

**Matter of Gallagher**

2007 NY Slip Op 34612(U)

September 26, 2007

Surrogate's Court, Kings County

Docket Number: File No. 4328/01

Judge: Margarita López Torres

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1996, the decedent was seen by a local doctor, Dr. Anthony Scafa, who found evidence of the 1995 stroke. Additionally, Dr. Scafa noted that as a result of the stroke, the decedent suffered from sensory and expressive aphasia that required her husband, Peter Gallagher, to provide her medical history to Dr. Scafa.

The will was prepared by Steven Dorn, Esq. ("Dorn"). The three witnesses to the signing ceremony were Dorn, Pamela Elisofon, Esq. ("Elisofon"), and Tracy Luna, Dorn's secretary. Shortly after the will was executed, on June 4, 1997, Peter Gallagher died at their home. The decedent was unable to care for herself and was taken to the New York Methodist Hospital. She was subsequently transferred to the Menorah Home for the Aged.

On June 6, 1997, Terrile filed a petition to be appointed as guardian of the person and property of the decedent. In her petition, Terrile alleged that the decedent had suffered a stroke in 1995 which led to sensory and expressive aphasia and memory changes and that the decedent was unable to communicate her needs nor handle any activities of daily living. Terrile alleged that the decedent's husband had assisted the decedent in all her activities of daily living and that the decedent was unable to manage her financial affairs. Attached to the petition was a letter from Dr. Scafa. He stated that she could not manage her daily functions or communicate with anyone. He stated that the decedent was suffering from "permanent aphasia due to a cerebral infarction about 18 months" earlier. He noted that the decedent was unable to communicate her thoughts or take care of herself and recommended that she be placed in a nursing home.

In her petition, Terrile claimed to be the decedent's niece. In fact, the decedent's closest relatives were three maternal cousins, Bettman, Giblin and Vincent Scheer. Eventually, the cousins were cited in the guardianship proceeding. Bettman objected to the appointment of Terrile as guardian and the matter was set down for a hearing. At the hearing, Terrile and Dr. Frederick Gannon testified in support of the petition. From his review of the medical records and examination of the decedent, Dr. Gannon testified that the decedent suffered from irreversible brain syndrome. The decedent was seen by a court evaluator, who supported the petition.

Following the hearing, the court rendered an order and decision finding that the decedent was suffering from organic brain syndrome and dementia. As a result, she could not express herself verbally and there were times when she was "greatly disoriented." *Matter of Gallagher*,

No. 105142/97, slip op at 36 (Sup Ct, Kings County September 29, 1997). Based upon the testimony presented at the hearing, the court found that the decedent was an incapacitated person as defined by Article 81 of the Mental Hygiene Law and was in need of a guardian of the person and property. *Id.* at 36. The court further found that the decedent required one-on-one attention, mandating placement in a medically assisted supervised home. *Id.* at 37.

Terrile had requested that the decedent be placed in the Carolton Convelescent Home in Fairfield, Connecticut, near where she lived, and the court, by order entered on November 25, 1997, granted this request and directed that she remain there pending further order of the court. *Id.* at 37. Terrile and Bettman were appointed co-guardians of the person of the decedent. *Id.* at 37. They were also appointed co-guardians of the decedent's property, but Terrile was given the authority to manage investments in light of experience in the investment field. In effect, Bettman's authority was limited to co-signing checks necessary for the decedent's maintenance and sale of the decedent's real property. *Id.* at 37-38.

The decedent died at the Carolton Convelescent Home on April 2, 2001. On November 2, 2001, Terrile filed a petition to probate the purported will and preliminary letters were issued to her. The probate petition incorrectly listed Terrile as the decedent's niece and sole distributee. On April 29, 2004, Bettman and Giblin filed objections to probate of the will. The probate petition, however, was not amended to list the decedent's actual distributees until November 5, 2004.

The objectants allege the will was not executed in accordance with the formalities required by law, that the decedent lacked testamentary capacity and that the execution of the will was procured by fraud and undue influence. In addition, the objectants challenge the qualification of Terrile to preliminary letters based upon the misrepresentation in the probate petition that she was the decedent's next of kin when she knew, as a result of the guardianship proceeding, that the decedent's three maternal first cousins were the next of kin. The objectants claim that this constituted a fraud upon the Court and ask that Terrile's preliminary letters be suspended pending a hearing. The objectants also challenge the jurisdiction of this Court to entertain the probate proceeding. She averred that because the decedent resided in Connecticut, and that pursuant to the order of the New York State Supreme Court, her New York property had

been sold, she no longer had personal property within the State and therefore there is no jurisdiction in New York.

The parties thereafter commenced discovery. Dorn and Elisofen testified at an examination before trial. Dorn testified he had known Peter Gallagher ("Peter") and the decedent for over forty years. They had originally been friends and clients of his father, Francis Dorn, Esq. Indeed, Francis Dorn is named as alternate executor in the decedent's prior will. For a number of years, Peter and the decedent would visit Dorn at his office. For a period of about two years prior to 1997, Peter told Dorn he wanted Dorn to prepare a will. Eventually, Dorn told Peter to come in with his wife to prepare a new will.

The decedent and Peter wanted simple wills, leaving a small bequest to the local church and the remainder to each other. If they were not survived by a spouse, they wanted the residuary estate to go to Peter's niece, Terrile. Dorn testified that both Peter and his wife confirmed that this is what they wanted as their last will. Peter wanted to include Terrile in his will, saying that she lived in Connecticut and was very helpful to them. Peter did most of the talking. The decedent would either agree or disagree with his statements. The decedent did not discuss her family. There was no discussion about the couple's health or medical history. As Dorn summarized it, they had a clear idea of what they wanted in their will and Dorn followed their instructions. Peter wanted the wills executed that day but Dorn explained that it required time to prepare the documents. They arranged to come back the next day.

Dorn testified that it was his practice to have wills executed in his office. Peter and the decedent returned to Dorn's office on May 9, 1997 to execute their wills. Dorn testified it was his practice to bring clients into his office and offer them coffee. Because the Gallagher's wills were parallel wills, they were executed together. He brought in the two witnesses. After introducing them to the Gallaghers, Dorn told the witnesses that they were going to be witnesses to a will execution. He asked them if they wanted to be witnesses and they affirmed they did. He then read the will to the Gallaghers and went through the execution ceremony. He showed the respective instrument to each, asked them if this was their will. He asked them if they wanted the two potential witnesses to act as witnesses and they would execute the wills. Dorn would then read the affidavit of due execution and the witnesses would sign the will and the affidavit.

He did not remember the decedent saying anything during the ceremony. Usually, her husband did the talking. He recalled that they thanked him for his help. Dorn testified that he thought they were both competent to execute wills.

At her examination before trial, Elisofon testified that she was working in her office when Dorn asked her to come in and witness the execution of the wills. When she walked in, Dorn, the Gallaghers, Dorn's secretary and his paralegal were present. Elisofon spoke with the Gallaghers for about ten minutes. Then Dorn went through the will execution ceremony. Dorn asked each if the document was their will and whether they were familiar with the provisions contained in the wills. Upon receiving an affirmative answer, he introduced the witnesses. Dorn would have the Gallaghers read the instruments, make sure that this was what they intended and then sign it. The decedent signed her will first, Peter then signed his, and the witnesses witnessed both wills. They signed the attestation clause and an affidavit of due execution, which was then notarized.

Elisofon thought that they were a nice and pleasant couple in their sixties. They both participated in small talk with Elisofon prior to the ceremony. The decedent seemed to understand what the other people were saying and make appropriate responses. Elisofon testified that she was always concerned when she signed as a witness to will execution and would listen very carefully to responses from the client. She remembered Dorn asking the decedent if she understood the will and was willing to sign it and the decedent said, "Yes." Elisofon stated that if she had any concerns about the Gallagher's mental capacity, she would not have signed the will as a witness. The third witness, Tracey Luna, was not deposed, but submitted an affidavit of an attesting witness as part of the probate petition.

On January 18, 2005, the objectants served Terrile with a demand for the production of medical reports and authorizations to obtain copies of the decedent's medical records from the New York Methodist Hospital, the Menorah Home for the Aged and the Carlton Chronic & Convalescent Hospital.

After conference, the parties stipulated that all discovery would be concluded by September 8, 2006 and a note of issue would be filed by September 15, 2006. The note of issue and certificate of readiness were filed by the objectants on September 14, 2006. Nonetheless, the

objectants moved to dismiss the probate petition and deny probate to the will, on the grounds that Terrile was judicially estopped from denying that the decedent lacked testamentary capacity when the will was executed and that Terrile's intentional delay in giving her notice of the probate petition resulted in the destruction of vital medical records. In the alternative, she asks that the Court grant summary judgment that the decedent lacked testamentary capacity and disqualify both Terrile's current and former attorneys from representing her. Terrile cross-moved for summary judgment dismissing the objections and admitting the will to probate.

#### **Objectants' Motion to Dismiss**

Objectants move to dismiss the probate proceeding on a number of grounds.<sup>1</sup> The first ground is that Terrile, in the guardianship proceeding, alleged the decedent suffered a stroke in 1995 which resulted in sensory and expressive aphasia requiring the appointment of a guardian of her person and property. Objectants argue that this precludes Terrile from asserting that the decedent had testamentary capacity under the doctrine of judicial estoppel. The second ground is that the delay in giving the objectants notice of the probate proceeding prejudiced their ability to obtain medical records needed to establish their objections. The third ground is that the deposition of Terrile, combined with the medical records establish that the decedent lacked testamentary capacity.

Finally, in the event that the Court deny their motion to dismiss, they move to disqualify Terrile's attorney from continuing to represent Terrile. In the alternative, the objectants ask the Court to grant sanctions against Terrile for spoliation of medical evidence. They also seek the disqualification of Kopito from representing Terrile in this proceeding and the disqualification of Habel from providing legal advice to Terrile on issues relating to estate taxes and marshalling of assets. Terrile cross-moves for summary judgment dismissing the objections and granting probate.

#### **Judicial Estoppel**

Turning first to the objectants' motion to dismiss the probate petition on the ground of

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<sup>1</sup>The Court notes that Giblin is now deceased. Prior to her death, Giblin's attorney in this proceeding was representing both Giblin and Bettman. Whereas no fiduciary has been appointed for Giblin's estate, counsel for Giblin is relieved from representing Giblin.

judicial estoppel, the objectants claim that Terrile is judicially estopped from denying that the decedent was suffering from sensory and expressive aphasia since 1995. They further claim that the testimony of Dr. Scafa in his examination before trial establishes that sensory and expressive aphasia made it impossible for the decedent to communicate her thoughts. As a result, the will as drafted could not reflect the decedent's testamentary desires.

The equitable doctrine of judicial estoppel precludes a party from adopting a position directly contrary to or inconsistent with a position he or she assumed in a prior proceeding. *Maus v Cornell University*, 253 AD2d 1 (3d Dept 1990), *affd* 94 NY2d 87 (1999); *Baje Realty Corp. v Cutler*, 32 AD3d 307 (1<sup>st</sup> Dept 2006); *McCaffrey v Schaeffer*, 251 AD2d 300 (2d Dept 1998). The position may have been taken in a pleading, a deposition, or in testimony before the court.

*Boyers, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW U L Rev 1244, 1244-45 (1986). The doctrine serves a number of salutary purposes. It enhances "the orderly administration of justice and regard for the dignity of judicial proceedings."

*Environmental Concern, Inc. v Larchwood Constr. Corp.*, 101 AD2d 591 (2d Dept 1984), *Karsmanki v Terranova*, 115 AD2d 640 (2d Dept 1985). It preserves the sanctity of sworn pleadings. It "prevent[s] a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." *In re Galerie Des Monnaies of Geneva, Ltd.*, 62 BR 224, 226 (SDNY 1986).

The party seeking to apply judicial estoppel must show that: (1) the party to be estopped secured judgment in his or her favor in the prior action by adopting a certain position and then sought to assume a contrary position, merely because his or her interests have changed and (2) the court relied on the position in rendering its decision. *Jones Lang Wootton USQA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168 (1<sup>st</sup> Dept 1998), *lv denied* 92 NY2d 962 (1998); *Atlas Drywall Corp. v District Council of New York City and Vicinity of the United Brotherhood of*

*Carpenters and Joiners of America, Inc.*, 207 AD2d 762 (2d Dept 1994).

Objectants argue that Terrile averred in her petition and supporting documents that the decedent suffered a stroke in 1995 which resulted in sensory and expressive aphasia. Her statements in the prior proceeding may constitute admissions, and be admissible as evidence against her. *Coffin v President & Directors of the Grand Rapids Hydraulic Co.*, 136 NY 655 (1893). The objectants, however, go further and claim that Terrile is estopped from denying any statement made by the witnesses in the guardianship proceeding testifying on her behalf. Under their view, Terrile's statements in the guardianship proceeding precludes her from even asserting that the decedent possessed testamentary capacity when the will was executed.

In effect, the objectants are asking this Court to adopt an absolute and far reaching formulation of judicial estoppel. Under this formulation, the primary goal of judicial estoppel is protecting the sanctity of the oath. Only Tennessee has taken this absolute position. *Hamilton v Zimmerman*, 37 Tenn(5 Sneed) 39 (1957); *Boyers, supra*, at 1245.

Judicial estoppel differs from collateral estoppel in the privity is not required. It differs from collateral estoppel insofar as detrimental reliance is not required for judicial estoppel. Because the doctrine of judicial estoppel bars a party from denying the truth of the facts asserted in the first proceeding, it may lead to harsh results. *Davis, Judicial Estoppel and Inconsistent Positions of Law applied to Fact and Pure Law*, 89 Cornell L Rev 191, 199-200 (2000). As a result, the majority of courts, including New York, have rejected the absolute approach. These courts recognize that the primary consideration of judicial estoppel should be to preserve the integrity of the judicial process and the primary function of the judicial process is to reach the truth of the matters before it. The doctrine of judicial estoppel is limited to preventing a party

from playing fast and loose with the courts by deliberately shifting positions.

The application of the doctrine of judicial estoppel is left to the discretion of the courts. In determining whether to exercise its discretion, courts have considered a number of factors. The most important factor is whether the inconsistency in positions is clear and unambiguous. See *Bellevue South Assocs v HRH Cont. Corp.*, 184 AD2d 221 (1<sup>st</sup> Dept 1992), *lv denied* 80 NY2d 758 (1992); *Thrift Association's Service Corp. v DuBuono*, 255 AD2d 809 (3d Dept 1998). If the position of the party in the two proceedings can be reconciled, the doctrine of judicial estoppel does not apply. *Norstar Bank Nat. Ass'n v Davis*, 238 AD2d 892 (4<sup>th</sup> Dept 1997); *Zabel v Karasik*, 184 AD2d 436 (1<sup>st</sup> Dept 1992, see *Seneca Nation of Indians v State of New York*, 26 F Supp2d 555 (WDNY 1998), *aff'd* 178 F3d 95 (1999), *aff'd* 129 Sct 785 (2000). Thus, in *Zabel v Karasik, supra*, the court held that one of the co-executors' assertion that she owned the property in a matrimonial action was not inconsistent with the position taken in a discovery proceeding that the asset was an asset of the estate. This was so because the matrimonial claim might be based upon the estate's original ownership of the property. *Id.* at 437.

Another factor is whether the court relied upon the position in the first proceeding. Reliance is necessary, because the doctrine should be applied only in the "narrowest of circumstances." *Lamont v Gen. Motors Corp.*, 34 F Suppp2d 391 (WDVa 1990); see also *Vowers & Sons, Inc. v Strasheim*, 254 Neb 506, 576 NW2d 817 (1998); *Cloud v Northrup Grumman Corp.*, 67 Cal App4th 995, 75 Cal Rptr 544 (2d Dist 1998).; 28 AmJur2d Estoppel § 75. Therefore, the doctrine should be limited to situations in which the position of the party in the prior proceeding was necessary to the finding in that proceeding. See *Malamut v Doris L.*

*Sassower, P.C.*, 171 AD2d 780 (2d Dept 1991). Finally, the courts have considered whether the party asserting judicial estoppel will derive an unfair advantage or impose an unfair detriment on the party adversely effected by the doctrine. *New Hampshire v Maine*, 532 US 742-750-751 (2001). In *Whatley v Nike, Inc.*, No. 98-963-AS 2000 WL 33201902 (D. Or. October 20, 2000) (cited in *Davis, supra* at 196, n28), the court refused to apply the doctrine against a plaintiff to dismiss a patent infringement action for millions of dollars because the party had listed the value of his office equipment and patents in his divorce as \$2,250.

In the instant case, the assertion that the decedent needed a guardian in June, 1997 is not inconsistent with the assertion that the decedent possessed testamentary capacity in May, 1997. In order to appoint a guardian, the Supreme Court was required to find that the appointment was necessary to provide for the personal needs and to manage the property and financial affairs of the decedent and that the decedent was incapacitated. MHL 81.02(a).

Incapacity under the Mental Hygiene Law requires clear and convincing evidence that the decedent was likely to suffer harm because the decedent was unable to provide for her personal needs and property management and that the decedent could not adequately understand and appreciate the nature and consequences of her inability. MHL 81.02(b). Testamentary capacity, on the other hand, is the understanding that one is making a will, an awareness of the nature and extent of one's property and the objects of one's bounty. *See Matter of Kumstar*, 66 NY2d 691, 692 (1985); *Matter of Esberg*, 215 AD2d 655 (2d Dept 1995). Less mental capacity is required to execute a will than is required to execute any other legal instrument. *Matter of Coddington*, 281 AD 143 (3d Dept 1952), *affd* 307 NY 181 (1954); *Mater of Seagrist*, 1 AD 615 (1<sup>st</sup> Dept 1896), *affd* 153 NY 682 (1897).

Terrile does not dispute that the decedent was incapacitated, as defined by the Mental Hygiene Law, in June, 1997. Rather, she argues that the finding was not inconsistent with a finding of testamentary capacity and, in any event, the condition arose after the death of her husband on June 4, 1997.

Enactment of Mental Hygiene Law was intended to remove the stigma of incapacity, by providing for the needs of persons who, whether due to illness, age or other causes, had lost the capacity to manage their affairs without depriving them of all of their civil rights. Instead, the guardian's powers were limited to meet the needs of the individual in the least intrusive manner. In *Matter of Joseph S*, 25 AD3d 804 (2d Dept 2006), the Appellate Division held that a person who was unable to care for his own needs and property management was incompetent within the meaning of the Mental Hygiene Law, even though he appeared lucid and alert at moments. Therefore, a determination that one is incompetent under the Mental Hygiene Law is not a determination that one is incompetent at all times to make a will. *Matter of Bauer*, 96 Misc 2d 40 (Sup Ct, NY County 1978); *Matter of Schnelle*, 74 Misc 2d 226 (Sup Ct, Monroe County 1973). The fact that Terrile believed it was prudent to have a guardian for the decedent did not establish that the decedent lacked testamentary capacity. *In re Jerrell's Will*, 63 NYS2d 499 (Sur Ct, Monroe County 1946).

The law has long held that a will of an incompetent may be admitted to probate if executed at a time when the decedent's mind was sufficiently clear so that he or she had the essentials necessary to establish testamentary capacity. *Matter of Alexieff*, 94 NYS2d 32 (Sur Ct, Westchester County), *aff'd* 277 AD 790 (2d Dept 1950); *Matter of Davis*, 29 Misc 2d 60 (Sur Ct, Westchester County 1961). Thus, it has been held that a will executed by one judicially declared

insane will be admitted to probate upon proof that it was made during a lucid interval. *See Matter of Coe*, 47 AD 177 (3d Dept 1900); *Matter of Charap*, 4 Misc 2d 627 (Sur Ct, NY County 1955), *affd* 286 AD 1000 (1955); *Matter of Widmayer*, 34 Misc 439 9 (Sur Ct, NY County 1901), *affd* 74 AD 336(1902). Therefore, Terrile did not obtain judgment in the guardianship proceeding by adopting the position that the decedent lacked capacity when the will was executed in May, 1997, nor did any court make any such finding.

In the instant case, most of the allegations in the guardianship petition do not unambiguously refer to the decedent's mental condition in the period before the guardianship proceeding was brought in June, 1997. For example, Terrile's statements that the decedent could not communicate her needs (Guardianship Petition, ¶ 3), that the decedent suffered from confusion (Guardianship Petition, ¶ 4), do not necessarily imply that these conditions existed when the will was executed. As a result, Terrile's statements about the decedent's mental condition prior to June, 1997 were not necessary to the Supreme Court's finding that the decedent was incapacitated. Accordingly, the Supreme Court did not determine the decedent had suffered a stroke in 1995, or suffered from sensory or expressive aphasia in 1995, nor was such a determination necessary to appoint a guardian. It was sufficient for that court to find that in June, 1997, the decedent suffered from conditions which required the appointment of a guardian.

As to the equities, the detriment to Terrile in being able to prove testamentary capacity in the probate proceeding far outweighs any benefit Terrile obtained in the guardianship proceeding. In being appointed co-guardian, Terrile obtained no benefit. The courts have recognized that appointment as a fiduciary is a responsibility, not a beneficial interest in the decedent's estate or property. On the other hand, applying judicial estoppel in the manner proposed by the objectants

would mean that Terrile is denied the possibility of establishing that the decedent validly left her a considerable estate. Nor are the objectants prejudiced by requiring that they meet their burden of proving lack of testamentary capacity in the probate proceeding.

Balancing all of the factors required in a claim of judicial estoppel, the Court denies the objectants' motion to dismiss the probate petition on the ground of judicial estoppel.

### Spoilation

Objectants next argue that the probate petition should be dismissed because the failure to recognize their status as distributees for over three years, resulted in the destruction of the decedent's medical records maintained by Dr. Scafa and the Menorah Home for the Aged , where the decedent was taken after her husband's death and until the transfer to Connecticut. They allege that as a result of the delay and Terrile's inaction to their demand for medical records until they were forced to compel authorizations, they did not receive the authorizations until March, 2005. When they contacted the Menorah Home for the Aged, they were informed that the decedent's medical records were destroyed in January 2005. Dr. Scafa was deposed and testified at his examination before trial that he retained his medical records relating to the decedent for seven years after treatment in 1996 and then destroyed them. Objectants claim that as a result of the delay, they have been prejudiced in showing lack of capacity when the will was executed in 1997. Objectants assert the records would have shown the decedent had a stroke long before the death of her husband and that she could not speak and suffered from substantial mental impairment. Objectants move to dismiss the probate proceeding on the ground that the petitioner's delay in giving them notice of the proceeding and in providing authorizations for the medical records, whether intentional or negligent, resulted in the destruction of key medical

records.

Where a party alters, loses or destroys key evidence before it can be examined by the other party, the courts may dismiss the pleadings of the party responsible under the doctrine of spoliation. *Squitieri v City of NY*, 248 AD2d 201 (1<sup>st</sup> Dept 1998); *Mudge Rose Guthrie Alexander & Ferndon v Penguin Air Conditioning Corp.*, 221 AD2d 243 (1<sup>st</sup> Dept 1995); Dowd, "Spoliation: The Game has changed", NYLJ, August 17, 2007 at 24, col 1. In the instant case, it is not a party who has destroyed the records, but the medical providers. No case has held that a proceeding should be dismissed where a third party has destroyed records, even if vital to another party's case. See *Metlife v Basil-Chevrolet*, 1 NY3d 478 (2004). Accordingly, the motion to dismiss for spoliation is denied.

Objectants next move for dismissal pursuant to CPRL § 3226. Objectants claim that Terrile's delay was either deliberate or the result of gross negligence and justifies the dismissal of her petition or, in the alternative, an "adverse inference" charge, citing *Met Life Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478 (2004); *Squitieri v City of New York*, 248 AD2d 201 (1<sup>st</sup> Dept 1998); *Mudge, Rose, Guthrie, Alexander & Ferndon v Penguin Air Conditioning Corp.*, 221 AD2d 243 (1<sup>st</sup> Dept 1995); *Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068 (4<sup>th</sup> Dept 1999). Section 3126 of the CPLR provides that if any party refuses to obey an order for disclosure or wilfully fails to disclose information which the court orders disclosed, the court may make such orders as are just. Sanctions under this section have been applied where evidence has been destroyed by a party. *Dowd, supra*.

Terrile argues that objectants knew of the decedent's death in 2001 and failed to take any steps to obtain the medical records. However, until they filed objections and issue was joined,

the objectants had no authority to demand production of the records. It is disturbing that it took three years for Terrile to cite the decedent's distributees. Terrile knew that she was not a distributee and that Bettman was appointed a co-guardian in the 1997 guardianship proceeding. She can not now claim the error was inadvertent because her attorney in this proceeding was the very same attorney who represented her and Bettman in the guardianship proceeding. Under such circumstances, the failure to cite the maternal cousins is disturbing. Nonetheless, the motion to dismiss the probate petition under CPLR 3126 must be denied. Dismissal has been limited to cases where a party has destroyed the evidence. The decisions, included those cited by objectants, applying sanctions involved destruction of evidence by a party, or by a litigant who expected to be a party. *Met Life Auto & Home v Joe Basil Chevrolet, Inc., supra*; *Squitieri v City of New York, supra*; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp., supra*. In the instant case, Terrile did not destroy any evidence.

In addition, the party seeking sanctions must establish they acted promptly to secure the records. In the instant case, issue was joined in April, 2004, with the filing of the objections. The record is devoid of any evidence that Dr. Scafa or the Menorah Home for the Aged were contacted by the objectants prior to receiving authorizations from Terrile sometime after March, 2005. There is no record that objectants sought to obtain a court ordered subpoena for the medical records. Nor is there any record of objectants contacting the medical providers to ask them to preserve the records while authorization was being obtained. While the medical notes would not have been provided without such a subpoena, the medical providers might have preserved the records until authorizations or subpoenas were obtained.

Moreover, the record does not establish by clear evidence that the objectants have been

harmd by the inability to obtain the evidence. *See Jones v Israel Tribute Committee, Inc.*, NYLJ, April 3, 2001, at 18, col 2 (Sup Ct, NY County). In the instant case, the objectants have the benefit of the report of the ambulance personnel, the testimony of Dr. Gannon, the minutes of the guardianship proceeding. In addition, it has not been shown that the medical records of the New York Methodist Hospital and the Carolton Nursing Home are unavailable.

Furthermore, Dr. Scafa was deposed. While he was not able to refer to his medical notes, he was able to refer to a printout of medical services provided and billed, which refreshed his recollection. In addition, he was able to refer to his June 6, 1997 letter in the guardianship proceeding. As for the Menorah Home for the Aged, the decedent's stay there was for a short time, until she was transferred to the Carolton Nursing Home where she died. Based on the above, the motion to dismiss the proceeding on the ground of spoliation pursuant to CPLR 3126 is denied.

#### Summary Judgment

Objectants also move for summary judgment on the issue of testamentary capacity and against Terrile's cross-motion for summary judgment dismissing the objections. Summary judgment is appropriate only where it is clear that no material issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307 (1972). Consequently, the movant is required to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. CPLR 3212[b]; *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065 (1979). If the movant succeeds in making this prima facie showing, the party opposing the motion must submit admissible proof sufficient to establish the existence of material issue of fact requiring a trial, or

must demonstrate an acceptable reason for the failure to do so. *Zuckerman v. City of New York*, *supra*.

The proponent has the burden of proving due execution of the will by a fair preponderance of the evidence. *Matter of Gagliardi*, 55 NY2d 109 (1982); *Matter of Stegner*, 253 AD 282 (2d Dept 1938); *Matter of McDonough*, 201 AD 203 (3d Dept 1922). To prove due execution Terrile must establish that the decedent's signature was at the end of her will, the decedent must have acknowledged the signature before the witnesses as her signature or signed in their presence, the witnesses must know that the ceremony is one to execute a will. The will herein was signed by the decedent at the end thereof. The decedent signed her will in the presence of the witnesses. Elisofon Dep. at 16-17; Luna Aff. at 1. The witnesses understood the decedent was signing her will. Elisofon Dep. at 8-11, 13, 14-18; Luna Aff. at 1. Additionally, the execution ceremony is granted a presumption of regularity if it was supervised by an attorney. *See e.g. Matter of Finocchio*, 270 AD2d 418 (2d Dep't 2000); *Matter of Kindberg*, 207 NY 220. At his deposition, attorney-drafter Dorn stated that he read the will aloud to the decedent and that she read it in his presence as well. Dorn Dep. at 25. He testified that it was his practice to inform the witnesses that they were witnesses to a will execution ceremony. He asked the decedent whether she wished the witnesses to be witnesses for her will. Dorn Dep. at 23. In addition, the existence of an attestation clause permits an inference of due execution. *Woolley v. Woolley*, 95 NY 231 (1984); *Matter of Kellum*, 52 NY 517 (1873). An attestation clause is present in the instant will. Indeed, Dorn testified that he read the attestation clause aloud in the presence of the decedent and the witnesses before the clauses were executed. Dorn Dep. at 23. Based on the foregoing, Terrile has established due execution and is granted summary judgement

as to that issue.

Terrile also has the burden of establishing that the decedent possessed testamentary capacity when the will was executed. Terrile must establish that: (1) the decedent understood the nature and consequences of executing a will; (2) understood the nature and extent of her property; and (3) knew who would be the natural objects of her bounty and her relationship to them. *Matter of Kumstar*, 66 NY2d 691, 692 (1985), *rearg denied*, 67 NY2d 647 (1986); *Matter of Collins*, 124 AD2d 48 (4<sup>th</sup> Dept 1987); *Matter of Slade*, 106 AD2d 914, 915 (4th Dept 1984). To this end, Terrile has submitted the testimony of the attorney-drafter, a subscribing witness, and the report of the counsel to the public administrator to show testamentary capacity. In addition, she submitted the affidavits of two nieces of Peter Gallagher, who knew the decedent. The two affidavits assert the decedent was able to converse normally with the affiant, was able to understand her surroundings and act appropriately, and frequently mentioned her trips and interactions with Terrile and Terrile's family. Finally, Terrile submits the affirmation of the court evaluator in the guardianship proceeding, who met with the decedent in the hospital subsequent to the decedent's execution of the will. The evaluator states the decedent knew Terrile was not a blood relative but a niece of her husband. The court evaluator states the decedent was able to understand the court evaluator and that the court evaluator was able to understand the decedent. Finally, the decedent identified her signature on the will before the evaluator.

In opposition, the objectants submitted evidence from the guardianship proceeding and the testimony of Dr. Scafa at his examination before trial in support of their allegation that the decedent lacked testamentary capacity. This raises an issue of fact to be determined at trial. In

addition, the statements of Terile in the guardianship proceeding are sufficient to raise an issue of fact as to the testamentary capacity of the decedent. These issues should be resolved by the trier of fact. Accordingly, the objectants' motion for summary judgment and Terrile's cross motion for summary judgment on the issue of testamentary capacity is denied.

Objectants bear the burden of establishing that the will was the result of fraud or undue influence. Warren Heaton on Surrogate's Court § 42,07. As to fraud, the objectants must show that a false statement was made to the decedent to cause her to dispose of a property in a manner different from the disposition she would have made in the absence of the false statement. *Matter of Coniglio*, 242 AD2d 901 (4<sup>th</sup> Dept 1997). Objectants have failed to produce any evidence whatsoever on their claim of fraud. Accordingly, the cross-motion to dismiss the objection of fraud is granted.

As for undue influence, the burden of proving undue influence is upon the objectants. The burden does not shift and must be supported by a fair preponderance of the evidence. *Matter of Anna*, 248 NY 421 (1928). Additionally, to make a showing of undue influence, the objectant must establish that: (1) the charged individual has a motive to exercise undue influence, (b) he or she had the opportunity to exercise undue influence, and (c) he or she actually exercised undue influence. *Matter of Firumoa*, 47 NY2d 845 (1979); *Matter of Bosco*, 144 AD2d 363 (2d Dept 1988).

The affidavits submitted establish that Terrile did not participate in the preparation of the will and was not present when the will was executed. The objectants have submitted no evidence that Terrile, or anyone else, exerted undue influence on the decedent. Accordingly, Terrile's cross-motion for summary judgment dismissing the objection that the execution of the will was

procured by fraud or undue influence is granted.

**Disqualification of Kopito and Habel**

Finally, objectants ask that Terrile's current counsel, Ira Kopito, Esq. ("Kopito") be disqualified from appearing for Terrile in this proceeding. They further move to disqualify Terrile's former counsel, Kenneth Habel, Esq. (Habel") from providing any professional services to Terrile. Habel represented Terrile in her petition to be appointed guardian of the decedent. After Terrile and Bettman were appointed co-guardians of the decedent, he represented both of them in the guardianship proceeding. After the probate proceeding was begun, objectants moved to disqualify Habel from acting as Terrile's attorney in this proceeding. Habel subsequently withdrew, and Kopito appeared as counsel for proponent.

Terrile does not dispute that Habel is still acting as attorney for the estate in preparing tax returns and providing other estate legal services. Objectants claim that Habel should be precluded from representing the estate in any way. Terrile argues that he should be allowed to represent her in matters not related to the probate proceeding.

Attorneys owe a fiduciary duty of both confidentiality and loyalty to their clients. *Tekni-Plex v Meyner & Landis*, 89 NY2d 123, 130 (1996). The Code of Professional Responsibility precludes attorneys from representing interests adverse to those of a former client on matters substantially related to the prior representation. DR 5-101(A)(1); *Tekni-Plex v Meyner & Landis*, *supra*. Under DR 5-108, a party seeking to disqualify the adversary's attorney must show: (1) the existence of a prior attorney-client relationship between the moving party and the opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) that the interests of the present client and former client are materially adverse. *Tekni-Plex v*


*Meyner & Landis, supra; Solow v Grace & Co.*, 83 NY2d 303 (1994). Satisfaction of all three criteria gives rise to an irrebutable presumption of disqualification. *Solow v Grace & Co., supra*. Moreover, attorneys must avoid not only an actual conflict of interest, but “even the appearance, of representing conflicting interests.” *Cardinale v Cardinale*, 43 Ny2d 288, 296 (1977). A lawyer may not “place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.” *Matter of Kelly*, 23 Ny2d 368 276 (1968).

In the case at bar, Habel is no longer the attorney of record for Terrile in the probate proceeding. However, he is providing legal services to Terrile that may relate to issues involved in the probate proceeding. In balancing the rights of the parties, the Court notes that Terrile provides no reason why Habel is required to provide any further legal services to her in administering the estate. It has been over six years since the decedent’s death and any usefulness of Habel’s knowledge in tax matters or marshaling estate assets would seem to have elapsed by the passage of time. On the other hand, Bettman has the right to be free from any concern that Habel may, even inadvertently, betray any confidences which she may have imparted to him. *Matter of Mann*, 111AD2d 652 (1st Dept 1985). Any doubts should be resolved in favor of disqualification. *Schmidt v Magnetic Head Corp.*, 101 AD2d 268 (2d Dept 1984).

As for Kopito, however, the objectants have made no showing that he has obtained any confidential information as a result of his relationship with Habel and that any confidential information that Bettman might have relayed to Habel would be preserved by severing Habel’s relation to this estate. Accordingly, this branch of objectants’ motion is denied.

Accordingly, objectants' motion is granted to the extent that during the pendency of the probate proceeding, Habel is disqualified from providing any further legal services to the estate. Terrile's cross-motion is granted to the extent that the objections based upon fraud and undue influence are dismissed and due execution is deemed established.

This constitutes the decision and order of the Court.

  
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HON. MARGARITA LÓPEZ TORRES  
Surrogate

Dated: September 26, 2007