SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

In the Matter of the Estate of

GRACE K. GOLD a/k/a
GRACE KOEPPEL GOLD,

Deceased.

File No. 2011-367745/E
Dec. No. 30132

File No. 2011-367745/E
Dec. No. 30133

----------x

In this proceeding, the decedent's daughters, Cheryl Gold Ragusa and Amy Gold Kaufman, have petitioned for successor letters testamentary in the estate of their mother, Grace K. Gold. The decedent's son, Kenneth Gold, has moved by order to show cause for a stay of the proceedings pending the adjudication of his petition to rescind his waiver and consent filed in connection with the probate of his mother's will and for vacatur of the decree admitting his mother's will to probate on December 6, 2011. Cheryl and Amy have separately cross-moved for an order dismissing the petition pursuant to CPLR 3211(a) (7) for failure to state a cause of action and pursuant to CPLR 3211(c) for summary judgment. For the reasons that follow, the cross-motions are granted.

BACKGROUND

Grace Gold died on November 8, 2011. She was survived by her husband, Eugene, and by her three children, Cheryl, Amy and Kenneth. Grace left a will dated February 4, 2011. The will provides as follows. Under Article FIRST, the decedent bequeaths her personal property to Eugene. The will also creates a trust, to be funded with an amount equal to the decedent's generation-skipping transfer exemption, under Article THIRD. The Article THIRD trust provides that the net income therefrom be paid in quarterly installments to or for the benefit of Eugene during his lifetime. The trustees also have the discretion to pay or apply the principal of

the trust to or for the benefit of Eugene. The trust terminates upon Eugene's death, and Eugene is given a testamentary limited power of appointment over the principal of the trust exercisable in favor of one or more of Grace's descendants. If Eugene fails to exercise the power of appointment, the principal is to be disposed of pursuant to Article SIXTH, which provides that the principal is to be divided into one share for each of the decedent's then-living children and one share for each predeceased child leaving issue surviving. The remainder of the decedent's estate is to be held in trust for Eugene with the income payable in quarterly installments to or for Eugene's benefit. The trust terminates upon Eugene's death, and upon termination, the trustees are to pay to Eugene's estate the amount Eugene's executor certifies in writing is the amount of the estate tax in Eugene's estate attributable to the inclusion of the trust in Eugene's estate. The dispositive terms of the Article FOURTH trust are identical to the Article THIRD trust with respect to payment of the remainder at Eugene's death. Eugene is given a testamentary limited power of appointment in favor of one or more of Grace's descendants or, if he fails to exercise said power, the then principal is to be divided into one share for each then living child and one share for any predeceased child leaving issue surviving.

Grace's will nominated Eugene as executor. In the event Eugene failed or ceased to act, Grace appointed her three children as his successors. The will nominated Eugene and Cheryl as co-trustees of the trusts under Articles THIRD and FOURTH. If Cheryl failed or ceased to act, Kenneth is named as her successor.

Grace's will was offered for probate by Eugene by petition dated November 14, 2011 and filed November 21, 2011. Kenneth signed a waiver and consent to probate dated November 15, 2011. By decree dated December 6, 2011, Grace's will was admitted to probate. Letters

testamentary issued to Eugene and letters of trusteeship issued to Eugene and Cheryl.

Eugene died on November 8, 2013, leaving a purported will dated February 29, 2012 and three codicils dated May 8, 2013, September 12, 2013 and October 26, 2013 (collectively "Eugene's will"), all of which have been offered for probate by Cheryl, the nominated executor thereunder. SCPA 1404 examinations have been conducted by Kenneth. Eugene's will provides for all of the decedent's shares in Doral Fabrics, Inc. and Potomac Mills, Inc. to be distributed to Kenneth, if he survives Eugene, or if he does not survive, to Kenneth's surviving descendants per stirpes, subject to reduction to satisfy other bequests in Article SEVENTH of the will. In Eugene's will, Eugene gives one-half of his residuary estate to each of Amy and Cheryl. In addition, Eugene exercises his testamentary power of appointment over an inter vivos trust dated April 19, 2011 created between Grace, as grantor, and Eugene and Cheryl, as trustees, as follows: one-half (½) to each of Amy and Cheryl. Eugene also exercises his powers of appointment over the trusts under Articles THIRD and FOURTH of Grace's will as follows: $2,000,000.00 to each of Amy and Cheryl and the balance to his descendants per stirpes. Eugene's will contains an in terrorem clause.

KENNETH'S PETITION TO RESCIND HIS WAIVER AND CONSENT

Kenneth has now petitioned to rescind his waiver and consent dated November 15, 2011, filed in connection with the probate of Grace's will and has moved by order to show cause for a stay of the proceedings. Essentially, Kenneth asserts that his mother, by virtue of her medical condition, did not have capacity to execute her will and that her will was the product of a "conspiracy" by his sisters, his father and the attorney-draftsman and "family attorney" Alan C. Rothfeld, Esq. Additionally, Kenneth claims that he signed his waiver as a result of

misrepresentations made by Mr. Rothfeld whom he believed was his attorney.

According to Kenneth, during the last year of her life, his mother was taking "a variety of powerful prescription medications, including, but not limited to, liquid morphine, OxyContin and fentanyl." Kenneth also states that his mother was also taking Aricept. Kenneth asserts that his mother was afflicted with "Alzheimer's type dementia in 2009" and that his mother required twenty-four-hour care and supervision to ensure her safety and assist her with basic tasks, including toileting, bathing, eating, hygiene and mobility. In addition, Kenneth states that his mother needed cognitive training and became increasingly "forgetful, confused and dependent."

In support of his allegations regarding his mother's diminished capacity, Kenneth annexes copies of his mother's discharge papers relating to her six-day stay in Sloan Kettering commencing on January 12, 2011. The case management notes state that "Alternative/options discussed with patient/family. Agency list reviewed with patient/family." The discharge "PT Recommendations" indicate that "supervision to be provided by daughter, husband and private assistant." The "OT Recommendations" indicate "Cognitive Training, Home Safety Evaluation, Other Recommendations: Recommend intermittent supervision from husband/private home assistant/family." The discharge papers indicate the following medication orders: fentanyl-for pain, metformin and oxycodone for pain as needed. The only restrictions on activities were no driving and no heavy lifting.

With respect to the alleged misrepresentations made by Mr. Rothfeld, according to Kenneth, while his family was sitting Shiva in the decedent's Great Neck home after Grace's death, the "family attorney, Alan C. Rothfeld" asked to meet privately with him, Eugene, Cheryl and Amy. Mr. Rothfeld "pulled out a set of legal papers" which Kenneth believes included a

copy of Grace's will and a waiver and consent form. Kenneth contends that he "immediately objected"and refused to sign the waiver and consent and that Mr. Rothfeld left the home. Thereafter, Mr. Rotheld left Kenneth a voicemail in which he stated, in sum and substance, that:

> "(1) the waiver and consent was required in order to avoid the issuance of a citation by the court; (2) that while some people could address such issues during a Shiva or wake, others apparently could not; (3) that failing to sign the waiver and consent would require the family to incur substantial additional attorney's fees and costs; and, (4) he implied that [Kenneth's] refusal to sign the waiver and consent would anger [his] father."

On November 15, 2011, Kenneth sent an e-mail to Mr. Rothfeld in which he claims he requested advice as to what he would be foregoing by executing the waiver and consent. He also raised issues regarding the whereabouts and status of Grace's jewelry. Mr. Rothfeld sent Kenneth the following responsive e-mail:

> "Dear Kenny: You're waiving the issuance of a citation (like a summons in an ordinary court proceeding) from the Surrogate's court and consenting to the probate of the Will, the appointment of Dad as Executor and the appointment of Dad and Cheryl as Trustees of Dad's two trusts.
>
> If the Waiver and Consent isn't signed, I have to get the Surrogate's court to issue a citation giving the person a given amount of time (usually about three weeks, depending on the court calendar) to file objections to probate. If no objections are contemplated, it therefore makes no sense not to sign the Waiver and Consent. Dad will freak out over the additional expense and delay.
>
> The fiduciary responsibility to disclose all estate assets is that of the Executor, not the Trustees.
>
> Jewelry is included in the Will. It is part of "tangible personal property" (along with furniture, clothing, cars and the like) left to Dad. The children were beneficiaries of the tangibles only if Dad didn't survive.
>
> Look forward to explaining all the technical details of the Will necessary to achieve the maximum tax benefit for the family."

Kenneth signed the Waiver and Consent on November 15, 2011 before a notary public.

On November 16, 2011, Mr. Rothfeld e-mailed a summary of the provisions of Grace's will to Eugene, Kenneth, Cheryl and Amy. Grace's will was admitted to probate by decree dated December 6, 2011.

Kenneth states that, after Eugene died on November 8, 2013, he learned that his father "left his entire estate" to Cheryl and Amy and that he "had exercised a 'power of appointment' to de facto disinherit" Kenneth and his sons from Grace's estate. According to Kenneth, Mr. Rothfeld helped his father and sisters "concoct a plan to financially exploit " Grace and disinherit him and his sons.

In support of his conspiracy theory, Kenneth alleges that upon learning Grace was terminal and as she lay in Memorial Sloan Kettering Hospital, Eugene summoned Mr. Rothfeld to redo Grace's will. On February 4, 2011, Eugene, Cheryl and Amy brought Grace to meet Mr. Rothfeld at a restaurant to sign her new will, just minutes before she was scheduled to receive chemotherapy. Kenneth claims that his mother's "diminished mental capacity" and her "painful and terminal medical condition" make it highly unlikely that she requested this new will or had the requisite capacity to understand its terms.

Kenneth argues that the new will gave Eugene a power of appointment unlike her prior 1997 will. In support of his allegation that his mother did not understand her will, Kenneth argues that the will includes as a substitute contingent beneficiary a dear friend who died two years earlier.

Kenneth also annexes to his papers a copy of Mr. Rothfeld's notes dated February 5, 2011. The notes document that upon Grace's death Eugene intended to exercise the powers of appointment. On March 18, 2011, Eugene had Mr. Rothfeld revise his will and "de facto

disinherits" Kenneth and further disinherits Grace by making no provision for her. Kenneth argues that the bequest to him of the businesses is of no consequence because the assets have minimal value. Kenneth's petition alleges as follows:

> "With the benefit of hindsight and independent counsel, I now know that Rothfeld coerced me to sign the waiver and consent in mother's estate and he did so to further my father's objectives to financially exploit my mother and disinherit me."

Additionally, Kenneth argues that on April 19, 2011, Mr. Rothfeld had Grace sign an inter vivos trust he created for her pursuant to Eugene's direction. He claims that once again, Mr. Rothfeld had Grace "sign a powerful legal document right before her chemotherapy treatments." Kenneth further argues that from April 20, 2011 through November 7, 2011, with Mr. Rothfeld's guidance, Eugene took control of Grace's assets. On December 15, 2011, Mr. Rothfeld provided Eugene with a draft of his new will, which documents his decision to exercise the power of appointment. Kenneth claims that from January 28, 2012 through November 7, 2013, Mr. Rothfeld, Eugene, Cheryl and Amy begin "an unethical, immoral and, arguably, illegal campaign to convert Grace's assets." Kenneth argues that this campaign included submitting a fraudulent estate tax return and misuse of estate funds.

In summary, Kenneth asks that the court allow him to rescind his waiver and consent for the following reasons:

(i) Alan C. Rothfeld was the "family attorney." For approximately four decades, Mr. Rothfeld provided legal advice and services to Kenneth's parents, his sisters and him;

(ii) When Grace died and Mr. Rothfeld requested that Kenneth waive "the issuance of a citation," he did so notwithstanding his concerns as noted in his November 15, 2011 email to Mr. Rothfeld. He did so because Mr. Rothfeld was his lawyer and he thought that he would protect Kenneth and his family;

(iii) Kenneth did not know then that several months earlier, Mr. Rothfeld prepared a will for Eugene that *de facto* disinherited Kenneth and his children from Eugene's estate. He did not know then that Mr. Rothfeld would soon prepare a new will for Eugene that would empower Eugene to disinherit Kenneth and his sons from Grace's estate.

In conclusion, Kenneth asks the court to "realize that it would be unfair to punish [him] and [his] family because they have been deceived by their family attorney."

Kenneth has also submitted the affirmation of his attorney in which he states that it is imperative that the relief be granted because Kenneth has discovered "a pattern and practice of improper, unethical and, possibly, illegal actions taken by the decedent's husband, daughters and family attorney including, but not limited to, the financial exploitation of the decedent and her estate."

THE CROSS-MOTIONS

Cheryl and Amy have each cross-moved for an order dismissing the petition for failure to state a cause of action or for summary judgment dismissing the petition. According to Cheryl, Kenneth's allegations are "gross falsehoods and distortions of fact." Cheryl argues that Kenneth misleads the court by failing to disclose her parents' generosity. For example, in 2006, each of the children received approximately $10 million from a real estate investment their mother gave to them. Cheryl also points out that their parents paid for their grandchildren's tuition. Cheryl further argues that their parents were disappointed that Kenneth had a mistress and that he ran the business into the ground after he was given 49% of the business. Cheryl further contends her brother was a "no show" the last year of Grace's life and that Kenneth's proceeding to vacate the probate decree and rescind his waiver and consent in Grace's probate proceeding is an end-run attack on Eugene's will which contains an in terrorem clause. In addition, she argues that

Kenneth's intentional delay in challenging their mother's will has put them at an extreme disadvantage because had Kenneth done so while Eugene was still alive, Eugene would have been the best witness to disprove Kenneth's false claims.

In addition, Cheryl portrays a very different picture of Grace during the last years of her life. She argues that in December 2010 on a family vacation to the Dominican Republic, her mother was not incapacitated, in a wheelchair and incompetent as Kenneth describes. Cheryl states that Grace was active, fully independent and mobile and alert. Cheryl further states that during the chemotherapy treatment her mother remained "alert, conversant, mobile and continued to make her own decisions." According to Cheryl, Grace went to restaurants, read books, went shopping and was determined to be at her grandson's wedding, which she did attend. Cheryl also claims that Kenneth and his family expected and received checks from Grace at a time they claim she was incompetent.

Cheryl disputes Kenneth's claims that there was a conspiracy to disinherit him. She contends that Mr. Rothfeld was not her attorney and that she had only minimal contact with him. According to Cheryl, her parents believed Kenneth received more than she and Amy and that her parents were trying "to balance it out fairly." She also argues that Kenneth was not disinherited, rather he is not satisfied and just wants more. According to Cheryl, her father's assistant found promissory notes made by Kenneth as trustee of the 1997 insurance trust. She also claims that Kenneth charged his son's tuition on Eugene's credit card after he died and that Kenneth and his family looted the house a few weeks after Eugene's death.

Cheryl further points out that significant estate taxes will be due by reason of the inclusion of the two QTIP trusts in Eugene's estate and Eugene's estate is insufficient to cover

the payments. If Kenneth is successful in preventing the appointment of Cheryl and Amy as successor executors, substantial interest and penalties will be due.

The affirmation of Amy's attorney and Amy's affidavit essentially mirror the assertions of Cheryl. Amy states that her mother went skiing in St. Mortiz in January 2009 at the age of 80 and continued to live a full life. She states that the Golds were married for 59 years. According to Amy, she often accompanied her mother to doctor visits, while her brother did not.

Amy and Cheryl have also submitted affidavits from: (i) Alan Rothfeld, Esq., (ii) Philip Carter, (iii) Lee Tawil, (iv) John T. Wisentaner, (v) Luciano Rivera, aned (vi) Anthony M. Benjamin, Esq.

According to Philip Carter, he acted as a financial advisor to Grace Gold since December 21, 2006. Mr. Carter states that he often spoke with and visited Grace and Eugene. Mr. Carter further states that he recalls a dinner he had with Grace, Eugene and Amy in January 2011 at a restaurant in Manhattan. Grace told him she intended to live to see her grandson get married. She knew she was going to die and spoke about it freely. Mr. Carter contends that Grace "was alert, charming, vibrant, fully mobile and did not require assistance in any manner." After that dinner, he visited the Golds and Grace was always alert and nothing in her voice or what she said made him question her competence.

Lee Tawil has submitted an affidavit in which he states that he is employed by Neuberger Berman LLC and was part of the team that managed a discretionary investment advisory account in the name of the Eugene Gold Trust. He had a meeting with the Golds on May 4, 2011 to discuss and effectuate certain transfers. He states that there was no reason for him to believe that Grace did not understand the transfers.

According to John T. Wisentaner, he first met Grace in January 2007 when he was a senior portfolio manager for Fifth Third Bank in Grand Rapids, Michigan. He met with Grace about four times a year during the four years he knew her. On September 8, 2011, he took Grace and Eugene to the U.S. Open tennis match. He states that Grace was competent, conversant and alert. According to him, Grace had more energy than either Eugene or him.

Cheryl has also submitted the affidavit of her parents' houseman, Luciano Rivera. Mr. Rivera began working for the Golds in August 1998. According to Mr. Rivera, the Golds were much like another mother and father to him. Mr. Rivera states that, until her very last days, Grace had a clear mind, a good sense of humor and fully understood her medical condition. Mr. Rivera states that Kenneth was not a frequent visitor, while Cheryl and Amy were close to their parents. Mr. Rivera also claims that Grace never lost her mental sharpness and did not regularly use Aricept. She was given a doctor's sample but only took a few pills and never used it again.

According to Mr. Rivera, Grace told him that they would be giving most of the cash to the girls because Kenneth and his family had previously gotten much more than Cheryl and Amy. They felt that Kenneth was always looking for more money. Mr. Gold told Luciano that Kenneth would not be pleased and that he would probably make trouble for everyone. Luciano also states that Kenneth's wife offered to double the amount left to Luciano if he came to their house and met with "somebody."

Cheryl also submits the affidavit of Alan C. Rothfeld, Esq. Mr. Rothfeld disputes Kenneth's accusation that he is the mastermind of a plot to deprive Kenneth of what he perceives to be his entitlement from his parents' wealth. He calls Kenneth's accusations a "pack of lies and

misleading half-truths." According to Mr. Rothfeld, both Eugene and Grace always had "independent clarity of thought when it came to their estate plans." Moreover, Kenneth still received a substantial inheritance. Eugene and Grace "simply wanted to equalize the lifetime and testamentary benefit of their three children." Mr. Rothfeld further states that Eugene was displeased with Kenneth's inattention to Grace during her illness. As to the issue of the testamentary power of appointment, Mr. Rothfeld states as follows:

> In March 2011, Gene first told me that he intended to exercise his powers of appointment to compensate Amy and Cheryl so that all children would be treated equally. Shortly thereafter I advised Gene that I needed to disclose that to Grace and discuss it with her. Gene asked if he could be the one to discuss this with Grace. My response was that I needed to participate in the discussion. That discussion took place shortly after that in conversations among the three of us. Grace approved of Gene exercising his powers of appointment as intended, mentioning how attentive Amy and Cheryl were during her illness and Kenneth's disappointing inattention. She indicated a desire to equalize the lifetime and testamentary benefit of her three children and said she trusted Gene to work out the details, confident that he would do the right thing.

Moreover, Mr. Rothfeld states that Kenneth's submission of Grace's 1997 will which did not include testamentary powers of appointment for Eugene is misleading as he prepared a will for her in 2006 which similar to her final 2011 will gave Eugene a power of appointment. Mr. Rothfeld states that he wrote a letter dated February 2, 2011 to Grace reminding her about her new will and even referencing the 2006 will. Mr. Rothfeld also states that he never acted, directly or indirectly, as the attorney for any member of the Gold family, other than Grace and Eugene. He disputes Kenneth's allegation that the preparation of a lease in connection with the Golds' Qualified Personal Residence Trust made him the children's attorney. The lease was prepared at Eugene's direction and only Eugene was his client after Grace's death.

Mr. Rothfeld notes that he prepared other estate planning documents for Eugene,

including a health care proxy naming Amy as agent and a power of attorney naming Cheryl as attorney-in-fact, which did not make him, contrary to Kenneth's claim, either Amy or Cheryl's attorney.

Moreover, Mr. Rothfeld claims that Kenneth misrepresents the events surrounding his Shiva visit. He states that he brought the documents to the Shiva at Eugene's instructions and that he did not bill for the Shiva call, but only for the time of the private meeting with the family to discuss probate. In addition, Mr. Rothfeld states that his e-mail to Kenneth after the Shiva must be viewed in the context of Kenneth's statement at the private meeting that he had no intention of contesting Grace's will.

Mr. Rothfeld also disputes that he prepared promissory notes in connection with the 1997 irrevocable life insurance trust. He did not know that the notes existed until after Eugene's death and that is why the notes were not included in Grace's taxable estate. Mr. Rothfeld points out that inclusion of the notes would not have mattered since Grace's entire estate qualified for the marital deduction. In addition, Mr. Rothfeld disputes Kenneth's claim that the initial estate tax return did not list the jewelry, noting that the original return listed the jewelry but referenced an amendment which would, in fact, later be filed.

Mr. Rothfeld states that Kenneth's idea of a conspiracy with a master plan to disinherit him is completely devoid of reality. According to him, the Golds "wanted to use their estate plans as a method for adjusting among their children for what was given to them while alive and what was to be given in their Wills." He "hatched a plan with no one." According to Mr. Rothfeld, Eugene left his interest in Potomac Mills, which he valued at about $2,000,000.00 to Kenneth, and wanted to provide offsets to his daughters.

Mr. Rothfeld further disputes that he was involved with the issue of roof repairs to the building as proof that he was the "family attorney." He states that he participated in one conference call at Eugene's request and billed Eugene for .7 hours on February 16, 2011.

Anthony M. Benjamin, Esq. has submitted an affidavit in which he states that he witnessed Grace's will on February 4, 2011. He had lunch with Grace, Eugene, Amy, Cheryl and Mr. Rothfeld. Grace participated in the conversation and was alert at all times. After lunch, Mr. Rothfeld sat next to Grace and reviewed the changes in her prior will. Grace asked questions which Mr. Rothfeld answered. Grace confirmed that the will represented her wishes and she was satisfied with the will. Mr. Benjamin states that if he doubted Grace understood the contents of her will or lacked testamentary capacity, he would not have acted as a witness.

KENNETH'S REPLY

In reply, Kenneth submits his own affidavit, the affidavit of his wife, Susan, and his attorney's affirmation. According to Susan, she and Kenneth spent substantial time with Grace during the last year of her life. Susan states that when Grace was not eating and needed a dietary supplement beverage, she ran out to the drug store to bring it to her. Susan further asserts that both Grace and Eugene used wheelchairs on the family trip and that Grace did not leave the hotel. In addition, Susan claims that she has "a very clear memory of the fact that Grace most certainly suffered from dementia in the last years of her life." Susan argues that she personally arranged for the aides who attended to "all of Grace's activities of daily living." She disputes the claim that she attempted to bribe Luciano. Susan also states that she did not object to Grace writing out the birthday checks for her sons in May of 2011 because she was doing as Eugene asked and she did not know "it was improper to accept a check from someone without capacity."

She recalls that Amy told her that Grace was not supposed to write checks anymore.

Kenneth's reply affidavit reiterates his claims that he was misled by Mr. Rothfeld and, therefore, that his waiver was not informed. Kenneth, once again, states that Mr. Rothfeld was the attorney for the Gold family. He claims that Mr. Rothfeld provided him with legal advice regarding the 1997 Life Insurance Trust. Kenneth claims that Mr. Rothfeld should have told him he was "required" to retain his own attorney. Again, Kenneth states that Mr. Rothfeld "affirmatively implied" that Eugene had not yet decided to exercise his testamentary power of appointment.

Kenneth's attorney has submitted a reply affidavit in which he states that Cheryl has made a multitude of lies, omissions and intentional misrepresentations. According to Kenneth's attorney, Cheryl, who was an attorney, failed to disclose that she has been suspended from the practice of law. He also argues that Amy "appears to be an even more brazen liar" because she states her mother made little use of the aides assigned to her, yet Amy participated in the submission of documents to obtain reimbursement for the aides' services from MetLife Insurance Company. Kenneth's counsel again portrays Mr. Rothfeld as a conspirator and argues that the "unaffiliated attorney" Anthony Benjamin who acted as the other witnesses is worthy of scrutiny because there is testimony that Mr. Benjamin and Mr. Rothfeld have signed wills and legal documents as witnesses for years. According to counsel, Mr. Benjamin appears to be Mr. Rothfeld's "go to accomplice." In summary, Kenneth's counsel argues that "the cumulative impact of the aforementioned lies, misrepresentations, and intentional omissions provide evidence of fraud, misrepresentation and misconduct on behalf of Rothfeld, Cheryl, Amy and Eugene."

KENNETH"S CHILDREN

Counsel for Kenneth's children, Marc Gold, Michael Gold and Max Gold, who are contingent remainder beneficiaries of the trusts under the will of Grace Gold, ask that discovery be pursued because there are issues of fact as to Grace's intention and the disclosure to Kenneth before he executed the waiver. The grandchildren ask for the appointment of the Public Administrator as temporary administrator of Grace's estate.

CHERYL'S REPLY

Cheryl Gold has submitted two affidavits in which she acknowledges that as a co-trustee of the April 19, 2011 inter vivos trust she performed ministerial acts of signing the trust and account documents, but claims that she never had any dealings with the trust until after her father died. She also states that she was admitted as an attorney in 1991, but never practiced law. She decided, therefore, not to meet the continuing legal education requirements and did not file the biennial registration statements, which resulted in her suspension.

CONTROLLING LAW

The court will consider the cross-motions for dismissal and summary judgment first since it will be unnecessary to address the application for a stay if the cross-motions are granted.

> "On a motion to dismiss a complaint for failure to state a cause of action the complaint is to be construed in a light most favorable to the plaintiff (*Cohn v Lionel Corp.*, 21 NY2d 559), and deemed to allege whatever can be implied from its statements by fair intendment (*Howard Stores Corp. v Pope*, 1 NY2d 110)" (*Matter of Carvel*, NYLJ, Nov. 24, 1995, at 33).

In addition, on a motion to dismiss for failure to state a cause of action, all of the allegations contained in the pleading must be assumed true, and the court must determine whether the alleged facts fit within any cognizable legal theory (*Morone v Morone,* 50 NY2d 481 [1980]).

CPLR 3211(c) provides that:

> "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment."

At the July 17, 2014 oral argument on the motions, the court advised counsel it was converting the motions to motions for summary judgment.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman,* 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his or her proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or

unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

REVOCATION OF WAIVER AND CONSENT

In general, courts are reluctant to allow the withdrawal of a waiver and consent since "such actions disrupt the orderly process of administration and create a continuous aura of uncertainty" (*Matter of Stern*, NYLJ, July 20, 1994, at 28, col 3 [Sur Ct, New York County]). The burden of proof is on the party attempting to revoke the waiver (*Matter of Anderson*, 22 Misc 2d 662 [Sur Ct, Suffolk County 1960]). The test for withdrawal of a waiver and consent differs depending upon whether a probate decree has issued. If a decree has issued, it is more difficult to revoke the waiver because vacatur is also required (*Matter of Frutiger*, 29 NY2d 143 [1971]). Whether the withdrawal is sought pre-decree or post-decree, however, the party seeking to revoke the waiver must show that the waiver was obtained by fraud or overreaching, or was the product of misrepresentation or misconduct, or that newly discovered evidence, clerical error or other sufficient cause warrants revocation (*Matter of Frutiger*, 29 NY2d 143 [1971]; *Matter of Titus*, 39 AD3d 1203 [4th Dept 2007]; *Matter of Westberg*, 254 AD 320 [1st Dept 1938]; *Matter of Henderson*, 4 Misc 2d 599 [Sur Ct, New York County 1956]). If withdrawal is sought pre-decree, such a showing is sufficient absent prejudice to the other side (*Matter of Culley*, NYLJ, Feb 14, 1996, at 31, col 3 [Sur Ct, New York County]). If withdrawal is sought post-decree and vacatur is sought, the party seeking withdrawal must also show a reasonable probability of success in a will contest by raising legitimate questions of testamentary capacity, fraud, undue influence or invalid execution (*Matter of McMahon*, NYLJ, June 11, 1998 at 31, col 1 [Sur Ct,

New York County]). For the court to vacate a decree, "it must appear that there is a substantial basis for the contest and a reasonable probability of success on the part of the petitioner (*Matter of Hoolan*, 2008 NY Slip Op 32702[U] [Sur Ct, Nassau County]).

Revocation of a waiver has been denied where the applicant claims that he did not understand the effect or significance of the waiver, yet his education and general experience belies such claim. In *Matter of Titus* (39 AD3d 1203 [4th Dept 2007]), the petitioner sought to revoke a waiver and consent on the basis that she executed the document, but did not understand its significance. The court denied the application pointing out that the applicant was a certified public accountant with a master's degree in business administration (*see also Matter of Martin*, 14 Misc 2d 266 [Sur Ct, New York County 1944] [petitioner's application was denied on the basis that petitioner was a woman of mature years, education and culture]; *Matter of Coccia* (59 AD3d 716 [2d Dept 2009] [denied party's attempt to withdraw waiver finding his allegation that he did not understand the impact of it conclusory]).

Moreover, necessary parties are deemed to have read and understood the contents and consequences of signing a waiver and consent (*Matter of Anderson,* 22 Misc 2d 662 [Sur Ct, Suffolk County 1960]). In *Matter of Anderson*, the court deemed a necessary party "chargeable with knowledge of the contents and the legal effect of such waiver - whether or not he availed himself of the advice of counsel at the time of the execution thereof" (*Matter of Anderson*, 22 Misc 2d 662, 663 [Sur Ct, Suffolk County 1960], *citing Matter of Stone*, 272 NY 121 [1936]).

In *Matter of Hoolan* (2008 NY Slip Op 32702[U] [Sur Ct, Nassau County]), this court denied petitioners' application to withdraw their waivers of process and consents and to vacate a decree of probate. This court found that the allegations of fraud and forgery were conclusory at

best and were belied by the record. This court stated as follows:

"Further, for the court to vacate a decree, it must appear that there is a substantial basis for the contest and a reasonable probability of success on the part of the petitioner" (*Matter of Greene*, 240 A.D.2d 745, 745, [2d Dept 1997]). As this court stated in *Matter of Gordon*, NYLJ, December 18, 2002, col 3 [Sur Ct, Nassau County], applications to vacate a probate waiver and consent are governed by *Matter of Frutiger* (29 NY2d 143, [1971]). In *Frutiger*, the Court of Appeals likened a waiver and consent to a stipulation, subject to vacatur upon a showing of good cause, such as fraud, collusion, mistake, accident, or some such similar ground (*id*. at 150). The Court of Appeals distinguished applications made post-decree from those made pre-decree (*id*. at 149), presumably because there is a lesser likelihood of prejudice if the will has not yet been admitted to probate. The court also noted that a "stricter test" is applied to applications made post-decree (*id*. at 149)."

Similarly, in *Matter of Gordon* (NYLJ, Dec. 18, 2002, at 26, col. 2 [Sur Ct, Nassau County]), this court denied petitioner's motion to vacate a waiver of process and consent. The court noted that the waiver and consent was the official form promulgated pursuant to SCPA 1406 and was sent with a cover letter by the attorney for the executor describing the nature and effect of the waiver. This court held that to vacate a waiver and consent under the circumstances there, the court would have to find an informed knowledgeable jural act had no legal significance whatsoever, which it declined to do.

Additionally, in *Matter of McMahon* (NYLJ, June 11, 1998, at 31, col 1 [Sur Ct, New York County]), the court declined to allow the decedent's niece and nephew to rescind their waivers and consents. The niece and nephew claimed that they were induced to sign their waivers based on their reliance on certain misrepresentations by the executor and her attorney concerning the value of the estate and the effect of certain changes in the provisions of an earlier will more beneficial to petitioners. They also argued that they were misled as to the value of the estate, which amounted to fraud. The Court stated:

> "To set aside a consent to probate, a party must establish that the consent was obtained by fraud or overreaching, was the product of misrepresentation or

> misconduct, or that newly discovered evidence, clerical error or other sufficient cause justifies opening up the decree (*Matter of Frutiger*, 29 NY2d 143; *Matter of Hall*, 185 AD2d 322; *Matter of Lindsay*, 136 Misc 555). In addition, for petitioners to prevail on this type of application, they must also show a reasonable probability of success in a will contest by raising legitimate questions of testamentary capacity, fraud, undue influence or invalid execution (*Matter of Frutiger*, 29 NY2d 143; *Matter of Callahan*, 273 AD 884; *Matter of Garbo*, NYLJ, July 31, 1991, at 22, col 2); *Matter of Hall*, NYLJ, April 3, 1990, at 32, col 1).
>
> In the application sub judice, petitioners [sic] submissions fail to satisfy the legal standard for this type of proceeding."

In *Matter of Ancona* (NYLJ, January 14, 2004, at 31, col 6 [Sur Ct, Suffolk County]), two of the decedent's children petitioned for an order rescinding their waivers of process and consents to probate and for vacatur of the probate decree, and the respondents moved for summary judgment dismissing the petition. The court stated as follows:

> "A party may be permitted to withdraw a waiver of citation and consent to probate in proper cases (see, *Matter of Engelberg*, NYLJ October 1, 1991, at 25, col 6). With regard to the rules applicable to such a withdrawal, the Court of Appeals has stated that a consent to probate, made simultaneously with an appearance in the probate proceeding, is tantamount to a stipulation and, as such, should be treated in accordance with the rules governing same (see, *Matter of Frutiger*, 29 NY2d 143). Thus, in order for the court to grant the requested relief, a party must establish that the consent was obtained by fraud or overreaching, was the product of misrepresentation or misconduct, or that newly discovered evidence, clerical error, or other sufficient cause justifies vacating the decree (see, *Frutiger,* 29 NY2d at 149; *Matter of Hall*, 185 AD2d 322; see, *Matter of McMahon*, NYLJ, June 11, 1998, at 29, col 3). In addition, for petitioners to prevail on this type of application, they must also show a reasonable probability of success in a will contest by raising legitimate questions of testamentary capacity, fraud, undue influence, or invalid execution (see, *Frutiger*, 29 NY2d at 150; see, *Matter of Garbo*, NYLJ, July 31, 1991, at 22, col 2).
>
> Applications to vacate probate are not lightly granted since vacatur disrupts the orderly process of administration and creates a continual aura of uncertainty and non-finality (see, *Matter of Arnold*, NYLJ, October 29, 1993, at 22, col 5). In order to succeed, petitioners must show a substantial basis for the contest and a reasonable probability of success (see, *Matter of Callahan*, 273 AD 884; see, *Matter of Westberg*, 254 AD 320)."

In *Matter of Ancona*, the court found that the only allegation in support of the request was the statement that petitioner threatened that if she refused to sign the waiver, "there would be

trouble" and she "would be subpoenaed to Supreme Court." The court found that the statement, even if true, was a "substantially correct assessment of what would result if the waiver was not executed." The court stated that "[a] party cannot claim duress as a ground to relieve her from her waiver if the other party merely threatened to do what was within his legal rights to do (*see Estate of Morse*, NYLJ, May 19, 1998, at 26, col 3). Fear of being served with civil process is insufficient to set aside a decree of probate (*see Matter of Leeper*, 53 AD2d 1054)."

There are, however, certain situations where a necessary party will be permitted to withdraw a waiver and consent. For example, a withdrawal will sometimes be allowed if evidence is brought to the court's attention that may alter the outcome of the probate proceeding (*In re American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82 [2008]). Thus, in *Matter of Culley* (NYLJ, Feb. 14, 1996, at 31, col 3 [Sur Ct, New York County]), the court allowed the withdrawal where the distributees raised factual issues surrounding the decedent's testamentary capacity. They also were unaware at the time they signed the waivers that the decedent had been residing in a nursing home operated by a religious group named as a legatee in a codicil submitted for probate. The distributees also were not represented by an attorney and were incorrectly told by the nominated fiduciary that the waivers could be withdrawn at any time. Similarly, the court permitted withdrawal of a waiver in *Matter of Gallas* (NYLJ, Feb. 4, 2000, at 37, col 4 [Sur Ct, Westchester County]) where the petitioners showed that the proponent of the purported will, also the draftsman, misled them into signing the waivers.

In addition, withdrawal of a waiver has been permitted in the interest of justice and where a withdrawal would not result in prejudice (*Matter of Carrion*, NYLJ, Jan. 25, 1989, at 26, col 3 [Sur Ct, Bronx County]; *Matter of Hertz*, NYLJ, Dec. 4, 1992 at 25, col 2 [Sur Ct, Bronx County]; *Matter of Engelberg*, NYLJ, Oct. 1, 1991, at 25, col 6 [Sur Ct, Westchester

County]; *Matter of Stupel*, NYLJ, Jan. 3, 1996, at 28, col. 6 [Sur Ct, Suffolk County]).

Here, Kenneth asserts that by virtue of newly discovered evidence in the probate proceeding for Eugene's purported will he has uncovered a conspiracy to disinherit him. The crux of Kenneth's argument to rescind his waiver is that Kenneth believed Mr. Rothfeld was his attorney and Mr. Rothfeld failed to disclose that Eugene intended to exercise the powers of appointment given to him under Grace's will. Kenneth claims that Mr. Rothfeld coerced him into signing the waiver and consent.

Courts have long held that an attorney retained by an executor is not the attorney for the estate (*Matter of Schrauth* 249 AD 847 [2d Dept 1937]). In *Matter of Scanlon*, 2 Misc 2d 65 [Sur Ct, King County 1956]), the court held that an attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not the estate. Many beneficiaries of an estate, however, mistakenly assume that the fiduciary's attorney represents them (Gibbs and Carew, "Recent Legislation on Fiduciary's Duty, Beneficiary's Right," NYLJ, Oct 18, 2002, at 19, col 4). In addition, a unilateral belief by an individual that an attorney is his personal attorney alone does not confer upon them the status of attorney-client (*Griffin v Anslow*, 17 AD3d 889 [3d Dept 2005]). Self-serving allegations of an attorney-client relationship are insufficient to establish an attorney-client relationship (*Conti v Polizzotto*, 243 AD2d 672 [2d Dept 1997]). "It is fundamental that an explicit undertaking to perform a specific task is required" to establish an attorney-client relationship (*Sucese v Kersch*, 199 AD2d 718 [3d Dept 1993]).

Kenneth's claim that Mr. Rothfeld represented that he was his attorney and coerced him to sign the wavier and consent is unsupported by the record. Neither Mr. Rothfeld's preparation of the summary of Grace's will provisions nor his responsive e-mail show anything other than

the waiver and consent was executed by Kenneth independently and by his own choosing. The record does not support misrepresentation, misconduct or newly discovered evidence that justifies vacating the decree. Moreover, the court notes that Kenneth's argument of a conspiracy theory is based upon Mr. Rothfeld's knowledge that Eugene intended to exercise the powers of appointment to his exclusion. Kenneth, however, fails to recognize that wills are ambulatory during the lifetime of the testator and only take effect upon death (*see* EPTL 1-2.19 (a); *Matter of Hennel*, NYLJ, June 25, 2013, at 31 [Sur Ct, Schenectady County]). The court is also mindful of the length of time from the date of the decree to the commencement of this action - approximately three years.

Additionally, Kenneth has failed to show a reasonable probability of success in invalidating the will, the second part of the *Frutiger* strict test in post-decree vacatur cases. Kenneth makes unsubstantiated self-serving claims that Grace had diminished cognitive capacity.

As to testamentary capacity, it is essential that a testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property and his relation to the persons who ordinarily would be the natural objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691[1985]; *Matter of Bustanoby,* 262 AD2d 407 [2d Dept 1999]). A testator must understand the plan and effect of the will and less mental faculty is required to execute a will than any other instrument (*see Matter of Coddington*, 281 App Div 143 [3rd Dept 1952], *affd* 307 NY 181[1954]). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not necessarily inconsistent with testamentary capacity and do not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845, 847 [1979]; *Matter of Hedges*, 100 AD2d 846 [2d Dept 1984]) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 846 [2d Dept 1984]).

"When there is conflicting evidence or the possibility of drawing inferences from undisputed evidence, the issue of capacity is one for the jury" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]). "One may be able to make a valid will though afflicted with a fatal disease, or possessing an imperfect mind or memory. A will may not be rejected simply because the testator does not make it until near death, or because he is ill or weak" (3 Warren's Heaton on Surrogate's Court Practice §42.06 [1], at 42-93 [7th ed]).

In this case, the record establishes that Grace was hospitalized in 2011 prior to the will's execution. The testimony of the attesting witnesses is that Grace was of sound mind and memory on the date of the will's execution. Although there is an entry in the discharge record for Grace's hospitalization approximately one month before the will's execution of cognitive training, there is no evidence of lack of capacity and Kenneth has failed to demonstrate a reasonable probability of success in challenging the will. The court also notes that Kenneth was aware of his mother's medical condition at the time of her death, yet failed to take any action.

Even viewing Kenneth's allegations of conspiracy as a challenge on the basis of undue influence, Kenneth fails to demonstrate a reasonable probability of success. In order to prove undue influence, the contestants must show (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*cf. Matter of Walther*, 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally*, 2 NY PJI 7:55). Kenneth has made no such showing.

With respect to the appointment of Cheryl and Amy as successor executors of Grace's estate, the law is well settled that the testator's choice of fiduciary must be given great deference and the Surrogate's power to refuse to grant letters is limited (*Matter of Flood,* 236 NY 408, 410 [1923]). The court will not interfere with Grace's choice of fiduciaries based upon Cheryl's suspension from the practice of law for not fulfilling her continuing legal education requirements or the manner in which Amy completed an application for reimbursement for Grace's aides.

With respect to Kenneth's nomination as a successor executor, it is well settled that a nominated fiduciary is not compelled to accept the office as the duty to propound the will "rests under a moral obligation...but it is not an imperative legal duty" (*Dodd v Anderson,* 197 NY 466, 471 [1910]). An executor further has a duty to make reasonable efforts to establish the instrument naming him or her as executor (*Matter of Keating,* 55 Misc 2d 948, 950 [Sur Ct, Nassau County 1968]).

In the instant proceeding, Kenneth has made it clear that he believes that the decedent's will is invalid and has not joined in the application of Cheryl and Amy to be appointed as successor executors. As this court stated in *Matter of Lublin* (43 Misc 3d 721, 723-724 [Sur Ct, Nassau County 2013]):

> "[A] nominated fiduciary may renounce the appointment which may be "express or implied...in writing or by matter in pais [outside of the court]" (*Keith v Proctor,* 114 Ala 676, 685 [Sup Ct Alabama 1896]). A renunciation of the appointment of executor may be implied from the circumstances (*see e.g. Ayres v Weed,* 16 Conn 291 [Sup Ct Connecticut 1844]; *Jaworski v Anderson,* 1998 Conn Super Lexis 3537 [Superior Ct Connecticut 1998]; *Keith v Proctor,* 114 Ala 676, 685 [Sup Ct Alabama 1896]); *Abercrombie v Holtcamp,* 267 Mo 412 [Supreme Ct Missouri 1916]; *Briggs v Probate Court of Westerly,* 23 RI 125 [Sup Ct Rhode Island 1901]; *Schwartz v Schwartz,* 67 Cal App 2d 512 [Ct of Appeals California 1945]). While never directly addressed in New York, other states have found where a co-executor questioned the validity of a will, he or she was found to have constructively renounced the appointment (*Grant v Osgood,* 241 SC 104, 109 [Sup Ct South Carolina 1967]). In *Grant v Osgood*, the court noted "[i]t is inconceivable that one should be allowed to accept a trust, take a solemn oath to

> execute the same, and in the same breath and at the same time, attack the instrument..." Similarly, the court in Rhode Island found a constructive renunciation of the office and stated "being one of the executors named by testator in his will it was her duty to support the same instead of seeking to overthrow it (*Briggs v Probate Court of Westerly,* 23 RI 125 [Sup Ct Rhode Island 1901]."

The court finds that Kenneth has impliedly renounced his right to serve as a successor executor. The cross-motions for dismissal of Kenneth's petition to rescind his waiver and consent and for vacatur of the court's probate decree with respect to Grace's will are granted. Accordingly, there is no need to address the application for a stay. Successor letters testamentary shall issue to Cheryl Gold Ragusa and Amy Gold.

Settle order on the motions and a decree on the petition.

Dated: July 31, 2014

EDWARD W. McCARTY III
Judge of the
Surrogate's Court