Matter of Stein
2018 NY Slip Op 30055(U)
January 10, 2018
Surrogate's Court, New York County
Docket Number: 2009-0382
Judge: Nora S. Anderson

[* 1]

SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding, Will of

SAMUEL STEIN, File No. 2009-0382

Deceased.

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A N D E R S O N, S .

In this probate proceeding in the estate of Samuel Stein, proponent, BNY Mellon, N.A., moves for summary judgment dismissing the objections of decedent's son, Edward Stein.

Testator died on December 1, 2008, at the age of 89, survived by Rose, his wife of more than 60 years, objectant, and a grandson, Spencer (the child of a predeceased daughter Linda). At his death, decedent, who was a lawyer and insurance broker, had amassed a substantial estate, none of which was left to objectant in the two purported wills that he executed. In the propounded instrument, dated May 7, 2002, decedent left his personal and real property to Rose, whom he nominated as executor. He further directed that his residuary estate be distributed to the trustees of an inter vivos trust, executed the same day, for the benefit of Rose and Linda, or if the latter predeceased Rose, then Spencer.[1] Under an earlier instrument, executed on March 31, 1999, decedent left 60% of his estate to Rose, 20% each to Linda and Spencer, and

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[1] In the event that Spencer, who is 29, dies without issue before the age of 30, objectant succeeds to the funds held in trust for Spencer's benefit.

specifically disinherited objectant, stating that he considered Edward "capable of providing for himself and his family."

It is undisputed that, at the time the instrument was executed in 2002, decedent was in declining health and was living with Rose in New Rochelle, New York. Linda lived in Manhattan, but assisted her elderly parents with personal and financial matters. Objectant had little, if any contact, with his father and was estranged from his mother and sister. The attorney-drafter had no prior relationship with either decedent, Rose, or Linda, who were referred to him by another client. However, Rose and Linda were both involved in discussions which led to the drafting of decedent's will.

The propounded instrument was executed at the attorney-drafter's office under his supervision. Three individuals acted as witnesses, each of whom signed an attestation clause and a self-proving affidavit (SCPA § 1406). The attorney-drafter, who also prepared Rose's will and trust, testified that he believed that Rose and decedent were present at the execution of each other's wills. However, Linda, who accompanied her parents to the attorney's office, was asked to leave after "exchang[ing] pleasantries."

BNY Mellon propounded the 2002 will as nominated successor executor, Rose having renounced her appointment and Linda, the first alternate nominated executor, having predeceased in 2007.

Preliminary letters were issued to proponent on February 2, 2009. At the time of decedent's death, Rose and decedent were the subject of separate contested Mental Health Law (MHL) Article 81 Proceedings initiated by objectant. Because of questions regarding Rose's capacity, the court appointed a guardian ad litem for her in this proceeding. Rose, however, died on November 25, 2011, before the guardian ad litem was in a position to report on the validity of the propounded instrument. After jurisdiction was completed over the fiduciary of Rose's estate, Edward filed standard objections on the grounds of lack of capacity and due execution, fraud, and undue influence. Proponent now moves for summary judgment dismissing the objections. Decedent's grandson Spencer joins in the motion.

Discussion

The standards for summary judgment are clear. Summary judgment is available only where no material issues of fact exist (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.* at 324 [citations omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof establishing a genuine issue

of material fact or must provide an acceptable excuse for the failure to do so (*see e.g. Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The party resisting summary judgment is entitled to every favorable inference that can reasonably be drawn from the evidence (*see e.g. Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]). That evidence may include hearsay as long as it is not the only proof offered *(see e.g Bishop v Maurer*, 106 AD3d 622 [1st Dept 2013]). In addition, evidence that might be barred at trial under CPLR § 4519 (Dead Man's Statute) can be used to oppose summary judgment (*see Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562, *supra* [citations omitted]).

Testamentary Capacity

On the issue of testamentary capacity, proponent must make a prima facie showing that decedent was competent to make a will, *i.e.*, that he understood the nature and extent of his property, the natural objects of his bounty, and the provisions of the instrument (*see e.g. Matter of Kumstar*, 66 NY2d 691 1985]). The mental clarity required of a testator is lower than

that required to execute all other legally binding instruments (*see e.g. Matter of Coddington*, 281 AD 143 [3d Dept 1952], *aff'd* 307 NY 181 [1954]). If a testator has the knowledge and understanding required by *Matter of Kumstar, supra*, at the time of the will's execution, then old age, physical illness, or even progressive dementia will not render the instrument invalid for lack of capacity (*see e.g. Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]).

Here, proponent made a prima facie showing of capacity by submitting the self-proving affidavit of the three attesting witnesses, stating that the decedent was of "sound mind, memory and understanding," as well as the deposition testimony of the witnesses and the attorney-drafter. Collectively, this evidence unequivocally supports a determination that, at the time of execution, decedent had testamentary capacity (*see e.g. Matter of West*, 147 AD3d 592 [1st Dept 2017]; Matter *of Schlaeger*, 74 AD3d 405 [1st Dept 2010]; *see also Matter of Leach*, 3 AD3d 763, 765 [3d Dept 2004][affidavits of attesting witnesses create a presumption of testamentary capacity]).

The attorney-drafter, an experienced trusts and estates practitioner, testified that he met with decedent five or six times over several months in connection with the drafting of decedent's will and that he had "[n]o question" as to decedent's testamentary capacity. Indeed, he stated that, if he

had had such concerns, he would have refused to continue the representation, as he had previously done with another client. Moreover, although the witnesses could not recall the specific circumstances of the execution ceremony more than ten years earlier, they each testified in substance that they would not have signed the self-proving affidavit if they had not believed its contents to be true.

In opposition, objectant relies primarily on his affidavit and deposition testimony and various medical records. However, key aspects of his narrative of decedent's purported mental decline are uncorroborated. For example, objectant contends that decedent was being treated for "memory loss" at an unspecified time after 1996, but provides no specifics or supporting medical records. Objectant also has no first-hand knowledge of his father's cognitive condition in the months prior to the instrument's execution. By his own admission, his contact with his father began to dwindle in 2001, and he had only one contact with him in 2002.

The medical records reflect decedent's long history of heart and vision problems and some documented memory loss and confusion. However, none of these medical records is sufficient to create a fact issue. Decedent's poor eyesight does not bear on the issue of his testamentary capacity (*see e.g. Matter of McCabe*, 75 Misc 35 [Sur Ct, NY County 1911]). Similarly, the

mere fact that decedent was hospitalized for heart-related matters four times between March 2000 and February 2002 is not dispositive, since a testator's poor physical condition, in and of itself, is not sufficient to raise a question of fact regarding the issue of decedent's capacity (*see e.g. Children's Aid Society v Loveridge*, 70 NY 387 [1877]; *Matter of Beneway*, 272 AD 463 [3d Dept 1947]).

Significantly, decedent's medical records do not indicate any mental infirmity that would warrant denial of the motion. The records for two of the hospital visits, including the one in February 2002, are completely silent regarding decedent's cognitive abilities. The records for the two visits in March 2000 and June 2001 do not provide any information or diagnosis that would bear on the relevant inquiry, namely decedent's testamentary capacity on May 7, 2002 (*see e.g. Matter of Morris*, 208 AD2d 733 [2d Dept 1994]). Thus, for example, when decedent was hospitalized for five days in March 2000 (more than two years before the will was executed), he experienced "episodes of disorientation in the night," claimed that he had been kidnapped, and that he had to be restrained. However, similar descriptions are conspicuously absent in the notes of the hospitalization 14 months later, but almost a year before execution of the propounded instrument. Indeed, the only reference to decedent's cognitive state is a single notation

that decedent was a "fair to poor historian" when providing pre-admission information.

Objectant's reliance on a 1996 MRI and March 2000 CT scan of decedent's brain is also misplaced. Objectant has not provided the court with the earlier 1996 MRI report. Instead, he submits a January 1997 letter discussing the MRI from a physician who evaluated decedent because of a fainting episode and high blood pressure. The letter describes the technical findings of the MRI, but goes on to state that a "screening neurologic assessment [of decedent] was normal." The later March 2000 scan was consistent with the earlier MRI. Omitted from objectant's opposition, however, is any explanation by an expert of the significance of decedent's scans. Moreover, to the extent decedent's conditions had any effect on his cognitive function, it was not enough to give the attorney-drafter pause about decedent's testamentary capacity. Nor did it result in any further comment or recommendation for ongoing treatment in decedent's medical records.

Also insufficient are the notes of decedent's cardiologist from March 11, 2002, and May 2, 2002 (five days before decedent's execution of the propounded instrument). The doctor's statements are limited to one instance where decedent evidenced confusion about his multiple prescribed medications. Further, he makes no mention of decedent's overall mental

state. Nor do his notes suggest that decedent could not meet the standard set forth in *Matter of Kumstar* (66 NY2d 691, *supra*). In any event, it is well settled that dementia alone is not sufficient to create a fact issue (*see e.g. Matter of Friedman,* 26 AD3d 723 [3d Dept 2006]).

Significantly, objectant ignores decedent's conduct shortly after the execution ceremony. His behavior indicates that he understood his estate plan and was able to take steps to effectuate it. According to the attorney-drafter, within two days of executing the will and trust, decedent, of his own volition, telephoned him at least once and requested that a change be made to the trust instrument. Specifically, decedent asked the attorney-drafter to add himself as a co-trustee to serve with Rose and Linda. The call resulted in the execution of an amended trust agreement on May 16, 2002. In addition, at or about the same time, decedent requested that the attorney-drafter send a copy of the amended trust agreement to BNY because it required the document in order to transfer funds into a new trust account.

Decedent's capacity to execute his will is supported by his medical records and the substantial evidence from those present at the execution ceremony. Objectant's opposition, which is long on conjecture and short on substance, fails to create a fact issue. As a result, objectant's reliance on

Matter of George (NYLJ, 1202647742671 [Sur Ct, Kings County 2014]) and *Matter of Andersen* (NYLJ, 1202616550637 [Sur Ct, Kings County 2013]) is misplaced. In both cases, the court denied summary judgment on the issue of testamentary capacity, but the record was replete with evidence of serious cognitive impairment at or near the time the wills were executed. No such proof appears in the record here.

Based upon the foregoing, the motion is granted to the extent that the objection based upon lack of testamentary capacity is dismissed.

Due Execution

Proponent must also make a prima facie demonstration that the propounded instrument was duly executed, *i.e.*, that it was executed in accordance with the formalities of EPTL § 3-2.1 (*see e.g. Matter of Tully*, 227 AD2d 288 [1st Dept 1996]). A presumption of due execution exists where an attorney supervises execution of the will (*see e.g. Matter of Kindberg*, 207 NY 220 [1912]; *Matter of Halpern*, 76 AD3d 429 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). Further, absent conflicting proof, an attestation clause serves as prima facie evidence that the will was duly executed (*see e.g. Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Falk*, 47 AD3d 21 [1st Dept 2007).

Here, the execution of the instrument was supervised by an

attorney. It contains an attestation clause. The self-proving affidavits of the attesting witnesses indicate that all statutory formalities were met. Proponent has thus submitted prima facie evidence that the instrument was executed in accordance with EPTL § 3-2.1.

In opposition, objectant contends that the witnesses' failure to recall details of the execution ceremony is sufficient to preclude summary judgment. However, the fact that a witness may not remember the ceremony, which occurred many years earlier, cannot be equated with "testi[mony] that the **formalities** ... did not occur" and does not overcome the presumption of due execution (*Matter of Ruso*, 212 AD2d 846, 847 [3d Dept 1995][emphasis in original]).

Objectant also mischaracterizes some of the witnesses' testimony or its import to advance his argument that the statutory formalities could not have been met, notwithstanding the self-proving affidavits. For example, he emphasizes that one of the three witnesses had not previously witnessed a will while working at the attorney-drafter's firm. However, this argument is without any merit whatsoever given that any adult can act as an attesting witness. Here, the witness testified that she had served as an attesting witness "many times" at her previous job. Objectant also suggests that the same witness undermined her self-proving affidavit by testifying generally

that, had she observed a testator signing below the signature line, she might have questioned whether to affirm that the testator had no "defect of sight." But the question was asked of this witness without reference to decedent's signature on the instrument, which appears only slightly below the signature line. More important, the self-proving affidavit makes clear that poor eyesight is relevant only if it "would affect [the testator's] capacity to make a valid will," a topic that objectant's counsel never raised at the witness's deposition.

There is no dispute that decedent was blind in one eye and had glaucoma in the other. However, notwithstanding decedent's poor eyesight, objectant fails to demonstrate how, as a result, the instrument's execution did not meet the requirements of EPTL § 3-2.1. The attorney-drafter testified that his customary practice was to ask a testator to read the will and then to review the instrument's contents with the testator. Only when the attorney-drafter was satisfied that the testator understood the instrument's provisions would he call in the witnesses for the execution ceremony, which he conducted in accordance with EPTL § 3-2.1.

The attorney-drafter also specifically testified that, in keeping with his practice, he reviewed the testamentary documents with decedent and his wife for more than an hour. While the attorney-drafter could not recall, after nine years,

all the details of the execution ceremony, his testimony was clear that he did not deviate from his standard practice, which was to ensure that decedent understood the provisions of the will whether he specifically read them or not. This is all that is required (*see e.g. Matter of Morris*, 208 AD2d 733, *supra*). Objectant's assertion that the propounded will did not meet the statutory requirements is based on nothing more than speculation and conjecture, which is never sufficient to create a fact issue (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, *supra*). Accordingly, the motion is granted to the extent that the objection based upon lack of due execution is dismissed.

Undue Influence and Fraud

Although objections based upon fraud and undue influence are often discussed in tandem, the two concepts are distinct. Fraud requires a showing that a knowingly false statement caused the decedent to execute a will that differed substantially from the will he would have executed in the absence of such statement (*see e.g. Matter of Ryan*, 34 AD3d 212 [1st Dept 2006], *citing Matter of Evanchuck*, 145 AD2d 559 [2d Dept 1988]). Undue influence, on the other hand, requires a showing that the propounded instrument resulted from influence that "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by

importunity could not be resisted, constrained the testator to do that which was against his free will and desire . . . ." (*Children's Aid Society v Loveridge*, 70 NY at 394, *supra*; *see also Matter of Kumstar*, 66 NY2d 691, *supra*). Motive, opportunity and the actual exercise of undue influence must be demonstrated by the objectant (*see e.g. Matter of Walther*, 6 NY2d 49 [1959]).

Here, proponent has made a prima facie case for dismissal of the fraud objection. He has submitted evidence that the drafting and execution of the instrument were the products of decedent's knowing intent rather than a fraud committed upon him. In response, objectant argues that several "failures" on the part of the attorney-drafter "constitute[d] a deception such as to create a fraud" upon decedent. However, these purported "failures," some of which are not supported by the record, are more in the nature of criticisms of the quality of the services the attorney-drafter provided. They are not evidence that the attorney-drafter or anyone else deliberately "made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement" (*Matter of Evanchuck*, 145 AD2d 559, 560 [2d Dept 1988], *citing Matter of Beneway*, 272 App Div 463, *supra*; *see also Matter of Ryan*, 34 AD2d 212, *supra*). Under these

circumstances, objectant has failed to create a fact issue as to fraud, and the objection is dismissed.

As for undue influence, proponent has made a prima facie showing that the propounded instrument was an expression of decedent's own intent rather than that of any other person. Among the proofs submitted was the testimony of the attorney-drafter and the self-proving affidavits of the witnesses, which collectively support a determination that the propounded instrument was, in fact, a reflection of decedent's free will.

Objectant contends, however, that Linda and Rose unduly influenced decedent to exclude objectant as a beneficiary because of their own deep-seated resentment toward him. According to objectant's affidavit and deposition testimony, Rose and decedent had a tumultuous marriage and, while over the years objectant had gravitated toward his father, with whom he became very close, Linda remained close to Rose. As a result, objectant's relationship with Rose and Linda deteriorated and became increasingly hostile as the years passed.

According to objectant, he remained close to his father and saw and spoke to him regularly, even assisting him professionally from time to time until the late 1990's. As evidence of his closeness with decedent, objectant submits a 1994 draft will in which decedent left him 50% of the remainder of a QTIP trust and left objectant's daughter (his only child

at the time) 50% of a residuary credit shelter trust. Objectant claims that decedent told him the will had not been executed only because Linda, who did not like that her 50% share of the QTIP trust remainder after Rose's death was to be held in further trust, pressured him not to sign it.

Objectant concedes that his relationship with decedent changed in the late 1990's so that, by the time the will was executed in May 2002, he had virtually no contact with his father. However, he blames Rose and Linda for the estrangement. He asserts that, as decedent's physical and mental condition began to deteriorate, Rose in particular made it more and more difficult for him to talk to or see his father. According to objectant, Rose would refuse to put decedent on the phone when he called or, when she would permit the call, she would insist on being on the call as well. Objectant also claims that Rose did not permit him and his wife and two children to visit her and decedent at their home.

For a time, decedent was still able to visit objectant at his home in New Jersey, but, according to objectant, decedent told him that Rose was making his life so "miserable" when he visited objectant's home that the visits would have to stop. Eventually, objectant's calls and visits to decedent's office ended as well when decedent's health declined and he retired.

This state of affairs, objectant contends, created the

ideal conditions for Rose and Linda to unduly influence decedent. His opposition to summary judgment is rooted in his assertion that Rose and Linda undermined his relationship with decedent at a time when decedent was vulnerable and reliant on them and, in doing so, they were ultimately able to supplant decedent's desire to benefit objectant in his estate plan with their own desire to see him disinherited.

As is often the case where undue influence is alleged, objectant relies on circumstantial evidence to defeat summary judgment. Such reliance is proper since "[u]ndue influence is seldom practiced openly, but ... is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind ...." (*Matter of Burke*, 82 AD2d 260, 269 [2d Dept 1981]). The law is clear, however, that any such evidence must be "of a substantial nature" (*Matter of Walther*, 6 NY2d at 54, *supra*).

Courts consider many factors when evaluating whether an instrument is the product of undue influence, including the testator's physical and mental condition (*see e.g. Children's Aid Society v Loveridge*, 70 NY 387, *supra*), whether the attorney who drafted the instrument was the testator's attorney or was instead associated with the beneficiary (*see e.g. Matter of Elmore*, 42 AD2d 240 [3d Dept 1973]), whether the beneficiary had any direct involvement in the preparation or execution of the instrument (*see e.g. Matter of Ryan*, 34 AD3d 212, *supra*),

whether the propounded instrument is not a natural will and deviates from the testator's prior testamentary plan *(see e.g. Matter of Brush*, 1 AD2d 625 [1st Dept 1956]), whether testator was isolated from the objects of his natural affection (*see e.g. Matter of Burke*, 82 AD2d 260, *supra*), and whether the person who allegedly wielded the influence was in a position of trust (*see e.g. id.*).

Objectant's submission of decedent's medical records provides undisputed evidence of decedent's weakened physical state. The records also show that, although decedent had testamentary capacity, his cognitive function could be impaired at times. According to the attorney-drafter's notes, Linda herself described her father in a phone call in December 2001 as having some short-term memory loss.

Objectant's detailed testimony about how Rose tried to prevent or limit his in-person or telephone contact with decedent is also pertinent to the issue of undue influence. So too is the testimony of the attorney-drafter as to the details of Rose and Linda's involvement in the drafting process. Rose's participation and her presence at the execution ceremony does not per se suggest undue influence. She and decedent together had retained the attorney-drafter to prepare a joint estate plan. However, nothing in the record indicates that he ever discussed privately with decedent his estate plan (which was

not the mirror image of Rose's) or the decision to disinherit objectant.

Linda's involvement in the drafting process cannot be ignored, notwithstanding that the attorney-drafter testified, in conclusory fashion, that he did not believe the propounded influence was the product of undue influence. He testified that Linda first contacted him based upon the referral. She also facilitating appointments and provided a detailed statement of her parents' assets. Linda was also present for most meetings with the attorney-drafter and telephoned him on several occasions outside of decedent's presence. On one occasion several months before the will's execution, Linda provided information to aid the lifetime transfer to herself of decedent's condominium in Florida. On another occasion, Linda called the attorney-drafter to ask that he include a specific provision in the draft will and related trust disinheriting objectant. In spite of the attorney-drafter's claim that he rebuffed her efforts, the exchange demonstrates not only Linda's strong view that her brother should be specifically disinherited, but also, that she was willing to take steps to effectuate her wishes.[2]

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[2] In the end, such a provision was not included in the decedent's will. Nor was it included in the trust agreement, which gave objectant a remote contingent interest (*see* footnote 1). It was, however, included in Rose's will and trust.

Linda's undisputed position of trust in relation to her father is also a factor. The attorney-drafter testified that decedent told him that he "relied heavily on Linda, that he loved her very much, that she was always there for him, and that they had a wonderful relationship." Objectant contends that Linda's relationship with her father went beyond one of simple closeness and amounted to a "confidential relationship" *i.e.*, one in which decedent was "dependent upon or subject to the control" of Linda (*Matter of Smith*, 95 NY 516, 522 [1984]). When such a relationship exists and there is circumstantial evidence supporting undue influence, such as the beneficiary's involvement in obtaining the will's execution, an inference of undue influence may be drawn *(see e.g. Matter of Neenan*, 35 AD3d 475 [2d Dept 2006]; *see also* PJI 7:56 and 7:56.1).

Such an inference does not shift the burden of proof, but it does require the beneficiary to provide a satisfactory explanation for the bequest and to show that the instrument's dispositive provision(s) were fair and free from undue influence (*see e.g. Matter of Bach*, 133 AD2d 455 [2d Dept 1987]; *see also* PJI 7:56 and 7:56.1). However, where the person alleged to have unduly influenced a decedent is a close family member, courts may find that the familial relationship negates or counterbalances any inference of undue influence that might otherwise arise from the confidential relationship (*see e.g.*

Matter of Walther, 6 NY2d 49, *supra; Matter of Scher*, 74 AD3d 827 [2d Dept 2010]; *Matter of Zirinsky*, 43 AD3d 946 [2d Dept 2007]).

Whether Linda had a confidential relationship with decedent under the circumstances here is a triable issue (see *Matter of Greenberg*, 34 AD3d 806 [2d Dept 2006]; *Matter of Conner*, NYLJ, Apr. 21, 2011, at 29, col 4 [Sur Ct, NY County 2011]). But, even if that were not the case, or any confidential relationship was negated by the close familial relationship, sufficient circumstantial evidence exists to warrant a jury determining whether Linda and/or Rose unduly influenced the execution of the propounded instrument. Apart from the record described above, two events occurring after execution also support an inference of undue influence and are appropriately considered on this motion (*see e.g. Matter of Rosen*, 296 AD2d 504 [2d Dept 2002]).

The first event, recounted by the attorney-drafter, involved a phone call from Rose on August 22, 2002, less than four months after the propounded instrument was executed. Rose was very concerned about objectant's having contact with decedent. She believed that objectant was trying to "influence [decedent] as to his estate plan," and she wanted the attorney-drafter's help to prevent it. Rose told him that objectant had taken decedent to see a psychiatrist and she was concerned that

decedent could be influenced or manipulated by the psychiatrist and/or objectant to objectant's advantage. When the attorney-drafter then spoke to decedent, he said that objectant had "tricked" him into seeing the psychiatrist and that "his son was trying to get him to do things he did not want to do." Whether Rose was on the line or in the room is not disclosed in the record. But what is clear is that subsequently, on October 11, 2002, decedent called the attorney-drafter outside of Rose's presence and told him that he was "troubled" and that he did not "hate his son like the others do." The conversation was significant enough in the attorney-drafter's mind that he made a contemporaneous note to memorialize it.

The second event, described by objectant, occurred in early August 2002 (just three months after the execution of the propounded instrument) and, according to him, demonstrates that Linda's relationship with decedent was not what proponent's evidence suggests and that she could be very intimidating.[3] Objectant claims that decedent's former secretary reported that decedent had come to her apartment in "rough shape" after being thrown out of Linda's residence. The woman then asked objectant to come to her apartment, telling him that Linda had been

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[3] Objectant's transcripts of several telephone messages Linda purportedly directed to objectant and his wife cannot be considered as they are undated and unauthenticated and therefore have no evidentiary value (*see e.g. Oquendo v Rosgro Realty Corp.*, 117 AD2d 528 [1st Dept 1986]).

verbally abusive to decedent and that Linda and/or Rose had thrown decedent's checks on the floor and that decedent "had been made to pick them up like a dog." Objectant testified that, when he arrived, decedent told him that he had been "threatened with abandonment unless he went along [with whatever Linda and Rose wanted]."

The record shows that, at the time that the will was executed, decedent was clearly caught in the middle of a dispute between his wife and daughter, whom he relied upon for assistance and care, and his son, whom he told the attorney-drafter that he "loved." Since Linda and Rose are deceased, their version of events is not before the court. According to the attorney-drafter's notes, objectant was being disinherited because his wife "had caused a breach in the family," but the nature of the breach is not described. Objectant only offers that his "mother seemed to have issues with my wife."

Whatever the reason for objectant's strained relationship with his mother and sister, decedent's statements to the attorney-drafter and objectant are evidence that not only did decedent not share Rose and Linda's hostility towards objectant, but also that there was the potential for decedent to be pressured by them. Also significant is that just four months after execution of the will, Rose thought that decedent was pliant enough to be influenced, although she expressed

concern that someone other than herself, namely objectant, might unduly influence decedent to change his estate plan.

The court is mindful that decedent had specifically disinherited objectant in his March 1999 will, when he was in more regular contact with objectant. The court has also considered the February 2009 report by the court evaluator in the Article 81 proceeding in which objectant sought the appointment of a guardian for decedent. In that report, the evaluator reported, among other things, that decedent "claimed to understand and agree" with his estate plan. The court evaluator did not, however, express a view as to the reliability of decedent's assessment. Under all the circumstances here, there is sufficient evidence to put to a jury the question whether decedent genuinely wished to provide for Rose and Linda to the exclusion of objectant or, instead, was compelled to agree to the estate plan that Linda and Rose wanted out of fear that he would be cast aside and abandoned when he could not care for himself.

For these reasons, summary judgment is denied on the issue of undue influence.

This constitutes the decision and order of the court.

Dated: January 10, 2018

S U R R O G A T E