Matter of Filiberto
2019 NY Slip Op 35252(U)
April 29, 2019
Surrogate's Court, Queens County
Docket Number: File No. 2015-3895/B
Judge: Peter J. Kelly
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Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY
--X
PROBATE PROCEEDING, WILL OF

PETER FILIBERTO a/k/a
PETER J. FILIBERTO,

File No. 2015-3895/B

Deceased.
--X

Offered for probate in this proceeding is an attorney-drafted instrument dated October 5, 2012, purported by Anthony Nicoletti (petitioner) to be the last will and testament of the decedent.

Objections have been filed to the validity of the instrument by Our Lady of Lourdes Roman Catholic Church of Malverne and Saint Rosalie Roman Catholic Church of Hampton Bays (the Churches), Mario Mastrandrea (Mario), and the Office of the New York State Attorney General (the AG). The objections allege that the offered instrument is invalid on the grounds that it was not duly executed; the decedent lacked testamentary capacity; the instrument was procured by fraud-actual and constructive; duress; and undue influence. Additionally, according to Mario, the instrument was the product of a mistake and is against public policy.

The petitioner now moves for summary judgment in his favor, dismissing the objections, admitting the will to probate, and appointing petitioner as the executor of the estate. All objectants have opposed the motion. Upon review of the papers and exhibits filed in support of the motion, as well as the papers and exhibits filed in opposition, the reply thereto, and after oral argument on the record, the court finds as follows:

The decedent, Peter Filiberto, died on August 19, 2015, at the age of 87 leaving behind 11 nieces and nephews as his distributees. The record also reveals that decedent left a series of estate planning instruments dating back to 2006, and that he was engaged in litigation concerning his assets during his later years. Of no small additional significance is the fact that decedent's estate is valued in excess of 20 million dollars.

The challenged instrument, an attorney-drafted and supervised "pour-over" will, provides for the decedent's probate estate to be distributed to the Peter J. Filiberto 2010 Trust (the 2010 Trust). Importantly, and as more fully explained later, the 2010 Trust was actually executed in 2012 on the same day as the offered instrument.

The genesis of petitioner's relationship with the decedent, and its evolution from that of employee, to guardian, and eventually to that of executor, trustee, and residuary beneficiary, requires discussion to put this factually dense proceeding into a digestible context.

Chronologically, as revealed by the exhibits, the decedent signed instruments in 2006 (a will); 2007 (a pour-over will and intervivos trust); 2008 (a pour-over will and intervivos trust); 2010 (a stipulation in a guardianship proceeding concerning an unexecuted trust); 2012 (a purported "placeholder" will); and later in 2012, the will at issue and the 2010 Trust.

In summary, in instruments prior to 2012, the current objectants are included as beneficiaries and Mario is, at times, designated as fiduciary. In the 2012 instruments, they are not. It is unclear whether the originals of any of these instruments, other than the 2006 and offered will, are still in existence.

Complicating the matter further, besides decedent, petitioner, and objectants, there were several other individuals involved in decedent's personal and financial affairs during this time period, and their interaction with the decedent is pertinent to the discussion and legal analysis regarding the validity of the documents executed in 2012.

For many years, in fact, since 1993, the decedent had been receiving treatments from a Dolores Perri (Perri) for a varicose vein condition. It appears Perri was also decedent's nutritionist. In July of 2007, sixteen months after the execution of the 2006 instrument which left the decedent's estate to his nieces, nephews, a female companion, Mario, and the Churches, the decedent executed a pour-over instrument directing distribution of his estate pursuant to an intervivos trust. That trust again divided decedent's estate between decedent's companion, his nieces and nephews, and the Churches. Mario received a bequest of decedent's interest in Riviera Café LLC. Perri's son-in-law, John Cerullo (Cerullo), was also appointed as the trustee of the intervivos trust.

It appears Perri and Cerullo assert they then became concerned that decedent was being taken advantage of by Mario, who was now employed by decedent. At this juncture, Perri reached out to petitioner, a retired New York City Police detective. Perri informed petitioner at the outset of the testator's vast wealth and her concerns of his financial exploitation.

Thereafter, as a "favor" to Perri, petitioner gratuitously undertook to investigate Mario and apprise the Queens County District Attorney's office of his concerns. However, the District Attorney's Office refused to take action until a member of the decedent's family, as opposed to only petitioner, got involved. As a result, while there are conflicting accounts as to precisely when and by whom, the decedent's nephew, John Mezzasalma (John), was notified.

According to petitioner, John rebuffed his assistance and attempted to handle the decedent's affairs on his own, which petitioner claims infuriated the decedent. Meanwhile, Cerullo had fallen out of favor with the decedent to such an extent that on December 21, 2007, decedent commenced a lawsuit against him, claiming among other things, that Cerullo "took advantage of their confidential relationship" for failing, as trustee, to provide him with distributions from the 2007 Trust. Cerullo maintained that his basis for refusing to make distributions was due to his concerns that the decedent was being manipulated and financially exploited by Mario and other individuals.

In March of 2008, decedent then executed an attorney-supervised pour over will and a document titled Peter Filiberto Revocable 10^{th} Avenue Trust. As before, the beneficiaries of these instruments were decedent's companion, his nieces and nephews, and the Churches. The attorney-draftsperson was the nominated executor. Mario was the successor executor and also named as

Director and Chairperson of a Foundation dedicated to, *inter alia*, promote organic cooking and retail sales.

During 2008, decedent hired petitioner as a driver and bodyguard, thereby making petitioner his full fledged personal employee. Later that year, John notified the court in the Cerullo lawsuit that decedent was "extremely susceptible to undue influence and has not been taking care of his finances" and he subsequently commenced a proceeding in March of 2009 seeking his appointment as decedent's Article 81 guardian.

John cited a multitude of reasons why guardianship was a necessity for decedent, including Mario's alleged conversion of hundreds of thousands of dollars of decedent's funds; botched business deals; the failure of the decedent to pay bills and taxes; and decedent's neglect in tending to various legal matters and medical ailments. Further, John detailed the decedent's susceptibility to outside influence as follows:

> Coincidentally, since [petitioner's] employment, UNCLE PETE, has reverted to distrusting people and following the 'advice' of those physically closest to him. Inexplicably he discharged his attorney

> SHARON GRUER[1] . . . He has not called me, despite my efforts to reach him. I believe that someone arranged for him to get a new cell phone and the new number has not been provided to me. None of the many messages that I have left on his home phone answering machine have been returned.

The decedent's reliant and trusting nature was also observed by the court evaluator assigned to the matter, who described the decedent as someone that had no choice but to employ and depend upon others; and that his "poor choices" primarily concern his selection of individuals "he chose to surround himself with" by "employing those that had their own interests and agendas." Additionally, the evaluator states that the decedent "seemed to turn a blind eye on issues that certainly have cause for review" and had a habit of simply "rubber stamping" matters of complexity.

Indeed the decedent's proclivity in this regard, and his apparent susceptibility to the influence and manipulation of others is buttressed by his own affidavit dated December 21, 2007, where he states Cerullo and his co-

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[1] Gruer, an experienced trust and estate's attorney, ceased representing the decedent on or about November of 2008, a few months subsequent to petitioner's employment as decedent's "assistant" and/or "bodyguard" in July of that year. Additionally, attorney Michael H. Reich, sought to be relieved as decedent's counsel in the Cerullo lawsuit at or about this time, allegedly based upon his inability to speak with the decedent outside of the presence of initially, Mario, and later, the petitioner.

respondents had "taken advantage of our confidential relationship in steering me to friends, relatives and associates in which I was fraudulently and unwittingly persuaded to sign a trust placing most of my assets out of my reach." His verified petition states that he was "encouraged, coerced and defrauded" into entering into the 2007 Trust and that it was procured through respondents' "undue influence, conspiracy, fraud, duress and in violation of their fiduciary responsibilities." Ironically, such accusations essentially mirror the ones that are now being lodged by the objectants herein.

Eventually, upon the decedent's consent, and pursuant to the terms of a stipulation entered with John which was placed on the record in 2009 and reduced to a writing in 2010, petitioner was ultimately appointed guardian of the decedent's person and co-guardian of his property along with a William Devine.

The Supreme Court's order of December 22, 2010, appointing the co-guardians reflected the terms of the settlement including the preservation of a legacy to John and his siblings; the approval in "form and substance" of a proposed 2010 trust similar to the 2007 Trust; and the appointment of the decedent and co-guardians as the co-trustees thereof.

The proposed 2010 trust annexed to the order ultimately signed by the

Supreme Court, provided for the decedent's residuary estate to be divided amongst decedent's companion, the decedent's nieces and nephews, and the Churches. This trust was to be executed and funded upon the appointment of the co-guardians. Any amendment or attempted revocation of the trust required court approval and notice to all interested parties. The order also specifically directed the decedent to execute a pour-over will, providing that his assets be transferred into the trust upon his death. For all intents and purposes, it appeared that the decedent's lengthy legal proceedings had finally been resolved to the satisfaction of the decedent and the parties.

However, the trust approved by the Supreme Court pursuant to the settlement was not signed. Instead, the decedent made an application contending, among other things, that the trust approved by the court now did not comport with his wishes, by its terms was violative of the settlement agreement, and could result in a windfall to John and his family, providing them with the possibility of receiving more than that which was contemplated in the settlement. A new proposed 2010 trust, supposedly more reflective of decedent's understanding of the settlement, was submitted to the Supreme Court. Of paramount importance however, was that the remainder beneficiaries of the trust

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were left blank in this proposal.

The 2010 Trust and the will were both executed on October 5, 2012. Despite petitioner's contention that these instruments were executed with the oversight, approval, and endorsement of the Supreme Court, the record that has been provided to this Court does not indicate that the Supreme Court Justice then presiding over the matter was ever made aware that the remainder beneficiaries of the decedent's newly approved trust was not as previously set forth, but instead was solely to be the very guardian the court had appointed, or alternatively, members of his family. After its execution, and purportedly at the decedent's behest, petitioner filed the original pour-over Will with this Court for safekeeping, thereby ensuring its preservation.

Petitioner's role as decedent's court-appointed personal needs and property guardian was conspicuously not disclosed, as it should have been, in paragraph 8(a) of his attorney-prepared and personally verified petition for probate. Additionally, this relationship was not revealed in his first petition filed in this court dated September 30, 2015, wherein he sought to have the original 2012 will transmitted to Nassau County on the alleged basis that the decedent was a Nassau County domiciliary at the time of his death. This petition was withdrawn by counsel subsequent to the court scheduling a hearing as to decedent's domicile (<u>see</u> decision of this Court dated December 18, 2015).

Hence, before the Court is the validity of a pour-over Will that, when read in conjunction with the 2010 Trust, results in a dispositive scheme that differs from decedent's prior testamentary schemes, and bestows upon petitioner, the decedent's Article 81 guardian at the time of his death, the largess of his estate.

Petitioner, who has apparently entered into financial settlement arrangements with decedent's distributees, contends that dismissal of the objections filed by the Churches, Mario, and the AG, is warranted inasmuch as the offered instrument was the result of a "six-year process overseen by the Honorable Howard G. Lane." He further maintains that objectant, Mario, could never inherit from the estate as decedent contractually obligated himself to exclude Mario as a beneficiary; and that the Churches were eliminated as beneficiaries as a direct result of decedent's "professed disdain . . . of the widespread publicity of child sexual abuse by members of the Catholic clergy."

The opposition papers, on the other hand, denounce the will as violating the Supreme Court's Order of December 22, 2010, and, more broadly, public policy. The objectants contend that the offered instrument is the product of undue

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influence practiced upon the elderly and fragile decedent by his driver/bodyguard turned court-appointed guardian, upon whom the decedent was hopelessly reliant. The objectants also contend that the motion is premature inasmuch as discovery is not complete.

As a threshold matter, the court first turns to the branch of objectants' opposition that contends that the motion is untimely, in that the objectants were in the process of scheduling third-party depositions of individuals with knowledge relating to the alleged undue influence.

A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence, or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of the movant (*see e.g. Skura v Wojtkowski*, 165 AD3d 1196 [2d Dept 2018]). Simply stating that discovery is incomplete and that the parties were in the process of scheduling third-party depositions, without more, is insufficient to delay action upon the motion (*see Country Glen, LLC v Himmelfarb,* 4 Misc 3d 1015(A) [Sup Ct, NY County 2004]).

The within objectants have not demonstrated the existence of essential facts in petitioner's exclusive possession which would warrant the denial of

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summary judgment (*see* CPLR § 3212[f]; *Matter of Zirinsky*, 43 AD3d 946 [2d Dept 2007]; *Matter of DiCorcia*, 35 AD3d 463 [2d Dept 2006]; *Delaney v Good Samaritan Hosp.*, 204 AD2d 678 [2d Dept 1994]; *Home Sav. Bank v Arthurkill Assoc.*, 173 AD2d 776 [2d Dept 1991]).

In any event, it appears that notwithstanding the fact that third-party depositions were not conducted, the objectants were nevertheless able to procure third-party affidavits to submit in opposition to petitioner's motion. Accordingly, the request to deny the motion on the grounds that discovery is incomplete is denied.

Turning now to the merits of the summary judgment motion, in order to prevail, petitioner as the movant must establish prima facie entitlement to judgment as a matter of law in the first instance (*see generally Zuckerman v NY*, 49 NY2d 557, 562 [1980]; *see also e.g. Matter of Mooney*, 74 AD3d 1073 [2d Dept 2010]; *Matter of DiChiaro*, 39 AD3d 751 [2d Dept 2007]). More specifically, the petitioner has the burden of demonstrating that the instrument offered for probate was duly executed in accordance with EPTL § 3-2.1 and that the decedent possessed testamentary capacity at the time the instrument was executed (*see e.g. Mooney,* 74 AD3d at 1075; *DiChiaro,* 39 AD3d at 751).

Generally, once the requisite proof has been proffered by the movant, the objectants must assemble and lay bare affirmative proof that their claims are real and capable of being established at trial (*see Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27 [1st Dept 1979] *aff'd* 49 NY2d 924 [1980]). The objectants are to be afforded every favorable inference that may be drawn from the evidentiary facts alleged (*see e.g. Matter of Wimpfheimer*, 8 Misc 3d 538 [Sur Ct, Bronx County 2005]), and the court is constrained to deny the motion if there is any doubt as to the existence of a triable issue (*see e.g. Baker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994]).

In support of those branches of the motion seeking to dismiss the objections based upon due execution, capacity, duress, and mistake, the petitioner has submitted a copy of the subject instrument with a contemporaneously executed attestation clause and self-proving affidavit as well as transcripts of the SCPA 1404 examinations of the supervising attorney/ draftsperson and two attesting witnesses to support his arguments that the instrument was properly executed by decedent at an execution ceremony supervised by an attorney; that decedent had the requisite capacity at the time to do so; that the record is devoid of the existence of any physical threats which

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provided the basis for any of the dispositive terms; and that the instrument, as drafted by the attorney, accurately reflects the decedent's wishes. These submissions establish prima facie entitlement to the relief requested (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Selvaggio*, 146 AD3d 891 [2d Dept 2017]; *Matter of Templeton*, 116 AD3d 781 [2d Dept 2014]; *Matter of Rottkamp*, 95 AD3d 1338 [2d Dept 2012]; *Matter of Malan*, 56 AD3d 479 [2d Dept 2008]; *Matter of Kaufmann,* 20 AD2d 464 [1st Dept 1964]).

In response, the objectants have either failed to specifically address these issues or offer evidence in opposition thereto; merely refer to decedent's physical rather than mental condition; or only submit conjecture, supposition, or statements which wholly fail to establish a factual predicate sufficient to support a legal argument as to the existence of an issue of fact. Accordingly, those branches of petitioner's motion seeking to dismiss said objections are granted.

With respect to the objections alleging fraud or constructive fraud, the petitioner has established, prima facie, the absence of any representations or omissions of material facts made by himself to the decedent by the submission of the transcripts of the 1404 examinations, as well as the self-proving affidavits. Objectants, in the face of this prima facie showing, have failed to rebut this

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evidence in any manner other than Mario's largely incomprehensible papers where he alleges he believes "stories" must have been told about him to the decedent which were untrue. This proof is woefully inadequate to defeat the requested relief and accordingly, those objections are likewise dismissed (*see In re Gross*, 242 AD2d 333 [2d Dept 1997]; *In re Bianco*, 195 AD2d 457 [2d Dept 1993]; *Del Vecchio v Nassau County*, 118 AD2d 615 [2d Dept 1986]).

Left remaining, is the factually-driven objection of undue influence. With respect to undue influence, the burden of proof generally lies with the party asserting undue influence (*see Matter of Walther*, 6 NY2d 49, 54 [1959]; *see also Matter of DelGatto*, 98 AD3d 975, 977-78 [2d Dept 2012]). Those objecting on this basis bear the burden of demonstrating the existence and exercise of undue influence; the operation of such influence so as to subvert the testator's mind at the time of the execution of the will; and the execution of a will that but for undue influence, would not have occurred (*see Matter of Burke,* 82 AD2d 260 [2d Dept 1981]).

Where a confidential relationship exists,

> **[a]n inference of undue influence, requiring the beneficiary to explain the circumstances of the bequest arises** when a beneficiary under a will **was in a confidential or fiduciary relationship with the testator and was involved in the drafting**

> **of the will** . . . Although the inference does not shift the burden of proof on the issue of undue influence, it places the burden on the beneficiary to explain the circumstances of the bequest. **The adequacy of the explanation presents a question of fact for the jury**.

(*Matter of Neenan,* 35 AD3d 475 [2d Dept 2006] (emphasis added); *see also Matter of DelGatto*, 98 AD3d 975, 978 [2d Dept 2012]; *Matter of Bach*, 133 AD2d 455, 457 [2d Dept 1987]; *Matter of Collins*, 124 AD2d 48 [4th Dept 1987]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]; *Matter of Putnam*, 257 NY 140 [1931]).

As indicated above, petitioner, who is not blood-related to the decedent, was the decedent's court-appointed personal needs and property guardian at the time the instrument was executed. Unquestionably, he occupied a confidential relationship with the decedent as a matter of law at the time of the instrument's execution (*see Gordon v Bialystoker Ctr. & Bikur Cholim, Inc.,* 45 NY2d 692, 698 [1978]; *Matter of Estabrook,* 2013 NYLJ LEXIS 7352, **14-16 [Sur Ct, Suffolk County 2013]; *Matter of Bender*, 2010 NYLJ LEXIS 753, **18-19 [Sur Ct, Kings County 2010]).

Separate and apart from this, the record indicates that the relationship between the decedent and the petitioner appears to be confidential as a matter of fact as well. When distilled to its essence, the overriding consideration in this analysis appears to be the degree of dependency, and concomitant disparity of power, that exists between the testator and the confidant (*see e.g. Ten Eyck v Whitbeck,* 156 NY 341, 353 [1898]; *Bender,* 2010 NYLJ LEXIS at **19-21). That dependency is contingent on a variety of factors, including but not limited to the extent of the beneficiary's involvement in the decedent's affairs, be they personal, business, or financial in nature; the testator's mental and physical state; and whether the testator has other means of emotional and social support available outside of the relationship (*see id.*).

Petitioner's attorney insists, however, that an inference of undue influence cannot arise because petitioner was, purportedly, not involved in the drafting of the will. Such an argument is flatly contradicted by the record before this Court, which includes sworn statements made by petitioner himself that squarely establish otherwise.

Included among the voluminous records submitted to this Court are petitioner's sworn statements to the Supreme Court wherein he touted himself as the point person or intermediary between the testator and all of his attorneys, likened his duties to the decedent as akin to that of a "Chief Executive or General

Manager," and used this heightened role as a basis for obtaining and justifying a retroactive six figure salary increase for the multitude of services he provided on a 24/7 basis as guardian. By his own admissions, petitioner was, in effect, decedent's gatekeeper and spokesperson, intimately involved in every aspect of the decedent's life, legal, personal, business, and financial (*see* AG exhibit 4).

Additionally, petitioner was involved in decedent's selection of Marc Alhonte (Alhonte), the attorney who not only defended the decedent in the guardianship proceeding, but also procured petitioner's appointment as guardian, and is the draftsperson of the offered instrument. Assuming petitioner's sworn statements to the Guardianship Court are accurate, petitioner communicated with Alhonte on a regular basis over the course of several years. It also appears that the draftsperson represented petitioner himself on more than one occasion in his role as the decedent's guardian (*see e.g. Matter of Gerdjikian*, 8 AD3d 277 [2d Dept 2004]; *Matter of Leeds,* 2015 NY Misc LEXIS 2582, *11 [Sur Ct, Nassau County 2015]).

More troubling than the want of fully independent and detached counsel as set forth above, is the fact that petitioner was provided with a draft of the offered instrument and the 2010 Trust, and went so far as to have another attorney, Michael Angiulo (Angiulo), review the instruments, and provide suggestions to make them "air tight." Accordingly, as petitioner occupied a confidential relationship with the decedent, and participated in the instrument's drafting, review, finalization, and preservation, he is required to provide an explanation of his bequest (*see* cases sited *supra*).

Although petitioner has submitted, among other items, the testimony of the attorney draftsperson, handwritten notes purportedly written by the decedent, and affidavits from, among others, distributees and beneficiaries with whom he has entered into settlement agreements, the law is clear in that the adequacy of the explanation for this substantial bequest and the credibility of the various witnesses merit the careful scrutiny and sagacity of the trier of fact (*see Matter of Lamerdin's Will*, 250 AD 133 [2d Dept 1937]). Accordingly, the branch of the motion to dismiss the objections to the validity of the instrument based on undue influence is denied as the petitioner has failed to demonstrate prima facie entitlement to relief.

It is important to note that even if this Court were to effectively disregard the sacrosanct and fiduciary relationship that existed between petitioner and the decedent and his participation in the procurement of the instrument, the objectants have, in any event, set forth sufficient circumstantial evidence of undue influence demonstrating the existence of triable issues of fact in this regard (*see Matter of Walther*, 6 NY2d 49, 56 [1959]; *Matter of Zirinsky*, 43 AD3d 946, 948 [2d Dept 2007]).

Such circumstantial evidence may include the physical and mental condition of the testator; whether the propounded instrument deviated from the testator's prior testamentary plan; whether the attorney who drafted the will was the testator's attorney; whether the person who allegedly wielded the undue influence was in a position of trust and confidence; the opportunity and disposition of the person to wield undue influence; and whether the testator was isolated from the objects of his natural affection (*see generally e.g. Children's Aid Soc. v Loveridge*, 70 NY 387 [1877]; *Matter of Anna*, 248 NY 421, 424 [1928], quoting *Rollwagen v Rollwagen*, 63 NY 504, 519 [1876]; *Matter of Katz*, 63 AD3d 836 [2d Dept 2009]; *Matter of Elmore,* 42 AD2d 240 [3d Dept 1973]; *Matter of Kruszelnicki*, 23 AD2d 622 [4th Dept 1965]; *see also Matter of Burke*, 82 AD2d 260, 270-72 [2d Dept 1981]; *Matter of Hirschorn*, 21 Misc 3d 1113 [A] [Sur Ct, Westchester County 2008]; *Matter of Zirinsky*, 10 Misc 3d 1052[A] [Sur Ct, Nassau County 2005]).

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In addition to the factors already discussed, including the changes to the decedent's prior testamentary scheme upon petitioner's entry into his life, there is evidence that the decedent's physical limitations rendered him peculiarly sensitive to the influence of those upon whom he had no choice but to rely.

Additionally, there is evidence of isolation of the decedent in the record inasmuch as the decedent systematically ceased communicating with a number of people shortly after petitioner entered his life (*see e.g. Will of Kaufmann*, 20 AD2d 464 [1st Dept 1964]).

The Court also observes that petitioner moved the decedent from the familiarity of his longtime residence in Queens to a residence located in Long Beach in August of 2011 (*see e.g. Matter of Anna*, 248 NY 421, 424 [1928], quoting *Rollwagen v Rollwagen*, 63 NY 504, 519 [1876]; *Matter of Delyanis*, 252 AD2d 585 [2d Dept 1998]). This change of abode was not reported to the Supreme Court until March 29, 2012, at which time it was requested that the new address remain confidential allegedly due to "numerous threatening phone calls and messages" to the decedent and petitioner.

Accordingly, viewing the evidence in a light most favorable to the objectants, the court finds that objectants have come forward with sufficient circumstantial evidence to raise triable issues of fact with respect to undue influence (*see generally e.g. Rollwagen v Rollwagen*, 63 NY 504, 519 [1876]; *Matter of Cavallo*, 6 AD3d 434 [2d Dept 2004]; *Matter of Delyanis*, 252 AD2d 585 [2d Dept 1998]; *Matter of O'Brien*, 182 AD2d 1135 [4th Dept 1992]; *Matter of Pavelock*, 16 Misc 3d 1124[A] [Sur Ct, Dutchess County 2007]; *see also Matter of Katz*, 63 AD3d 836, 838 [2d Dept 2009]; *Matter of Gerdjikian*, 8 AD3d 277 [2d Dept 2004]).

In light of the above, Mario's "public policy" objection need not be addressed at this time.

As the will at issue is merely a "pour over" document, the vehicle controlling the distributive plan is the 2010 Trust. Since the issues concerning undue influence and the facts surrounding the execution and drafting of both instruments are identical, pre-trial discovery regarding the validity of the 2010 Trust should be almost complete. Consequently, the court finds and directs the objectants to commence a proceeding to determine the validity of the said trust so this entire matter can be disposed of with one trial (*see* SCPA 502; *Estate of Kronik*, 2019 NYLJ LEXIS 422, *7 [Sur Ct, New York County 2019]; *Estate of Chrystal Desher Saman,* 2004 NYLJ LEXIS 1459**16-20 [Sur Court, Nassau County 2004]; *Estate* *of Tisdale*, 171 Misc 2d 716, 719-21 [Sur Ct, New York County 1997]).

The parties and their counsel are directed to appear for a pre-trial conference on **June 25, 2019 at 9:30 a.m.**

This is the decision and order of the Court.

Dated: April 29, 2019

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