, and (b) whether the effect of the stipulation is just and reasonable.

The Court made specific Findings that there was, in fact, a good faith Will contest as established by Tim, Michael and Patricia Sullivan. In Schroeder, supra, this Court determined that in the context of Minn. Stat. §524.3-1102, Subd. 3, good faith meant a claim had legal merit. A determination of good faith or legal merit can be either factual, legal or both. To the extent that the determination is factual, deference should be given to a Trial Court on its factual Findings. With regard to application of the law to the facts, the legal conclusion of the Trial Court is not binding on the Appellate Court, and the Appellate Court may review these legal conclusions *de novo*. A.J. Chromy Const. Co. v. Commercial Mechanical Services, Inc., 260 N.W.2d 579 (Minn. 1979), In re Holden's Trust, 291 N.W. 104 (Minn. 1940), and Schroeder, supra. In this case, an examination of the facts and the law clearly support the Trial Court's determination that the Will contest was in good faith.

The siblings who challenged the Will claimed that the Will and/or Codicil were defective in that either the Decedent lacked capacity or was under undue influence. In support of these contentions, information existed that the Decedent's health had deteriorated significantly. In a

letter submitted to all family members by the Decedent's spouse dated May 22, 2003 (Appellant's Appendix, Page 88), the Decedent's spouse had indicated concerns about the Decedent's capacity. In addition, the siblings challenging the Will and Codicil provided information that both an emergency and general guardianship and conservatorship had been commenced only months after the execution by the Decedent of his Codicil. The Court specifically found that these facts constituted a good faith basis to challenge the admissibility of the Will and Codicil to probate.

Indeed, the Appellant cannot dispute the good faith basis for this claim as her contention in her appeal is that the Court should have found that the Codicil was, in fact, defective based upon capacity or undue influence. The Appellant's position is that the Court erred in not throwing out the Codicil based upon those legal theories. As a result, the Appellant can really not be heard to object to the Trial Court's determination that there was a good faith basis for the Will contest.

It is, of course, important for this Court to note that the Appellant herself made no such Will challenge but apparently supported some portion of her siblings' challenge to the Codicil.

The Trial Court's determination that a good faith dispute existed about the ability to submit the Will or Codicil to probate is clearly supported by the law and facts and cannot be effectively challenged by the Appellant given her position that the Codicil should have been excluded from probate.

The second portion of the analysis regarding acceptance of a probate stipulation requires the Court to make a determination that the stipulation is just and reasonable. In Minnesota, the only case addressing the application of Minn. Stat. §524.3-1102 is Schroeder, supra. In that case,

the Appellate Court determined that a stipulation should not have been approved by the Court. The Appellate Court went at great lengths to discuss the issue of whether there was a good faith basis to challenge the Will in Schroeder. The Court determined that there was not such a good faith basis for challenging the Will. Thereafter, in Schroeder, this Court goes on to discuss whether the stipulation, even if the result of good faith litigation, was just and reasonable. It must be pointed out that any discussion of the meaning of good faith and reasonableness contained in Schroeder is *dicta* since the stipulation in Schroeder could not have been approved based upon the Appellate Court's determination of a lack of good faith.

The Schroeder Court found that in order for an agreement to be just and reasonable, it must, among other things, defer to the general intent of the Testator. Only under circumstances where necessary to protect the interests of the beneficiary or to prevent wasteful ligation, could the general intent of the Testator be ignored. It is clear that the Schroeder Court wanted to give due deference to the general intent of the Testator, but clearly understood that some consideration for the prevention of wasteful litigation must occur.

In Schroeder, the actual stipulation itself eliminated the spendthrift provisions of a trust created for apparently that sole purpose. The Schroeder Court found that this clearly violated the intent of the Testator and had the effect of potentially wasting the Testator's gift to his children. The spendthrift provisions of the Testator's will were so fundamentally part of the estate plan that to ignore them was, in the Schroeder Court's mind, not just or reasonable.

In this case, the Trial Court found that the stipulation itself was just and reasonable. First, the Court properly found that admission of the Codicil to probate would have the effect ofx increasing the size of the Decedent's estate. Application of the provisions within the Codicil had

a positive effect on the estate's tax obligation; thus, increasing, for all concerned, the potential size of the Decedent's estate. This obviously was a just and reasonable result and would be consistent with the Decedent's general intent to avoid tax as outlined in both his Will and Codicil.

The only real change that exists between the Will or Codicil of the Decedent and the actual stipulation of the parties relates to the trustee's discretionary authority to spend uneven sums between siblings. As noted earlier in this section of the Memorandum, that authority was purely discretionary with the trustee. The trustee, in his sole discretion, could spend money for the care of one child and have that sum be unequal as compared to other children. The provisions of the stipulation required that any expenditures for the children ultimately be equal.

The Appellant contends that this makes the stipulation unjust and unfair. However, as the Trial Court properly points out, the Appellant had no reasonable expectation or guarantee that she would receive any unequal treatment. The authority for unequal distribution rested solely with the trustee. He, in his sole discretion, could decide whether unequal treatment would occur. No action could lie for a breach of that discretionary authority since no criteria are given for its exercise. The trustee, by his consent to the settlement agreement, has clearly demonstrated that he had no intention of making an unequal distribution between the siblings. As a result, the effect of the stipulation, in no meaningful way, changes the distribution of assets as outlined in the Will and Codicil. The general intent of the Decedent is carried out by the stipulation. The change in the discretionary authority of the trustee is not such an egregious change as to justify a finding of unreasonableness or unfairness particularly in light of the fact that this authority for uneven distribution rested solely with the trustee who ultimately consented to a stipulation which removed that discretionary authority.

The Court properly found that there was a good faith challenge to the probate of the Will and Codicil, and further, properly found that the stipulation was just and reasonable. The Court properly applied the provisions outlined in Minn. Stat. §524.3-1102 in analyzing this stipulation. The Appellant need not sign such a stipulation because her interests were not in any way adversely affected by the stipulation. In fact, the Appellant benefitted from the stipulation by having the benefit of a larger estate to be distributed between the parties.

Minn. Stat. §524.3-1101 indicates clearly that any compromise of controversies accepted by the Court will have the effect of binding all interested parties.

Since the Appellant did not challenge the Will, since her interests were protected, since she was given a right to input in connection with the acceptance of the stipulation and since the Court found that the provisions of Minn. Stat. §524.3-1102 were met, the Appellant is properly bound to the terms and conditions of the stipulation and the Court's decision to enforce the stipulation is supported by the law and facts.

II. THE TRIAL COURT WAS NOT REQUIRED TO HAVE A TRIAL ON THE MERITS REGARDING THE UNDERLYING CHALLENGE TO THE DECEDENT'S CODICIL OR WILL.

The Appellant, in her brief, apparently contends that the Trial Court committed error by not setting aside the Codicil executed by the Decedent. The Appellant contends that the Codicil was a product of undue influence or lack of capacity. The Appellant, at length in her brief, gives the factual basis by which she believes the Court should have determined the Codicil was the product of influence or executed during a lack of capacity. As discussed in the previous section of this Memorandum, the Court specifically found that there was a good faith basis to make those claims. The Appellant apparently agrees with that proposition but contends that somehow the Court should have held a Trial on the merits despite the stipulation of the parties.

The Appellant filed a request with the Court that she receive notice of all proceedings. The Appellant did not file a challenge to the Will or Codicil. The Appellant clearly supported her siblings' challenge of the Codicil, but she did not file any documents challenging the probating of that Codicil. The Appellant did file a Petition Objecting to the Approval of the Settlement Agreement and for Family Allowance on August 26, 2005. That document, at Paragraph 3, states that the Appellant, "has stated to the Court and the parties hereto her objection to the probate of the will of Decedent and/or the codicil thereto." In that petition, the Appellant indicated to the Court that she objected to the approval of the settlement on the grounds that the settlement was not just and reasonable and that she had not consented to it. Those issues have been discussed in the previous section of this Memorandum.

The Appellant's petition objecting to the settlement and seeking a family allowance in itself does not constitute a challenge to the Codicil. The Appellant did not have an absolute right to have the issue of the challenge to the Codicil heard by the Court. Once the Court accepted the stipulation as required by the criteria outlined in Minn. Stat. §524.3-1102, then any challenge to the probate of the Codicil or Will became moot, and the Appellant no longer had an absolute right to a Trial on those issues.

III. THE TRIAL COURT DID NOT ERROR WHEN IT DENIED THE APPELLANT, THE 64 YEAR OLD DAUGHTER OF THE DECEDENT, A FAMILY ALLOWANCE PURSUANT TO MINN. STAT. §524.2-404.

On August 26, 2005, the Appellant filed a petition seeking, among other things, a family allowance. On September 8, 2005, the Appellant filed an affidavit in support of her request for a family allowance. This affidavit essentially outlined the physical infirmities which the Appellant has discussed at length in her Memorandum before this Court. In addition, the affidavit alleged

that the Decedent had made voluntary payments to the Appellant for the purpose of providing her support.

The Personal Representative and spouse of the Decedent objected to the request for a family allowance essentially contending that any sums of money received by the Appellant were, in fact, loans, and therefore, did not constitute support.

On September 12, 2005, a hearing was held and the Appellant gave testimony regarding her family allowance claim and was subjected, at that time, to cross-examination.

The Court specifically found in its Findings that the Appellant was not entitled to a family allowance. The Court found that the Appellant was not economically dependent upon the Decedent prior to his death. Further, the Court found that any testimony by the Appellant indicating that the payments were support, rather than loans, was not credible.

Minn. Stat. §524.2-404 states in pertinent part:

> (a) In addition to the right to the homestead and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support, and children who were in fact being supported by the decedent, shall be allowed a reasonable family allowance in money out of the estate for their maintenance as follows:
>
> > (1) for one year if the estate is inadequate to discharge allowed claims; or
> >
> > (2) for 18 months if the estate is adequate to discharge allowed claims.
>
> (b) The amount of the family allowance may be determined by the personal representative in an amount not to exceed $1,500 per month.
>
> (c) The family allowance is payable to the surviving spouse, if living; otherwise to the children, their guardian or conservator, or persons having their care and custody...
>
> (f) The personal representative or an interested person aggrieved by any determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family

allowance other than that which the personal representative determined or could have determined.

An examination of the record will clearly support the Trial Court's determination of fact and law resulting in the Trial Court's denial of the Appellant's request for a family allowance.

Pursuant to Section (a) of Minn. Stat. §524.2-404, "children who were in fact supported by the decedent" may be allowed a reasonable family allowance. Section (c) of Minn. Stat. §524.2-404 states, "The family allowance is payable to the surviving spouse, if living; otherwise to the children, their guardian or conservator, or persons having their care and custody." (emphasis added). The Respondent would respectfully suggest that the Appellant's claim for family allowance is moot in light of the provisions outlined in Section (c) of Minn. Stat. §524.2-404. If the Appellant would have qualified for a family allowance under Section (c) of the statute, that family allowance would have necessarily been required to be paid to the Decedent's spouse since she is alive. Section (c) of the statute does not authorize the payments to be discretionarily made to any other individual except if the Decedent's spouse is not living. As a result, even if the Court would have granted a family allowance, the payment for a family allowance would have been made to the Decedent's spouse, not to the Appellant. As a result, she essentially has no standing to object to the Trial Court's determination that no family allowance should be granted.

More significantly, the provisions of Section (c) clearly indicate the general purpose of the statute. It is certainly a stretch to imagine that this statute was designed to allow for the continued support of adult children. The provisions of Section (c) which require payment to a living spouse clearly indicate that the purpose of this family support was not to provide support

to children who are living separately from their parents but to provide support to a child being directly cared for by a parent.

Even if this statute is read to include the possibility of supporting a 64 year old child, the Trial Court's factual Findings regarding whether the Appellant is a child who "in fact (is) being supported by the decedent" is supported by the evidence.

No definition of "being supported" is provided within the Probate Act. The Trial Court reasonably concluded that support was the result of economic dependence of a child on the parent. In the present case, it is clear that the Appellant received sums from her father during the course of her lifetime. The question is whether that constituted financial or economic dependence upon her father. The Court properly found that the transfers of sums from the Decedent to the Appellant were haphazard, did not occur with any specific frequency which would have been connected to financial needs of the Appellant such as a monthly rental payment, specific bills, etc. While the Appellant testified that these transfers occurred when she asked the Decedent for money, she clearly indicated that there was no schedule to these transfers.

The Court properly found that the Appellant had been financially independent of her father for many years. While the Appellant argues that she has financial difficulties, this does not make her a "dependent child." For many years, the Appellant was married and dependent upon her husband to provide support. The mere fact that the Appellant needs money does not make her dependent upon her father. Many adult children need money, but that does not make them the dependent of their parents.

Perhaps of most significance in analyzing whether the Appellant is a dependent child within the meaning of Minn. Stat. §524.2-404 is the Court's determination regarding the nature

of the funds transferred from the Decedent. The record clearly supports the Trial Court's determination that these transfers from Decedent to Appellant were not gifts but rather loans. A loan arrangement clearly is different than an individual being dependent upon their parent for money. Loan arrangements exist between financial institutions and individuals. Those loan agreements anticipate a repayment of principal, at the very least, and usually interest. The arrangement to borrow money does not create a dependency relationship.

In this case, the Appellant herself indicated to the Social Security Administration that these transfers of sums from her father to herself were loans. She indicated that in writing to the Social Security Administration. Now the Appellant contends that it does not matter what we call the arrangement, it still makes her dependent. This "rose by any other name" argument is disingenuous. The Appellant, by her own admission, indicates that she had an obligation to repay her father for the sums transferred from father to daughter. This relationship of a lender is substantially different than the relationship that exists when a child is dependent upon their parent for support. When a parent pays for his child's care, it is not a loan. When a loan is created, then the dependency relationship ceases and a contractual and/or financial relationship exists instead.

In Act One, Scene Three of Shakespear's Hamlet, Polonius properly and prophetically warns, "neither a borrower or a lender be; for loan oft loses both itself and friend, and borrowing dulls the edge of husbandry." The mere fact that the borrowing and lending relationship between the Decedent and the Appellant has dulled the edge of the Appellant's "husbandry" does not turn that relationship into one of dependency which justifies a family allowance.

The Trial Court made factual Findings based upon a factual dispute. This Court must give due deference to the Court's Findings on facts. The Court specifically found that the Appellant's testimony regarding dependency was not credible. This credibility determination must be given deference by this Court. Minnesota Rule of Civil Procedure 52.01.

The Trial Court was well within its discretion in determining that the Appellant was not a dependent child, and therefore, not entitled to family maintenance or support. Further, it is clear that even if the Court would have granted a family allowance, the payment itself would have gone to the Decedent's spouse, not the Appellant, and therefore, she simply would not have benefitted from any family allowance directed by the Trial Court.

IV. THE TRIAL COURT'S DETERMINATION ON OTHER ISSUES, ASSIGNED AS ERROR BY THE APPELLANT WERE CLEARLY WITHIN THE DISCRETION OF THE COURT AND SUPPORTED BY THE RECORD.

The Appellant has noted in her brief a number of additional claims of error. These include the Court committing error and discharging the personal representative bond, or allowing an attorney involved in the drafting of the will and codicil to participate in the proceedings, and finally, supports denial of the Appellant's request for reconsideration or a new Trial.

The decision to require a bond is within the sound discretion of the Trial Court. Minn. Stat. §524.3-604.

In addition, Minn. Stat. §524.3-605 creates a procedure by which an individual interested in the estate may request a bond a writing. No such request was made by the Appellant. Even if such a request had been made, Minn. Stat. §524.3-605 grants to the Court discretionary authority to grant or deny the request for the bond. The court had the authority to discharge the bond, and the Court's act in doing so is not error.

The Appellant contends that attorney Charles Krekelberg's participation in the proceedings was inappropriate since he had drafted the Will and Codicil and may, in fact, have been a witness at the time of a Trial on the merits regarding the admissibility of the Codicil or Will to probate. Mr. Krekelberg commenced representing the Personal Representative and Decedent's spouse. However, a Substitution of Attorneys was filed with the Court on October 28, 2004. This document substituted attorney Thomas J. Reif for attorney Charles Krekelberg. Clearly, attorney Charles Krekelberg could not have participated in the Trial on the merits regarding admissibility of the Will or Codicil to probate. However, once the issues involving the admissibility of the Codicil or Will to probate was resolved, then no conflict existed and Attorney Krekelberg ceased to need to be available as a witness.

The parties reached a stipulation regarding resolution of the underlying Will contest. Attorney Krekelberg appeared at the hearing in which the Court was to address whether to accept the stipulation. The Appellant chose to file a petition and requested that it be heard that day granting her a family allowance. Attorney Krekelberg participated in the questioning relating to the family allowance issue. Apparently, now, the Appellant opposes that participation.

The attorney representing the Appellant at the time made no objection on the record to Attorney Krekelberg's participation in the hearing. As a result, the Appellant has no standing to raise this issue now. In any event, Attorney Krekelberg participated in the family allowance dispute. Since the Court ultimately accepted the stipulation to resolve the underlying Will contest, once that stipulation was accepted, no conflict for Attorney Krekelberg to represent the estate existed. The claim for a family allowance was against the estate and not dependent upon the Will contest claim. Attorney Krekelberg, therefore, could, under the sound discretion granted

to the Trial Court, participate in the family allowance dispute, which he did. The Court allowing him to do so was not objected to and is not error.

The Appellant, after withdrawal of her attorney, filed *Pro Se* requests for reconsideration and a new Trial. Issues surrounding a determination whether or not to grant a new Trial are within the sound discretion of the Trial Court and will not be disturbed absent a clear abuse of discretion. Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905 (Minn. 1990). On Appeal from a denial of a Motion for a new Trial, the decision of the Trial Court will stand unless it is manifestly and palpably contrary to the evidence, when that evidence is viewed most favorable to the Court's decision. ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn.App. 1992).

In this case, the Court properly analyzed the Appellant's request for reconsideration and a new Trial and appropriately denied those requests.

CONCLUSION

The Trial Court properly accepted the Stipulation of the parties to resolve the underlying Will contest herein. The Court properly applied the statutory factors outlined in Minn. Stat. §524.3-1102. The Court properly found that there was a good faith Will contest and that the stipulation of the parties was just and reasonable. The Court was not required to obtain the consent of the appellant in accepting that stipulation since the Appellant had not filed a challenge to the Will and since the Appellant's rights were not realistically or meaningfully affected by the stipulation.

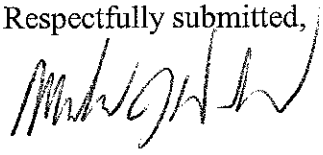
Once the Court accepted the stipulation, the Court had no obligation to require a hearing on the merits relating to the will contest, and the Appellant had filed no such petition.

The Court properly denied the Appellant's request for a family allowance and properly determined that the Appellant was not financially dependent upon her father. Even if a family allowance would have been granted, the family allowance, under Minn. Stat. §524.2-404 (c) would not have been paid to the Appellant, but instead, would have been paid to the Decedent's living spouse.

The Appellant's other claims of error by the Trial Court are without merit.

For the reasons stated in this Memorandum, the decision of the Trial Court should be upheld in all respects.

Respectfully submitted,



Michael J. Dolan