| **Matter of Williams** |
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| 2018 NY Slip Op 32497(U) |
| October 4, 2018 |
| Surrogate's Court, New York County |
| Docket Number: 2012-2554/A/B |
| Judge: Nora S. Anderson |
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK



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In the Matter of a Proceeding for Various Types of Relief in Relation to a Trust Created by

LUCILLE B. WILLIAMS,

File No. 2012-2554 /A/B

as Grantor,

under Agreement dated October 2, 2007.

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A N D E R S O N , S .:

Presently before the court is a motion for summary determination (CPLR 3212) in a contested proceeding involving a revocable trust (the "Trust") established by Lucille B. Williams (the "Grantor") on October 2, 2007, and restated by her on November 7, 2008, and on March 20, 2009.[1] The proceeding was commenced by Grantor's five stepchildren, who seek various types of relief in relation to the Trust. Movant, Grantor's daughter, asks the court to dismiss her step-siblings' petition.

**Factual Background**

To the extent that the facts are undisputed, they are as follows. Grantor died on October 9, 2011, aged 83, survived by movant as her sole distributee. On the date of Grantor's death, her probate estate had a value of approximately $200,000 and the Trust remainder had a value of more than $10 million. Grantor's second husband, Bob, to whom she was married for about 30 years, had died some 15 years earlier. The couple had each brought children to the marriage -- his four sons and a daughter and her son and daughter (in combination, "the seven children").

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[1]Movant purports to make this motion in the probate proceeding that is currently pending in Grantor's estate, as well as in the present proceeding. However, the probate proceeding is uncontested, and a motion for summary determination therein would be anomalous (*see* CPLR 3212[a]). Accordingly, the court must limit its analysis of the motion to the issues raised in the present proceeding.

With Bob's three older children already living independently, the household established by Grantor and Bob consisted of his two younger children and both of hers. Whether the blended-family arrangement generally fared as badly as movant alleges or as well as objectants would have it is a sharply disputed question. For present purposes it is enough to identify the points upon which the parties agree in such connection.

For one, from the start of their marriage Grantor and Bob in various respects took pains to be even-handed toward the seven children. For another, when Bob died, on December 27, 1995, he left his estate outright to Grantor, but only after directing (in a pre-residuary bequest) that $600,000 be divided among the seven children equally. Notably, the bulk of the assets that Bob left to Grantor consisted of securities held in a brokerage account then valued at approximately $10 million (the "Brokerage Account").

Another point of agreement among the parties is that Grantor and Bob had at some point established a practice of regular, joint, and equal giving to the seven children (and, from time to time, to the couple's grandchildren) in the form of semi-annual cash gifts celebrating the end-of-year holidays and the date of their marriage. It is undisputed that after Bob's death Grantor continued the tradition for years, but discontinued it in 2009, which was in several respects a pivotal year for her. That year was the first following the death of her son (movant's brother) as a result of a motorcycle accident on September 7, 2008, that had left him hospitalized as a paraplegic to the date of his death (December 20, 2008). Although the son's relationship with his step-siblings through the years is among the matters presently in dispute, all parties agree that the son's death was a deeply tragic loss for Grantor, who as she aged had come to rely increasingly on his companionship and assistance as to her household and other personal needs,

including the hiring of round-the-clock aides to help her cope with her various physical ailments. It is also undisputed that movant, who lived with her husband and children in Pennsylvania and whose contact with Grantor over the decades was mainly by telephone, came to occupy a considerably more important practical role in Grantor's life – with, as movant puts it, a relationship that was "stronger"after the son was hospitalized and then after he died. Although the frequency of the step-children's own in-person visits with Grantor over the years is itself a point of some disagreement, it is undisputed that only two of them lived in the New York area, but it is also undisputed that they remained in contact with Grantor by phone and in writing both before and after the son's death.

The record establishes that Grantor executed two testamentary instruments prior to the one now propounded as her will. The first, executed in 1984, left her tangibles and any real estate interests to Bob if he survived her and bequeathed her residuary estate to the seven children in equal shares. The second, executed in 2001, left the investment assets in the Brokerage Account – representing the bulk of her estate -- to the seven children, again in equal shares, with the residuary passing to her son and daughter.

The third testamentary instrument, now propounded as Grantor's will, was executed on November 7, 2008, on which date Grantor also executed a power of attorney and health care proxy naming her daughter as her agent (replacing Grantor's son as her agent under instruments executed at the time the Trust was created) . The third testamentary instrument left Grantor's tangibles to her daughter and her residuary to the Trust created about a year earlier. The original Trust agreement between Grantor and her son, the latter as her co-trustee, provided that at Grantor's death the investment assets in or traceable to the Brokerage Account were to be

divided equally among the seven children, with the balance of the Trust's assets (including her Manhattan apartment) to be divided between her son and daughter. An amendment of that instrument, executed concurrently with the propounded will, was prompted by the son's changed circumstances in the wake of his accident: it provided that his share of the remainder was to be held in further trust, and it replaced the son with the daughter as co-trustee. By contrast, a second instrument to amend the Trust (the "Trust Restatement") , executed some four months later and now at the center of the parties' dispute, substantially altered decedent's dispositive provisions for the remainder: under it, the entire trust remainder was left to Grantor's daughter, with a provision explaining that the absence of any gift to the step-children was not for want of love and affection for them but because, as the provision put it, they had been "adequately" provided for from other sources.

In their petition for relief concerning the Trust, the step-children seek to set aside the Trust Restatement on the grounds that Grantor lacked capacity to execute it and that it was the product of movant's fraud and undue influence. The step-children's other stated "grounds" for invalidating the Trust Restatement (lack of due execution, duress, "overreaching") are in essence mere variations of lack of capacity and undue influence.

**Standards Applicable to Summary Determinations**

Although on summary judgment motions the phrases "burden of proof" and "preponderance of the evidence" are occasionally invoked by the courts or, as in this case, repeatedly by the parties, the phrases are misplaced in such a context. Where a factual dispute is raised in an action or proceeding, at trial one of the parties will necessarily have a heavier burden than the other to prove or disprove the fact. However, the very premise of a motion for summary

judgment is that the material facts are not open questions and that the issues therefore can be determined as a matter of law, *i.e.*, without the need for trial. Thus, although a movant for summary judgment has an evidentiary burden, for purposes of the motion he does not have a "burden of proof" within the standard meaning of that phrase. Instead, the movant must submit evidence making a prima facie case for his position on the law, "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In considering whether the movant has made a prima facie case, a court must be mindful that she cannot do so through evidence that is hearsay as to her (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Nor may she do so through evidence that would violate section 4519 of the CPLR, the so-called "Dead Man's Statute" (*see Phillips v Kantor & Co.*, 31 NY2d 307).

Where the movant has succeeded in making a prima facie case of entitlement to a favorable ruling as a matter of law, the adversary must then demonstrate that a material issue of fact nonetheless is in genuine dispute ([*id.*]) and that a trial is therefore necessary (*see Zuckerman v City of New York, id.*). If the adversary fails to do so, the motion must be granted.

Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such relief should be considered with caution (*F. Garofalo Elec. C. v NY Univ.*, 300 AD2d 186, 188 [1st Dept 2002]. On the other hand, "timidity in exercising the power [to rule summarily] in favor of a legitimate claim and against an unmerited one ... contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation" *(Di Sabato v Soffes,* 9 AD2d 297, 299 [1st Dept 1959]).

On a motion for summary determination, the opposing party must be allowed the benefit

of any reasonable inference in that party's favor. Moreover, a credibility issue clearly points to the need for trial (*Dauman Displays v Masturzo*, *supra*, at 205). Finally, allegations by the party opposing the motion must be "substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 (2d Dept 1981), and mere speculation cannot serve as a substitute for proof (*see, e.g., Shaw v Time-Life Records*, 38 NY2d 201 [1975]; *Matter of Eastman*, 63 AD3d 728, 740 [2d Dept 2009]; *Matter of Hatzistefanou*, 77 Misc 2d 594 [Sur Ct, NY County 1974]).

**Motion for Summary Determination as to Capacity**

On the capacity issue, the parties disagree as to the standard of capacity that applies where the instrument in question involves a revocable trust. According to movant, the standard is fixed by the character of the Trust as a testamentary substitute, revocable as it was during Grantor's lifetime. Thus, movant contends that, to have executed the Trust Restatement effectively, Grantor needed no more than testamentary capacity – the least demanding condition of mind required of an individual executing a legal instrument (*see Matter of Coddington*, 281 AD 143 [3rd Dept 1952]). Under that standard, a testator must understand the nature and extent of his property and, at least on an elementary level, the function and content of the will disposing of that property, as well as that certain persons would ordinarily be the natural objects of his bounty (*Matter of Kumstar*, 66 NY2d 691 [1985]).

According to the stepchildren, by contrast, the standard of capacity applicable to the Trust Restatement, as a bilaterally executed instrument amending an "agreement," is the more demanding standard applied to contracts (*see Ortelere v Teachers' Retirement Bd.*, 25 NY2d 196, 202-203 [1969])(under traditional contract standard of capacity, party to employment-severance

contract must have ability to understand nature and consequences of transaction and to make a rational judgment concerning it);[2] *Blatt v Manhattan Med. Group, P.C.*, 131 AD2d 48 [party to contract had capacity where his mental faculties were sharp enough to allow him to understand nature of the give-and-take between himself and other party and to assess agreement's affect on his personal interests]; *see Matter of Goldberg*, 153 Misc 2d 560 [Sur Ct, NY County 1992] [same as to antenuptial agreement]).

As it happens, the capacity issue is a somewhat awkward one for each side. The problem for the step-children is implicit in their attempt to invalidate the Trust Restatement on the ground that Grantor was without capacity when it was executed, since they thereby risk raising a question as to her capacity to have created the Trust less than 18 months earlier. The problem for movant, on the other hand, is that the court in *Matter of ACN* (133 Misc 2d 1043 [Sur Ct, NY County 1986]) – the decision she claims as support for validating the Trust Restatement by applying the lower standard of testamentary capacity – did the exact opposite when it invalidated the trust involved in that case. The problem for both parties is that there is no square precedent to guide us on the capacity issue arising with respect to this revocable trust.

In the end, however, the very differences between this case and *ACN* point to the appropriate standard for determining capacity here. It was clearly pivotal to the *ACN* ruling that the charitable-remainder unitrust there at issue amounted to an irrevocable surrender of its grantor's full ownership of the entrusted property during his lifetime. Such a transaction was

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[2]Although the enactment of Article 81 of the Mental Hygiene Law, in 1992, to some extent altered the effect of the *Ortelere* standard, it did not do so to the extent relevant to the issues here.

appropriately put to a more stringent test for validity than should be applied to the revocable gift in this case, which, viewed from the time the Trust Restatement was executed, would take effect (if ever) only upon the owner's death (*id.*, at 1046-1047).

The mere the fact that the Trust Restatement had two signatories did not per se make the instrument the product of a negotiated transaction warranting the more rigorous test for capacity that is appropriate to a negotiated contract. Rather, as another court has noted, the fact of two signatures on a trust "agreement" may be "largely a matter of form" (*Matter of Goldberg*, 153 Misc 2d 560, 565 [Sur Ct, NY County 1992]). In any event, the instrument creating the trust in this case was by its express terms amendable by Grantor unilaterally, and the dispositive change effected by the Trust Restatement therefore had not required any signature other than Grantor's and thus cannot be said to have entailed a negotiation requiring the degree of mental acuity on Grantor's part as would be demanded of a contract.

For the foregoing reasons, the court concludes that the gauge of capacity to be applied here is the less demanding, testamentary standard.

The question as to whether movant has made a prima facie case for capacity need not detain us long. As a threshold matter she is aided by the law's presumption of capacity (*see, e.g., Matter of Betz*, 63 AD2d 769 [3d Dept 1978]; *Matter of Smith*, 180 AD 669 [2d Dept 1917]; *Jones v Jones*, 17 NYS 905, 908 [1st Dept 1892]["the legal presumption is that every man is compos mentis"]). In addition, movant has submitted the affidavit and deposition testimony of two lawyers, partners in the same firm, with whom Grantor consulted in relation to their preparation and her execution of the Trust Restatement, as well as the lawyers' written

memorializations of their discussions with Grantor concerning the Trust Restatement. The lawyers' separate accounts as to Grantor's responses and questions during their discussions near or at the time the Trust Restatement was executed describe a client who understood the nature of the legal steps that she was taking and of the property that would pass pursuant to those steps; who was aware of the identity of the natural objects of her bounty and of the provisions that she had made for them in the past; and who was mentally flexible enough to evaluate her estate-planning alternatives. Additional submissions by movant, including the affidavit and deposition testimony of, among others, one of the stepchildren and a home care aide who had worked for Grantor for some ten years (both before and after the Trust Restatement was executed), are consistent with the proposition that Grantor had not declined so far mentally that she would have been unable to execute a valid will or will substitute. In short, movant has made a prima facie case that Grantor had capacity for purposes of executing the Trust Restatement.

The stepchildren can successfully resist summary dismissal of their capacity objection only if their evidence puts movant's prima facie case for such dismissal into genuine question. To that end, they have submitted their own sworn statements and deposition testimony; the affidavit and deposition testimony of the home care aide; the deposition testimony of several of the medical doctors who treated Grantor within the last few years of her life; and the medical records of Grantor's several visits to hospitals in the years immediately preceding her death. The foregoing indicates that, by the time Grantor executed the Trust Restatement, she had suffered noticeable memory loss and instances of confusion. She had also experienced apparent delusions or hallucinations (repeatedly complaining of skin problems purportedly caused by lice or ticks, pests that were, however, undetectable to her medical providers, and repeatedly reporting to

police that she was being contacted by UFOs and terrorists).

But such proof of mental decline does not establish lack of capacity for purposes of probate. As precedents establish, even a diagnosis of Alzheimer's Disease or senile dementia would not per se disprove testamentary capacity if execution occurred during a lucid interval (*Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]; *Matter of Morris*, 208 AD2d 733 [2d Dept 1994]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]; *Matter of Villani*, 28 AD2d 76 [1st Dept 1967]; *Matter of O'Donnell*, NYLJ, Oct. 28, 2008, at 35, col 2 [Sur Ct, NY County]). Indeed, among objectants' own proofs are medical records, compiled near or after the Trust Restatement was executed, reporting that Grantor appeared to be "oriented" as to time, place, and person." Nor is incapacity proved by evidence that decedent entertained a delusional belief or experienced hallucinations unless – as does not appear to be the case here – a delusion or hallucination caused or altered the dispositive provisions of the propounded will (*see, e.g.*, *Matter of Honigman*, 8 NY2d 244 [1960] [remand to jury to determine whether delusion as to wife's infidelity was the basis for reduction of her inheritance]; *American Seamen's Friend Soc. v Hopper*, 33 NY 619, 625 [1865] [will invalidated by delusion if testamentary dispositions "were or might have been caused or affected by ... delusion"]; *Matter of Etoll*, 30 AD2d 224, 228 [3d Dept 1968] ["lack of capacity evidenced by abiding, insane delusion directed at the person who would normally be the principal or only object of testatrix'[s] concern and bounty"]).

In the absence of evidence that would create a genuine question as to capacity, the motion to dismiss the objection as to lack of capacity is granted.

**Motion for Summary Determination as to Undue Influence**

The premise of an objection alleging undue influence is that the legal instrument at issue expresses the wishes of someone other than the instrument's purported creator. This is not to say that influence per se is necessarily "undue." But where an instrument is proved to be the product of "a moral coercion, ... restraining independent action and destroy[ing] free agency, ... which, by importunity[,] ... constrained [the purported creator to execute the instrument] ... against [her] free will and desire," it must be invalidated (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]).

As is often noted, undue influence can seldom be demonstrated by direct proof, since such an influence rarely occurs in plain view (*Rollwagen v Rollwagen*, 63 NY 504, 519 [1876]), instead taking the form of a "subtle but pervasive" (*Matter of Neary*, 44 AD3d 949, 951 [2d Dept 2007]) manipulation of another that is aimed at displacing the other's volition with one's own. Proof of undue influence must establish more than a motive to achieve such effect on another and an opportunity to do so: it must establish also that such effect was actually achieved (*Matter of Fiumara,* 47 NY2d 845 [1979]).

It is movant's task on this motion to lay bare her proof that the Trust Restatement was a natural expression of Grantor's knowing and free wishes. To that end, movant is aided by the fact that she was by that point Grantor's only living child (and, indeed, her only close blood relative), a relationship that on the face of it could make her an unsuspicious choice as Grantor's sole beneficiary. Moreover, although movant's own affidavit largely consists of evidence that cannot be considered in support of summary judgment, movant is aided by the sworn testimony

of others, including the affidavit and deposition testimony of the two lawyers who prepared the Trust Restatement after discussions with Grantor and the deposition testimony of the financial adviser with whom Grantor consulted for many years, until her death.

The lawyers attest that Grantor, some eight years earlier, had independently chosen their firm to draft the 2001 will for her, and then eventually to draft the Trust and various other legal instruments. According to the lawyers, the change effected by the Trust Restatement was prompted by Grantor's fear that the stock market might continue the very sharp declines it had experienced in 2008 and the first quarter of 2009 and that movant would not be adequately provided for as a result. The testimony of the financial advisor (who, two days before the Trust Restatement was executed, participated in a meeting with Grantor, movant, and the lawyers) agrees with the lawyers' testimony on this point. According to one of the lawyers, Grantor had volunteered the observation that Bob's outright bequest to her of the Brokerage Account reflected his intention to leave her free to dispose of it at her death as she wished. Moreover, according to the financial adviser, decedent had expressly commented that the stepchildren were otherwise provided for by inheritance from their mother, who had died some ten years earlier. The lawyers further testify that Grantor had specifically considered, and expressly rejected, their suggestion that she leave relatively modest bequests to each of them, coupled with an in terrorem clause, in order to discourage them from challenging the Trust Restatement. The lawyers and financial adviser are agreed that decedent had demonstrated a strength of will in other respects as well, such as her insistence on making certain investments frowned upon by the adviser.

The foregoing evidence is sufficient to make a prima facie case for dismissal of the objection as to undue influence. It remains to be considered, therefore, whether the

stepchildren's proofs create a genuine question as to that case.

Those proofs include, inter alia, the affidavits of two of the stepchildren as well as of the former spouse of one of them and the companion of another; the deposition testimony of all five of the stepchildren (which, as opposition to a summary ruling, can be considered); movant's own deposition testimony; the affidavit and deposition testimony of Grantor's long-time home aide; the deposition testimony of several doctors with whom decedent consulted during the time period proximate to her execution of the Trust Restatement; and the various testamentary and trust instruments executed by Grantor, as well as Bob's probated will. The stepchildren's testimony describes various ways in which Grantor and their father took pains to blend their respective offspring as naturally as possible and to avoid even the appearance of favoritism. The stepchildren's testimony, corroborated by that of the home aide, also describes a continuing and amiable relationship between Grantor and the stepchildren after Bob's death. Although all but two of the stepchildren lived outside New York during the last decades of decedent's life, their evidence shows that they and Grantor, by occasional in-person visits, but largely by mail and phone, retained some closeness until her death.

Even viewed in light of the stepchildren's evidence of a long-time affinity and affection between them and Grantor, the absence of a beneficial provision for the stepchildren could not by itself create a genuine question as to undue influence. Nor could such question be raised solely by the fact that, by the time Grantor executed the Trust Restatement, circumstances had made her more dependent upon her daughter than ever before (*cf. Children's Aid Soc. v Loveridge,* 70 NY 387, 394-395) ("attachment arising from consanguinity, or the memory of kind acts and friendly offices ... cannot be regarded as illegitimate or as furnishing cause for legal condemnation").

However, such a question arises when the daughter's positioning vis-a-vis the mother is viewed in combination with other aspects of Grantor's situation at the time she executed the Trust Restatement.

Thus, there is the evidence that, by March 2009, Grantor's physical and mental frailty had been aggravated by Grantor's then-recent loss of the son who had been her daily mainstay; that some degree of Grantor's dependency upon the son had transmuted into some degree of dependency upon movant (as witness the power of attorney and health care proxy that Grantor gave movant when the son was no longer available to act under the same type of agency instruments that she had previously given him). There is the additional evidence that Grantor and Bob had for decades treated their children and stepchildren equally in relation to their worldly goods; that, until the Trust Restatement, Grantor's estate plan had continued the pattern of equal treatment as to the major property at her disposal – the Brokerage Account that the stepchildren's father had established, nurtured, and then bequeathed to her; that 18 months earlier, when the daughter was slated to receive only half of Grantor's assets outside the Brokerage Account, Grantor had seen fit to give her only one-seventh of the Account.

Also to be considered is the stepchildren's evidence that Grantor would not have had cause for the concern that movant attributes to her, *i.e.*, that movant had become less well-heeled financially as a result of her divorce and was thus in need of the entire Brokerage Account in addition to all of Grantor's net estate; and there is the fact that, until March 2009, the stepchildren's inheritance from their mother years earlier (such as it was) had not prompted Grantor to deny them the stakes in the Brokerage Account that she had given them under her prior estate plans. Added to that is the evidence that, in early 2009, Grantor had initially turned

to the lawyers to prepare an instrument amending the Trust that would have simply deleted the provisions for her now-deceased son, leaving the Trust on the same dispositive course as she had set for it a few years earlier. To be considered also is evidence that movant was a participant in the discussion with the lawyers, only a few days before execution of the Trust Restatement, during which Grantor first expressed an intent to depart from that course.

Furthermore, all of the foregoing is informed by two major elements in the record. The first, on the one hand, is the absence of evidence that Grantor's sentiments toward the stepchildren had critically changed by the time she executed the Trust Restatement. The second, on the other hand, is the presence in the record of movant's decades-long, almost palpable, animus toward her step-sister and stepbrothers. These two elements add to the genuineness of the question as to whether the Trust Restatement's elimination of benefits for the stepchildren, to movant's gain, was an expression of Grantor's wishes or her daughter's.[3]

As the First Department observed many years ago, "A change of intent from a formal instrument, with a carefully thought-out plan of distribution, to a subsequent plan which benefits a person charged with undue influence is always an important element for consideration in a contest" (*Matter of Brush*, 1 AD2d 625, 629 [1st Dept 1956], *quoting Matter of Lachat*, 184 Misc 492, 497 [NY County, 1944]). This of course is not to say that a major departure from the immediately preceding estate plan alone could support invalidation of the challenged instrument.

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[3]. In light of the foregoing, there is no present need to determine whether, as objectants contend, there was a confidential relationship between movant and Grantor that would significantly strengthen objectants' position as to undue influence (*see Matter of Satterlee*, 281 AD 251 [1st Dept 1953]).

Nor is it to say that a court may properly regard an instrument with suspicion solely on the basis that the change was in favor of an adult child who had sway over her parent. But there are several additional factors here to prompt concern as to the validity of the trust instrument in question: that the parent's mental and physical condition had by then been seriously compromised by advanced age and further buffeted by a traumatic event proximate in time to the challenged instrument; that the dispositive plan from which the challenged instrument departs was long-held; that the adult child participated in the process by which the past dispositive plan was radically altered in that child's favor, to the loss of beneficiaries for whom there is no evidence (outside of the challenged instrument itself) of change in the parent's heart. In such a case, the party claiming undue influence should be allowed to put the facts underlying that claim to the test of trial.

For the above reasons, the motion for summary dismissal of the petition on the ground of undue influence is denied.

This decision constitutes the order of the court.

Dated: October 4, 2018

SURROGATE