Matter of Jacobs
2015 NY Slip Op 31301(U)
March 31, 2015
Sur Ct, Nassau County
Docket Number: 2011-367869/A
Judge: Edward W. McCarty III

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

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Probate Proceeding, Will of

MORRIS JACOBS,

Deceased.

File No. 2011-367869/A

Dec. No. 30409

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Before the court is a motion, filed on behalf of cross-petitioner Susan Thys-Jacobs, which seeks an order: (1) pursuant to CPLR 3212, granting summary judgment; (2) dismissing entirely the objections to probate filed by Ellenmorris Tiegerman; and (3) admitting to probate the last will and testament of Morris Jacobs dated October 14, 2009.

BACKGROUND

Morris Jacobs (the "decedent") died on April 16, 2011, at the age of 90. He was survived by his wife of over 70 years, Rita Jacobs (Rita), and three children: Susan Thys-Jacobs; Ellenmorris Tiegerman; and Daniel Jacobs (Susan, Ellen, and Daniel). Decedent's gross taxable estate consisted of three main assets: (a) a one-third interest, valued at approximately $275,000.00, as a tenant in common, along with Rita and Ellen, in a home in Great Neck (the Great Neck house); (b) decedent's interest in bank accounts owned by decedent and Rita, as joint tenants with right of survivorship, with a combined value of approximately $344,000.00; and (c) decedent's one-half interest, as a tenant in common with Rita, in a book collection valued at approximately $68,000.00.

On November 30, 2011, Rita filed a petition for probate of the will dated October 14, 2009 (the October 2009 will). Under the terms of the October 2009 will, decedent left his residuary estate to Rita and nominated her as executor of the estate. Decedent nominated Susan as successor executor. On December 1, 2011, preliminary letters issued to Rita.

Some time thereafter, Rita's mental status deteriorated, leaving her unable to fulfill her fiduciary responsibilities. On June 27, 2012, Susan filed a cross-petition, seeking probate of the October 2009 will and appointment as executor, along with the issuance of preliminary letters, which were issued on July 24, 2012 and extended repeatedly.

Ellen requested SCPA 1404 examinations of the attorney-draftsperson and witnesses to the will, and these were conducted on March 8 and April 9, 2012. In addition, document discovery was conducted. Ellen filed objections to probate, followed by pre-trial discovery and additional document discovery. Five individuals were deposed: Susan, Rita, Ellen, Joseph Farber (husband of Ellen), and Daniel.

THE DEED

On October 14, 2009, the same day on which decedent executed the October 2009 will, decedent and Rita executed a deed creating a tenancy-in-common in the Great Neck house (the October 2009 deed). Although the October 2009 deed is not before the court, it is inextricably connected to the objections filed by Ellen and the present motion for summary judgment filed by Susan.

Prior to the execution of the October 2009 deed, the Great Neck house had been owned by decedent, Rita and Ellen as three joint tenants with rights of survivorship. If decedent had not executed the October 2009 deed, then upon his death, his interest in the Great Neck house would have passed in equal shares to the surviving joint tenants, Rita and Ellen, by operation of law, who then would have become equal 50% owners with rights of survivorship. Based upon the life expectancies of Rita and Ellen, the joint tenancy created a likelihood, although not a certainty, that Ellen would outlive her mother and become the 100% owner of the Great Neck house by

operation of law.

The October 2009 deed changed the ownership of the property from a joint-tenancy to a tenancy-in-common, thereby extinguishing all survivorship rights. Under the terms of the October 2009 will, decedent's one-third interest in the Great Neck house will pass to Rita. Since Rita already has a one-third interest, the devise gives Rita a total two-thirds interest in the Great Neck house, leaving Ellen with her preexisting one-third interest in the Great Neck house. Due to the execution of the October 2009 deed, these real property interests will not pass by operation of law; each owner has the right to dispose of her respective interest as she chooses.

PRIOR WILLS

Copies of decedent's three prior wills have been filed as exhibits to the motion; these wills, too, are not directly before the court at this time but are pertinent to an understanding of the proceedings. They are described in brief below.

Decedent's Will Dated January 5, 2006

In January 2006, decedent executed a will leaving his entire estate to Rita. If Rita did not survive decedent, then his personalty would pass to his children and his residuary estate would pass to Daniel. The document notes that the Great Neck house would pass by operation of law to Ellen as a joint tenant. In April 2009, decedent executed an addendum to his 2006 will, which was prepared by Susan. The addendum provided instructions for the division of decedent's book collection if Rita predeceased decedent.

Decedent's Will Dated June 2, 2009

Upon being advised by counsel that the addendum executed in April of 2009 was not a valid testamentary instrument, decedent asked counsel to prepare a new will for him, which

decedent executed on June 2, 2009, reflecting the terms of the addendum. This will, too, left everything to Rita, and only provided alternative directions for the distribution of decedent's assets, including personal property, to decedent's children in the event that he was predeceased by Rita.

Decedent's Will Dated August 21, 2009

Decedent executed his penultimate will in August of 2009, in which he again left everything to Rita, changed the bequest of personalty in the event that Rita predeceased him, and provided that property passing to Daniel, if any, would be held in trust.

MOTION FOR SUMMARY JUDGMENT

Susan filed a motion dated August 22, 2014, asking the court to grant her summary judgment, dismiss the objections filed by Ellen, and admit the October 2009 will to probate. In an affirmation filed by Christopher P. Ronan (Ronan) of McCoyd, Parkas & Ronan LLP, as counsel for Susan in support of the motion, Ronan argues that the will offered for probate is irrefutably legitimate, while the objections filed by Ellen are based on nothing more than her belief that her father wanted to leave her more than he did.

Ronan argues that the decedent's execution of the October 2009 deed has no impact on the validity of the October 2009 will, which does not adversely affect Ellen and is consistent with decedent's prior wills. Further, the October 2009 will provided that the decedent's interest in the Great Neck house would have passed to Ellen had decedent been predeceased by his wife, which would have resulted in the same outcome as ownership by joint tenancy.

Ronan argues that the objections filed by Ellen are contradicted by the depositions of the attesting witnesses and the attorney/draftsperson of the October 2009 will. Ronan insists that

there is no dispute regarding due execution, testamentary capacity, and the lack of undue influence. The October 2009 will was executed under attorney supervision on the same date as decedent executed the deed to the Great Neck house. The supervising attorney, Allan Fell (Fell), had represented decedent for five years, after the two men were introduced to each other a few years earlier by Ellen's husband, Joseph Farber. Correspondence from decedent to Fell in 2004 reflects decedent's concern with his control over the Great Neck house, and whether decedent could remove Ellen's name from the joint tenancy deed. Fell's notes reflect that decedent had advised Fell that although decedent had told Ellen that she would inherit the house, he subsequently worried about whether bequeathing the Great Neck house to Ellen was fair to Susan and Daniel. Fell's handwritten notes from January 2005 also reflect a conversation with decedent in which decedent advised Fell that Ellen was adamant that she did not want the deed changed from a joint tenancy or her name removed from the deed.

By letter dated August 11, 2009, decedent's counsel changed his prior advice and advised decedent that he and Rita could sever the joint tenancy with Ellen in the Great Neck house without Ellen's consent and create a tenancy-in-common, with each of the three owners holding a one-third interest without a right of survivorship. Ten days later, decedent executed his penultimate will without changing the deed, but Fell testified that shortly thereafter decedent asked him to prepare a new will and a new deed to the Great Neck house. On October 14, 2009, Fell met with decedent, after which the October 2009 will was executed before two witnesses, under Fell's supervision, with the witnesses executing a self-proving affidavit. In the October 2009 will, decedent once again left everything to Rita, and only provided for his children in the event that Rita predeceased him. On the same date, decedent and Rita executed the 2009 deed

prepared by Fell, changing the form of ownership of the Great Neck house from a joint tenancy to a tenancy-in-common.

Ronan argues that summary judgment is appropriate in this matter because Susan has established a prima facie case for probate of the October 2009 will and Ellen has not, and cannot, raise a triable issue of fact regarding due execution, testamentary capacity, undue influence or fraud.

OPPOSITION TO MOTION

In opposition to the motion for summary judgment, counsel for Ellen, John Morken of Farrell Fritz, P.C., filed an affidavit and a memorandum of law. In his affidavit, Morken notes that Ellen's objections to probate allege that: (1) decedent lacked testamentary capacity; (2) the October 2009 will was the result of undue influence by Rita; (3) the October 2009 will was procured by fraud perpetrated by Rita and Susan; (4) the October 2009 will was procured by constructive fraud; and (5) the October 2009 will was not duly executed. Morken argues that the heart of the will contest "concerns the Decedent's change of his expressed, long-standing intent that [the Great Neck house] pass to Ellen upon his death" which change was effectuated by the decedent's execution of the October 2009 will and the October 2009 deed. Further, Morken argues that issues of fact have been raised as to whether decedent had capacity to execute a will on that date and whether Rita and Susan procured the October 2009 will by fraud and undue influence.

In his affidavit, Morken references decedent's medical issues, which included a diagnosis of gastric lymphoma in 2001, a mini-stroke in 2006, a coma in 2007, and the resurfacing of lymphoma in 2008, which was addressed with chemotherapy. Medical records further indicate

that beginning in 2008 and 2009, decedent was diagnosed with colitis, wore a pacemaker, had difficulty standing and walking, had episodes of fatigue, wheezing and trembling, and would experience lightheadedness, causing him to fall. He had difficulty reading and wore hearing aids. According to Morken, based upon his client's testimony, on the date of decedent's execution of the October 2009 will, decedent was frail, experienced difficulty moving around, had depression, confusion, lightheadedness, vision loss and was functionally deaf. Based on Ellen's testimony, Morken states that on October 14, 2009, decedent's mental condition was impaired, he suffered from memory loss and confusion, he was lethargic, spoke of depression and unhappiness, and threatened to kill himself. Counsel references a note made by Dr. Berger on September 29, 2009, that decedent felt "depressed as wife is deciding about moving to Florida."

In his affidavit, Morken describes decedent's close relationship with Ellen, and decedent's financial and emotional support of Ellen and the school she founded. Morken also states that Ellen testified that she paid off the mortgage on the Great Neck house to help her parents. At the same time, Morken notes that Ellen's relationship with Rita was contentious, and he references testimony given by decedent's caregiver and Susan's housekeeper indicating that Rita was upset that Ellen spoke with decedent and not with Rita, and that Ellen paid off the mortgage on the Great Neck house. Morken also notes the strained relationship between Susan and Ellen, and decedent's "tortured" relationship with Rita, including Rita's "threats" to move to Florida. Based upon testimony provided by Ellen's husband, Morken states that decedent asked Ellen to stop visiting him because Rita screamed at and berated decedent after Ellen's visits.

Morken notes that as far back as 1991, decedent placed Ellen's name on the deed of the prior marital home owned by decedent and Rita in Long Beach as a joint tenant with right of

survivorship. When decedent and Rita sold their home in Long Beach and purchased their Great Neck home, a deed was executed which reflected decedent, Rita and Ellen as joint tenants with right of survivorship. Had the deed not been changed on October 14, 2009, the Great Neck house would have passed to Ellen by operation of law if she survives Rita. It is noted further that the decedent's prior wills executed in January 2006, June 2009 and August 2009 provided that if Rita predeceased decedent, the Great Neck house would pass to Ellen upon decedent's death.

Morken references Fell's testimony regarding a conversation in which decedent told Fell that "he has 'always told [Ellen] that she was inheriting the [Great Neck] house'" but concedes that the conversation took place in 2004, five years prior to decedent's execution of the October 2009 will. He also acknowledges decedent's concern, expressed to Fell at the same time, that giving the Great Neck house to Ellen might be unfair to Susan and Daniel, and that perhaps decedent should take Ellen's name off of the deed. Fell's legal advice to decedent was that he would need Ellen's consent to do that. Testimony indicates that Ellen was adamant in 2004 about remaining on the deed, and that decedent didn't want to upset Ellen. Subsequently, decedent met with Susan's attorney in late 2005 or early 2006 and was advised that he could "probably reapportion [his] estate."

It is Morken's argument that while decedent was worn down and feeling depressed about Rita's threats to leave him, Rita and Susan became directly involved in the creation and execution of the October 2009 will and the October 2009 deed. Fell's records reflect that Susan contacted him directly on May 18, 2009, and twice subsequently, to discuss decedent's estate plan. According to Fell's testimony, Susan told him that she had contacted her own attorney concerning severance of the joint tenancy held by her parents and Ellen, and Fell believed that

Susan was discussing the deed regularly with decedent and Rita.

On August 11, 2009, a day after speaking with Susan, Fell sent a new will draft to decedent, stating that he could undo the joint tenancy and explaining the steps to be taken. Fell again spoke with Susan the day after the letter and draft were sent. Decedent signed the draft will without requesting or making changes to the joint tenancy. The August 2009 will includes the decedent's direction that "if my wife predeceases me, that this house, my main asset, shall pass by operation of law to my daughter Ellen." Fell sent a copy of the executed will to Susan. On October 7, 2009, Susan contacted Fell, and Fell also spoke with decedent, although he does not recall the sequential order of these conversations. Fell then prepared the October 2009 will as well as the October 2009 deed. On October 14, 2009, Fell brought these instruments to decedent's home, where decedent executed them. Rita also executed the October 2009 deed and a mirror image will.

Morken relies upon Daniel's testimony that Susan exerted undue influence, and that Rita was involved in changing decedent's will so that the decedent's interest in the Great Neck house would not pass to Ellen but would instead pass to the decedent's three children. The October 2009 will actually provides the following language, in Article Fifth:

> "My personal residence located at 39 Windsor Road, Great Neck, New York is presently owned by Rita, Ellen and me as tenants in common. I leave my interest, as a tenant in common in said residence to my wife Rita, if she shall survive me. If Rita predeceases me, I leave my interest in said residence to Ellen if she shall survive me."

Had Rita predeceased decedent, his interest in the Great Neck house would have passed under the October 2009 will to Ellen. However, since Rita survived decedent, the terms of the October 2009 will provide that Rita receives decedent's one-third interest in the house. As a result, Rita

has the power to bequeath her total two-thirds interest as she chooses.

The issues of fact listed by Morken to support the allegation that the October 2009 will was procured by undue influence are the following:

1. Without Ellen's knowledge, Susan was directly involved in the creation of the October 2009 will and the October 2009 deed, for the sole purpose of altering decedent's plan for Ellen to inherit the Great Neck house.

2. Rita threatened to divorce decedent and yelled at him.

3. Medical records indicate that decedent felt depressed as a result of Rita's threat to move to Florida.

4. Despite decedent's opposition, Rita convinced decedent to give Daniel $200,000.00.

5. Rita influenced decedent to ask Ellen to stop visiting him.

6. Daniel testified that he knew that Rita and Susan influenced decedent to change his will.

7. Rita stated that she wanted to change decedent's will and that she did not want Ellen to inherit the Great Neck house.

The affidavit filed by Morken also asserts that decedent was unaware of his assets, which decedent had believed consisted of three primary assets valued at approximately $1,000,000.00 each: (1) the Great Neck house; (2) the bank funds; and (3) the book collection. Yet during discovery Susan produced a post-death appraisal of the book collection valuing it at only $136,010.00. Had decedent known the true value of the collection, he would have known that his idea of distributing one equally valued asset to each of his three children, in the event that Rita predeceased him, would not have worked, as the value of the book collection was far less

than the value of the house and the bank accounts.

An additional argument is that Rita and Susan perpetrated a constructive fraud by encouraging decedent to sign the October 2009 will and the October 2009 deed, knowing that these documents did not reflect his wishes.

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION

In a reply dated November 4, 2014, Ronan argues that the October 2009 will must be admitted to probate because there is no triable issue of fact concerning its validity. In the October 2009 will, decedent left his entire estate to Rita, as he did in the three prior instruments, none of which have been questioned by the objectant. Although Ellen claims that "[t]he heart of this contested proceeding concerns the Decedent's change of his expressed, long-standing intent that [the Great Neck house] pass to Ellen upon his death" the fact is that 2009 will and the three wills beforehand left decedent's entire estate to Rita, if she survived him. Even if the October 2009 deed had not been executed, the Great Neck house would not have passed to Ellen upon decedent's death, but would have left Rita and Ellen as joint tenants. Each joint tenant would have retained the right to sever the joint tenancy and to independently dispose of her respective interest.

Ronan argues that the October 2009 will is consistent with decedent's long-standing estate plan to bequeath his entire estate to Rita. It was never decedent's plan, as claimed by Ellen, that she would receive the Great Neck house upon decedent's death if he were survived by Rita. The record reflects that as far back as 2004, without any involvement by Susan, decedent expressed a wish to change the deed for the Great Neck house. At that time, Fell incorrectly told decedent that he could not unilaterally make a change, and Ellen objected to a change being

made. In 2009, decedent learned, apparently from Susan and her attorney, that in fact, the deed could be changed by decedent and Rita. Subsequently, decedent executed the October 2009 deed and the October 2009 will. As in his prior three wills, decedent bequeathed his entire estate to Rita and provided that if Rita predeceased decedent, Ellen would receive decedent's interest in the Great Neck house.

SUR-REPLY IN FURTHER OPPOSITION

With permission of the Surrogate, on November 14, 2014, Morken filed a sur-reply in opposition to the motion for summary judgment. He argues:

1. The decedent's long-standing plan for Ellen to inherit the Great Neck house was radically altered by his execution of the October 2009 deed and the October 2009 will.

2. There is an issue of fact as to whether Rita exerted undue influence in connection with decedent's execution of the October 2009 will and the October 2009 deed. Rita was motivated by a desire that Ellen not receive the Great Neck house.

3. Decedent's belief that his rare book collection was far more valuable than it actually was casts doubt on his testamentary capacity.

ANALYSIS

Summary Judgment

Summary judgment is a drastic remedy (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), awarded only sparingly (*Ronder & Ronder, P.C. v Nationwide Abstract Corp.*, 99 AD2d 608 [3d Dept 1984]), and only when there are clearly no triable issues of fact presented (*NBT Bancorp. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 625 [1996]). In a proper case, however, the court's granting of a summary judgment motion is not only appropriate, but

denial of such a motion is reversible error, even in a probate proceeding (*Matter of Greenspan*, 43 AD2d 998 [3d Dept 1974], *affd* 36 NY2d 737 [1975]). To prevail on a motion for summary judgment, the movant must establish his or her right to a directed verdict as a matter of law (*Friends of Animals v Assoc. Fur Manufacturers, Inc*., 46 NY2d 1065, 1067 [1979]). If the movant meets this threshold, the burden then shifts to the party moved against to lay bare his or her proof in opposition in evidentiary form (*Matter of Bank of New York*, 43 AD2d 105, 107 [1st Dept 1973]*, affd* 35 NY2d 512 [1974]). The party moved against may not successfully rely merely on conjecture or surmise (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]); a mere hope that somehow or other the objectant will be able to substantiate his or her allegations at trial is insufficient to deny summary judgment to a proponent who has made out a *prima facie* case (*Jones v Surrey Coop. Apts., Inc*., 263 AD2d 33 [1st Dept 1999]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [2d Dept 1987]).

Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, undue influence or fraud (*see e.g. Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). The remedy, however, is inappropriate where there are material issues of fact (*Matter of Pollock*, 54 NY2d 1156 [1985]).

In the motion before the court, Susan is seeking summary judgment, dismissal of Ellen's objections and the admission of the 2009 will to probate. The relief sought must be addressed in the context of each of the five objections: lack of testamentary capacity; undue influence; fraud; constructive fraud; and lack of due execution.

Testamentary Capacity

The proponent has the burden of proving testamentary capacity. It is essential that testator understand in a general way the scope and meaning of the provisions of testator's will, the nature and condition of testator's property and testator's relation to the persons who ordinarily would be the natural objects of his or her bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although the testator need not have a precise knowledge of his or her assets (*Matter of Fish*, 134 AD2d 44 [3d Dept 1987]), the testator must be able to 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 [3d 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 does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY 2d 845, 847 [1979]) 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 586 [2d Dept 1984]). "However, 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]).

In this case, the record establishes that at all relevant times, including the time when the will was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a will. The attesting witnesses testified that the decedent was of sound mind at the time of the execution of the propounded will. This testimony was buttressed by the testimony of the attorney-draftsperson. The self-proving affidavit also support decedent's competency at the time he executed the will.

Based upon the foregoing, the proponent has established prima facie that decedent was of sound mind and memory when he executed the 2009 will (EPTL 3-1.1). The record is devoid any proof that at the date of the execution of the propounded instrument, decedent was incapable of handling his own affairs or lacked the requisite capacity to make a will. There is absolutely no indication that decedent's medical issues in the years prior to execution of the 2009 will left him without testamentary capacity. The fact that decedent once expressed that he was feeling depressed does not amount to a medical diagnosis of depression that would render him incapable of executing a will. The fact that decedent had an inflated sense of the market value of his beloved rare book collection does not mean that he was incapable of understanding what he possessed and what he was giving away, as alleged by Ellen.

Accordingly, the objection of lack of testamentary capacity is dismissed, and summary judgment is granted on the issue of testamentary capacity.

Fraud

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to decedent to induce him to execute a will that disposed of his property in a manner contrary to that in which he would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1993]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). Ellen bears the burden of proof to show that the will was procured by fraud. To accomplish this, she must show, by clear and convincing evidence (*Simcusky v Salli*, 44 NY2d 442, 453 [1978]), that Rita or Susan, or both, made a false statement which caused decedent to dispose of his property by will in a way that was different from the way in which he would have disposed of his property had the

statement never been made (*Matter of Clapper*, 279 AD2d 730, 732 [3d Dept 2001]). For Ellen to defeat Susan's motion for summary judgment on fraud, she must produce something more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004] [citation omitted]). It is not enough to show motive and opportunity (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1977]). Without any showing of fraudulent misrepresentation by Rita or Susan, Ellen's opposition to summary judgment on the issue of fraud must fail. There is no such evidence in this case (*Matter of Philip*, 173 AD2d 543 [2d Dept 1991]). Accordingly, the objection of fraud is dismissed.

Constructive Fraud

Ellen argues that Rita and Susan were in confidential relationships with decedent, and that they perpetrated a constructive fraud by encouraging decedent's execution of the October 2009 will, knowing that it did not reflect decedent's intention to give the Great Neck house to Ellen. To establish these confidential relationships, Ellen points to decedent's emotional and physical dependence on Rita and on Fell's testimony that decedent confided in Susan and was reliant upon her. Ellen further notes that the will was prepared following Fell's discussion with Susan, and executed in the presence of Rita.

The law recognizes that a close family relationship "counterbalances any contrary legal presumption" (*Matter of Walther*, 6 NY2d 49, 56 [1959]). A confidential relationship may be inferred if one party has disparate power over the other (*Ten Eyck v Whitbeck*, 156 NY 341 [1898]). In contrast, where a parent/child relationship is involved, the court will not draw negative presumptions solely based upon that relationship (*see Matter of Walther*, 6 NY2d 49 [1959]). This court has stated that "even if a confidential relationship has been established, the

presence of a family relationship is generally sufficient to rebut any adverse inference" (*Matter of Zirinsky* (10 Misc 3d 1052 [A] [Sur Ct, Nassau County], *affd* 43 AD3d 946 [2d Dept 2007], *lv denied*, 9 NY3d 815 [2008] [citations omitted]). Without some showing of evidence, this court is unwilling to infer constructive fraud based upon the fact that decedent depended upon his wife of over 70 years or chose to confide in his daughter.

Contrary to Ellen's argument, the October 2009 will clearly reflected decedent's intention that his interest in the Great Neck house would pass to Rita, if she survived him, and to Ellen, if Rita did not survive him. This intention of the testator was expressed not only in the October 2009 will but in decedent's three prior wills, executed on January 5, 2006, June 2, 2009 and August 21, 2009. While the court recognizes that Ellen's interest in the Great Neck house was altered on October 14, 2009, it was not altered by decedent's execution of the October 2009 will being offered for probate.

The court grants the motion for summary judgment for dismissal of the objection of constructive fraud.

Undue Influence

In order to prove undue influence, the objectant 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 (*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 Pattern Jury Instructions,

Civil, 7:55). It is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]). Circumstantial evidence may be sufficient to warrant a trial on the question of undue influence (*Matter of Pennino*, 266 AD2d 293 [2d Dept 1999]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]).

The objectants bear the burden of proving undue influence (*Matter of Connelly*, 193 AD2d 602 [1993]; *Matter of Strand*, NYLJ, May 10, 2007, at 30, col 5 [Sur Ct, Kings County 2007]). They must show that the undue influence "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist" (*Matter of Walther*, 6 NY2d 49, 53 [1959]). This must be distinguished from a testamentary plan which reflects "affection, the desire of gratifying the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices" (*id.*). Instead, objectants would have to show "a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted" (*id.*). While "undue influence most often is not the subject of direct proof, but rather is shown by circumstantial evidence" (*Matter of Panek*, 237 AD2d 82, 84 [4th Dept 1997]), the circumstantial evidence must be substantial and must not allow for alternative explanations (*Matter of Walther*, 6 NY2d

49, 54 [1959]). "[A]n inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference" (*Matter of Ruef*, 180 App Div 203, 204 [2d Dept 1917] [internal citation omitted], *affd* 223 NY 582 [1918]).

"[A] marked departure from a prior, natural plan of testamentary disposition" (*Matter of Kruszelnicki*, 23 AD2d 622, 622 [4th Dept 1965]), would be a factor to be considered in any analysis of possible undue influence. The record before the court is devoid of any evidence supporting the objection of undue influence in the execution of the October 2009 will, which essentially conforms to the terms of decedent's prior wills. The objection is, therefore, dismissed.

Due Execution

The proponent has the burden of proof on the issue of due execution (*Matter of Kumstar*, 66 NY2d 691 [1985]). Due execution requires that the proposed will be signed by the testator, that such signature be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge his signature on the propounded will to each witness, that the testator publish to the attesting witnesses that the instrument is his will and that the witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1).

Where a will includes a valid attestation clause, it provides prima facie evidence that the will was executed properly (3 Warren's Heaton on Surrogates' Courts § 42.05 [4]). Where the execution of a will is supervised by counsel, there is a presumption of due execution in accordance with New York law (*Matter of Possenriede*, NYLJ, Feb. 26, 2003, at 26, col 2 [Sur Ct, Nassau County]; *Matter of Lichtenberg*, NYLJ, Mar. 21, 2001, at 20, col 5 [Sur Ct, Kings County 2001]). The court finds that all of these elements, combined with testimony concerning

the will execution, are sufficient to establish that the will was executed in conformance with the law (see *Matter of Malan,* 56 AD3d 479, 479 [2d Dept 2008]). In order to rebut this presumption and raise a material issue of fact, Ellen would have had to offer evidence in admissible form, not hearsay, speculation and conclusory allegations (*Matter of Halpern*, 76 AD3d 429 [1st Dept 2010]; *Matter of Levenson*, 289 AD2d 577 [2nd Dept 2001]). Ellen has failed to do so. Absent from the record is any proof that the propounded instrument was not executed in conformity with the formal requirements of EPTL 3-2.1 (*see Matter of Weinberg*, 1 AD3d 523 [2d Dept 2003]). There being no issue of fact concerning due execution, summary judgment is granted to Susan on this issue, pursuant to CPLR 3212 (b).

CONCLUSION

For all of the reasons set forth above, the court grants the motion for summary judgment which seeks an order, pursuant to CPLR 3212, dismissing the objections to probate filed by Ellen to the proffered will dated October 14, 2009. A decree may be entered admitting the propounded instrument to probate.

Settle decree.

Dated: March 31, 2015

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