

Matter of Neumann
2022 NY Slip Op 30813(U)
March 30, 2022
Surrogate's Court, New York County
Docket Number: Index No. 2016-4105
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Probate Proceeding, Estate of

DOLORES ORMANDY NEUMANN,

Deceased.

-----x

M E L L A, S.:

DECISION

File No.: 2016-4105

The following papers were considered in deciding this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Petitioner's Notice of Motion for Summary Judgment, Affirmation of Judd Burstein, Esq., in Support, with Exhibits 1-54, and Memorandum of Law.....	1,2,3
Affidavit of John R. Morken, Esq., in Opposition to Motion for Summary Judgment, with Exhibits A-G (including corrected Ex. 10) and 1-45, and Memorandum of Law.....	4,5
Affirmation of Donald Novick, Esq., in Opposition to Motion for Summary Judgment, with Exhibits A & B.....	6
Reply Affirmation of Judd Burstein, Esq., in Support of Motion for Summary Judgment, with Exhibits A-O, Reply Memorandum of Law in Support of Motion for Summary Judgment, with Exhibit A.....	7,8
Affirmation of John M. Czygier, Jr., Esq., in Support of Motion for Summary Judgment.....	9

Decedent Dolores Ormandy Neumann's daughter, Belinda Neumann Donnelly, moves for summary judgment to dismiss the objections to probate of a March 4, 2015 instrument that were filed by her father, Hubert Neumann, and her sister, Melissa Neumann. The court grants the motion to the extent of dismissing the objections grounded on the alleged lack of due execution and of capacity and the objection based on affirmative fraud. As analyzed below,

questions regarding undue influence and the existence of a confidential relationship and, if one existed, whether such relationship was exploited, remain for trial.

Relevant Facts

On February 18, 2015, Dolores Ormandy Neumann (decedent) fell in her home and broke her hip. Her neighbor contacted decedent's daughter, Belinda (Belinda, Movant, or Proponent),¹ who took her to the emergency room.

The following day, in the hospital before her hip surgery, decedent executed a testamentary instrument, her penultimate will ("the February 19th document"). It was drafted and its execution overseen telephonically by an attorney in Florida, who worked for the Law Offices of Amy Holzman. Holzman, who works and resides in New York State, was away on vacation and out of the country at the time. That instrument sought to disinherit decedent's spouse, Hubert, and after certain specific bequests, including her most significant asset, a painting by the artist Jean-Michel Basquiat, to Belinda, the February 19th instrument also gave Belinda the residuary estate. Decedent and/or Belinda were referred to Holzman for estate planning and will drafting by Alison Wolfson, a family friend who was also involved in the art world and later became Belinda's business partner.² It appears that Holzman had discussed estate planning with decedent several months prior to her February 2015 hospitalization, though Holzman had not yet been formally retained.

Decedent wrote certain hand-written additions on the February 19th instrument prior to signing it. In those hand-written notes, decedent requested that Belinda use the legacies under the will to provide for decedent's third child, Kristina Neumann. Decedent also indicated to the

¹ First names are used herein to avoid confusion because several parties share the same surname.

² Ms. Wolfson and decedent's brother-in-law served as the witnesses to the execution of the February 19th instrument.

initial drafter that she wanted to adjust the specific bequests, and when Holzman returned from vacation, a revised will was drafted and executed at the rehabilitation center where decedent had been admitted on February 26, 2015, after her hip surgery hospitalization.

The March 4, 2015 instrument, prepared by Holzman and with her colleague's assistance, contains dispositions modified from the February 19th instrument: it includes a bequest to the Philadelphia Orchestra, with which decedent's uncle was famously connected; it provides for bequests of certain tangible personal property—jewelry and art—to only three of her six grandchildren, that is, to the children of Belinda; and all other tangible personal property, including specifically bequeathed property of a small piano and harp, was given to Belinda. The Basquiat painting, entitled “Flesh and Spirit,” was now directed to be sold, with the proceeds to be distributed as part of decedent's residuary estate.³

Instead of benefiting Belinda exclusively, the net residuary estate in the propounded instrument is to be divided into ten shares, with one share going to the trustees of a testamentary trust for the benefit of her daughter Kristina,⁴ the lesser of one share or \$1 million to her daughter Melissa, and the remaining eight shares to Belinda,⁵ who is also nominated executor. With respect to Hubert, the propounded instrument again seeks to disinherit him. Additionally, a no contest clause was added.

³ Holzman avers that this decision to sell was the product of discussions with decedent, who needed available assets with which to fund the bequests to all her children and pay estate taxes.

⁴ This instrument also made Kristina and Belinda co-trustees of the trust for Kristina's benefit and gave Kristina the power to remove Belinda in favor of another co-trustee.

⁵ Article THIRD(a) provides that decedent makes the gift in trust for Kristina as a showing of her love but explains that Kristina is not receiving an equal share because, according to decedent, she has “had difficulties managing her financial affairs in the past,” decedent has already given her cash sums during life, and Kristina does not have children. Article THIRD(b) explains that decedent makes the bequest to Melissa as a showing of love as well, but that Melissa is not receiving an equal share because she has “adequate assets” and “a wealthy husband.” Article THIRD(c) provides that decedent is making the bequest of a larger share to Belinda because she and her husband do not have financial stability and have three children to support.

The circumstances of the genesis and execution of this March 4th instrument, the one at issue here, are as follows. On February 26, 2015, the day that decedent was released from the hospital and admitted to the rehabilitation center, Belinda met with Holzman in Holzman's offices for two hours, a meeting that Belinda does not remember. On the following day, Holzman spoke at length with decedent on the phone and on several occasions thereafter regarding the will's provisions.

On March 4th, Holzman and Orrit Hershkovitz, Esq., who would act as attesting witnesses, and a notary, Diana Sullivan, met decedent in the afternoon in an empty room in the rehabilitation center.⁶ After exchanging pleasantries, Holzman showed decedent a copy of the will, went over the entire will, and read verbatim to decedent the dispositive provisions as well as the witnesses' affidavit. After being questioned as to whether this was her will, decedent confirmed that it was, and signed it without aid. Thereafter, Holzman and Hershkovitz signed the witness affidavit, which was notarized by Sullivan. Nothing suggests that Belinda was present at the rehabilitation facility or communicated with decedent at or around the time of the March 4th execution.

Decedent died a year-and-a-half later, on September 23, 2016, at age 81. Belinda filed a petition to probate the March 4, 2015 instrument on November 14, 2016. After conducting extensive discovery, on April 2, 2019 and April 8, 2019, respectively, Hubert and Melissa (collectively "Objectants") interposed objections to probate on the basis of a lack of testamentary capacity and of due execution and that the will was the product of undue influence and fraud. They further request that Proponent be denied appointment as executor and trustee because of her overreaching.

⁶ Both Hershkovitz and Sullivan work with Holzman.

This is not the only contested proceeding between and among these parties in this and other courts. In this court, there are proceedings by Belinda as Preliminary Executor to disqualify Hubert as surviving spouse, to partition cooperative shares and personal property/art work, and for Hubert's claimed tortious interference with the eventual sale (for over \$30 million) of the Basquiat painting owned by decedent, the last of which was transferred to this Court from New York County Supreme Court.

Relevant to this probate proceeding, the record shows that decedent did have a previous testamentary instrument from May of 1999. That 1999 instrument gave \$25,000 to each of her grandchildren, distributed her estate to her three daughters equally, nominating all three as co-executors, and did not provide any bequest for Hubert.

Applicable Standards

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to demonstrate the absence of any disputed material facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212[b]). Upon such a showing, the burden shifts to the party opposing summary judgment, who must submit evidence demonstrating the existence of a genuine issue of material fact requiring a trial (*Alvarez, supra*, at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Allegations by the party opposing the motion must be "specific and detailed, substantiated by evidence in the record" (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]), and mere conclusory assertions, surmise, conjecture or speculation cannot serve as a substitute for evidence to defeat summary determination (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002]). All reasonable inferences, however, should be drawn in favor of the non-

moving party, and the court should not pass on issues of credibility (*Matter of Llewellyn*, NYLJ, Jan. 5, 2015, at 19 [Sur Ct, New York County], *aff'd* 135 AD3d 499 [1st Dept 2016], *citing Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

Here, Movant has established, *prima facie*, that the propounded instrument should be admitted to probate by pointing to the attestation clause in the will and by providing the contemporaneous affidavit of the two attesting witnesses which states that decedent was “of sound mind, memory and understanding” and “was not suffering from any defect of sight, hearing or speech, or from any other physical or mental impairment” that could affect her capacity to execute a will. The affidavit further explains that decedent was “under no constraint, duress, fraud or undue influence” and provides that the formal requirements regarding the ceremony of execution and attestation were satisfied. Movant also offers the deposition testimony of these two witnesses, both of whom are attorneys, one being the attorney-drafter. This is sufficient to establish Movant’s *prima facie* case (*Matter of Korn*, 25 AD3d 379, 379 [1st Dept 2006]; *see* SCPA 1408).

Although the court has drawn all reasonable inferences, as it must, in favor of the Objectants, as the non-moving party (*Matter of Llewellyn, supra*), they have failed to submit proof “specific and detailed, substantiated by evidence in the record” (*Matter of O’Hara*, 85 AD2d 669, 671 [2d Dept 1981]), to raise a question regarding their claims that decedent lacked the requisite capacity to execute a will, that the will was not properly executed, or that it was the product of a deceptive misrepresentation.

The court is mindful that summary dismissal deprives parties of the opportunity to have a trial and should be considered with caution (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]; *see Aguilar v City of New York*, 162 AD3d 601 [1st Dept 2018]; *see*

also *Matter of Llewellyn, supra*). Nonetheless, Objectants' conclusory assertions, conjecture, and speculation cannot serve as a substitute for evidence to avoid summary resolution of certain of their objections (*see Grullon, 297 AD2d at 263-264*).

Testamentary Capacity

In opposition to Movant's prima facie case, Objectants rely primarily on the following evidence: the affidavit of a physician who never treated decedent but who concluded that she lacked capacity; isolated comments in the decedent's medical records around the time of the will's execution that she was undergoing or wanted a divorce or was "single" and that she thought her Basquiat painting could be worth \$122 million; sworn statements of recollections of the ongoing good relationship between decedent and all her children and grandchildren; and decedent's "distorted reality" and "paranoia" as reflected in her failure to vacate her apartment upon returning home from her convalescence following hip surgery when it was discovered that the apartment was infested with bed bugs. From this, Objectants ask the court to conclude that decedent: a) did not know the nature and extent of her property; b) did not understand the nature and effect of executing a testamentary instrument; and c) was not able to identify the natural objects of her bounty and her relations with them (*Matter of Kumstar, 66 NY2d 691, 692 [1985], rearg denied 67 NY2d 647 [1986]; Matter of Slade, 106 AD2d 914, 915 [4th Dept 1984]*). This is the well-established functional analysis for testamentary capacity, which is less capacity than is required to execute any other legal document (*see Matter of Coddington, 281 App Div 143, 146 [3d Dept 1952], affd 307 NY 181 [1954]*).

Medical Conditions and Medications

The conclusion of Objectants' physician that decedent lacked capacity is an opinion based solely on review of medical records, and from one who never examined decedent

(sometimes referred to as a non-treating physician), and it does not alone create an issue of fact sufficient to survive summary dismissal (*Matter of Katz*, 103 AD3d 484 [1st Dept 2013]; *Matter of Van Patten*, 215 AD2d 947, 949 [3d Dept 1995]; *Matter of Llewellyn, supra*, at *13-14 [“such opinion evidence by a non-treating physician constitutes ‘the weakest and most unreliable kind of evidence’ as to capacity or its absence”]; *Matter of Murphy*, NYLJ, Oct. 11, 2013, at 47 [Sur Ct, Suffolk County]; *Matter of Makitra*, 101 AD3d 1579, 1580 [4th Dept 2012] [“Where there is direct evidence that the decedent possessed the understanding to make a testamentary disposition, even ‘medical opinion evidence assumes a relatively minor importance’” (citation omitted)]). The doctor’s report here falls squarely in this category.

There are no indications that decedent suffered serious complications during or after the surgery to repair her broken hip, and the notes from the rehabilitation center related to her physical therapy present no evidence that she ever failed to recognize anyone or to know who or where she was or that she behaved anything but rationally. None of the people that observed or interacted with decedent in the days leading up to and including March 4, 2015, doctor, psychologist, social worker, the two attorneys that witnessed her will, or Ms. Holzman’s paralegal, who also attended the execution of the propounded instrument, report decedent being anything other than oriented and alert. “Until the contrary is established[,] a testator is presumed to be sane and have sufficient mental capacity to make a valid will” (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947]).

Although the doctor’s report tries to make much of possible side effects to medication and possible symptoms of her medical conditions, to the extent that medication, including pain medication, had been prescribed, its administration alone does not show a lack of testamentary capacity (*see Matter of Glockner*, 17 NY St Rptr 798 [Sur Ct, New York County 1888]

[execution of will during testator's last illness, during time in which opium in moderate doses was administered under direction of her physician, does not evidence incapacity absent proof that drug affected testator's mental powers, or any effect at time of will execution]; *see also Matter of Carver*, 17 Misc 3d 1128[A] [Sur Ct, Essex County 2007] [“[t]estamentary capacity is not negated . . . by drug therapy administered under the direction of a physician”). The physician's recitation of the potential side effects of the various prescribed medications, including those that could impair cognitive functions, does not raise an issue of fact with respect to decedent's capacity in view of her medical records from the relevant time which consistently describe her as alert and oriented. Nor does decedent's receipt of mental health services raise a question as to her testamentary capacity. Emotional distress and anxiety do not render a testator without capacity (*see e.g., Matter of Nofal*, 35 AD3d 1132 [3d Dept 2006] [evidence that decedent was sad and depressed following deaths of husband and son “wholly inadequate to raise an issue of fact” as to capacity]).

Likewise, reliance by Objectants' physician on decedent's various physical infirmities, including hypertension, coronary artery disease, Crohn's disease, chronic obstructive pulmonary disease, epilepsy, and chronic anemia, is misplaced and the mere fact of the diagnosis of these ailments is insufficient to negate mental capacity. “[O]ld age, physical weakness [or even] senile dementia” does not disqualify an individual from executing a will (*Matter of Hedges*, 100 AD2d 586, 588 [2d Dept 1984]; *see Matter of Beneway*, 272 App Div at 467-468), as “long as the testat[or] was acting rationally and intelligently at the time the instrument was prepared and executed” (*Matter of Martinico*, 177 AD3d 882, 884 [2d Dept 2019] [citations omitted]; *Matter*

of *Hedges*, 100 AD2d at 588). That is what the contemporaneous evidence surrounding execution here supports.⁷

The extrapolation that Objectants' doctor makes from the medical records reviewed is speculative at best. To give another example, Objectants rely on the doctor's opinions to argue that decedent's sight and hearing were so impaired that she was unable to properly read or adequately hear people speaking to her. However, nothing within this record, including Melissa's affidavit in which she avers that decedent was "hard of hearing," raises an issue with respect to decedent's hearing or vision having an impact on her capacity to execute her will. The sole notation in the medical records about decedent's vision is that she self-reported to using a magnifying glass to read small print. Likewise, a report that she heard better from one side does not raise any doubt about decedent's capacity.

Knowledge of Relations and Assets

Objectants also rely on statements from certain medical records indicating that decedent wanted to divorce Hubert or that her marital status was "single" or that she referred to Hubert as her ex-husband to argue that decedent was confused about the purpose behind executing her will. Nothing in this record, however, suggests that decedent did not know who Hubert was to her, and instead, such statements were representative of the nature of their actual relationship, it being undisputed that they were separated and lived apart for decades. Although no evidence appears

⁷ The record in this case is different than the facts presented in *Matter of Raskas* (213 AD2d 718 [2d Dept 1995]), where dispositive provisions of the propounded instrument—allegedly dictated by the testator to proponent from his hospital bed one week before his death from terminal cancer—were in direct contrast to prior wills and other writings of the testator, in particular in naming proponent, the testator's nephew, as sole beneficiary when earlier indications were that the testator wanted to disinherit his relatives. Under the circumstances present in *Raskas*, the issue of whether the testator's weakened condition from terminal cancer, coupled with the administration to him of a combination of potent pain-killing medication prior to the will execution, may have impaired his ability to understand the nature and consequences of his actions supported denial of summary determination of the objection based on lack of capacity (*id.* at 719).

in this record to explain why divorce proceedings were never pursued by decedent against Hubert, the uncontradicted deposition testimony of the attorney-drafter, among others, was that decedent was particularly aware of her family members. A dispute, if any, about the nature of decedent and Hubert's relationship, whether decedent's allegations of abuse by Hubert are unfounded, or whether or not decedent wanted to divorce Hubert, is not material to the inquiry regarding testamentary capacity (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952] [even if existence of mental delusion of testator were established, no evidence that provisions of will were result thereof]). That decedent may have apprehended the quality of her marital relationship differently than Objectants have assessed it provides no basis from which to conclude that decedent was not aware of her marital status or that she lacked the necessary capacity to execute a will.

Nothing in Objectants' evidence provides a proper means of concluding that decedent was not cognizant of her family relations. Indeed, the propounded instrument on its face particularly names them and explains the nature of the bequests to her three daughters (*see Matter of Bush*, 85 AD2d 887, 888 [4th Dept 1981] [uncontroverted evidence was that testator chose not to leave anything to spouse from whom he had been separated for seven years]).

Nor does the stray statement that decedent thought her Basquiat painting could be worth nine figures, rather than the eight figures for which it eventually sold, provide grounds to infer that decedent did not understand the nature of the assets comprising her estate. Objectants' argument in this regard misapprehends the standard. A testator need not have "precise knowledge" of her assets, rather, an "awareness of or ability to keep in mind without prompting the general nature and extent of one's real and personal property" is expected (*Matter of Fish*, 134 AD2d 44, 46 [3d Dept 1987]; *Matter of Walker*, 80 AD3d 865, 867 [3d Dept 2011]; *Matter*

of *Llewellyn*, NYLJ, Jan. 5, 2015, at 19 [knowledge of one's assets does not require knowledge of every detail or discussion of one's finances with their attorney]). Here, the record establishes that decedent was aware of her possessions and had a reasonable understanding of their possible value. That at some point she may have thought that what she knew to be her most valuable asset, the Basquiat painting, was worth more than the ultimate sale price does not demonstrate that she did not or could not grasp in her mind that she owned this valuable asset (*Matter of Khazaneh*, 15 Misc 3d 515, 522 [Sur Ct, New York County 2006]). Objectants' view would require testator's knowledge of their assets to be comparable to that of an accountant and an art appraiser in order to satisfy the requirement that she knew the nature and extent of her property.

Objectants' reliance in this regard on *Matter of Slade* (106 AD2d 914, 915 [4th Dept 1984]) is misplaced. There, after trial, the court found proponents did not establish that the testator knew the nature and extent of the property she was disposing of by will where she believed her total assets to be only 1.5% of their actual value. Such evidence alone did not supply this result, however. In addition, a conservator had been appointed for the testator the year before the propounded instrument was executed based upon evidence that "her house was littered with more than \$30,000 in cash and that she had not paid her income tax, property tax, or utility bills" (*id.*). Further, the testator had been diagnosed with "degenerative dementia" during that year, and her stockbroker had testified that, starting three years before she executed the will, the testator had become "unable to transact any business and did not know what stocks and bonds she owned" (*id.*). These facts are in stark contrast to the record here.

Objectants also point to evidence that decedent sometimes voiced concerns about not having sufficient funds to cover her needs and expenses in an attempt to demonstrate that she did not appreciate her wealth. To the extent that there is any proof on this record that, during the

applicable time and not in the year-and-a-half after decedent executed the propounded instrument, decedent perceived herself to have financial hardship, such proof fails to raise an issue of fact regarding decedent's understanding of her assets at the time of execution.

Possessing valuable illiquid assets and having concern about covering day-to-day expenses are not necessarily at odds. Although decedent was not financially independent, the record suggests she was generally aware of what she possessed. Moreover, reliance, if any, on her spouse for support has no bearing on the relevant inquiry to establish capacity.

Objectants also propose a theory that capacity is undermined in this instance by observations of decedent's good relationship with all members of her family, which is in contrast to her not including them in her will. This argument that decedent could not have intended to leave disparate gifts to her children or made provisions for only some of her grandchildren, is, at bottom, just speculation about what decedent would have wanted, and the affidavits proffered in support do not raise a material issue of fact on this issue.

Objectants fail to proffer evidence that any term of the propounded instrument is "so unnatural or unreasonable as to cast doubt" on decedent's capacity (*see Matter of Bush*, 85 AD2d at 888). The allegation in the affidavits of Melissa and long-time family friend Ray Dotoratos and doorman George Gregory Bruno that decedent would never treat her children differently, even if true, is not contrary to the terms of the propounded instrument. Nor can Objectants' conjecture that it does not make sense that decedent would have made express provision for certain grandchildren, the children of Proponent, and not her other grandchildren, the children of Melissa, raise a question of fact as to decedent's capacity.

Decedent's Alleged Distorted Reality or Paranoia

In April 2015, upon decedent's discharge from a nursing home after hip surgery and rehabilitation, she was able to return to her long-standing residence, and a health aide, who apparently also slept there, indicated that there were bed bugs in the apartment and that she had been bitten. Objectants would have decedent's remaining in the residence after an inspection confirmed the presence of bed bugs to be indicative of her lack of mental capacity. That Objectants may have run from the building upon being informed of the presence of bed bugs does not demonstrate that it was unreasonable for decedent to not have vacated immediately given her particular circumstances. In this regard, Objectants have not offered proof that the situation was dangerous to decedent or that it made the residence inhabitable. In fact, neither of the two options for treatment of the infestation offered by the company that conducted the inspection required that the apartment be vacated for more than hours at a time. Nor have Objectants shown that decedent initially had suitable alternatives in light of her physical condition or had liquid assets⁸ with which to secure temporary lodgings to meet her needs.

Finally, regarding capacity, Objectants rely on an affidavit from an estate-planning attorney, with whom, following a referral secured by Melissa, decedent had a telephone consultation in August 2016, 15 months after execution of the propounded instrument and approximately one month before her death. The attorney states in her affidavit that decedent did not know if the document she had executed with the assistance of Belinda in 2015 was a will and that decedent was concerned that the document she had signed did not reflect how she wanted her estate to be distributed. Such statements, even if in fact made by decedent, have no bearing

⁸ There is some evidence in the record of decedent's being "cash poor"—she borrowed, in one instance in 2016, \$725 dollars from a family friend, which she stated she could not pay back except with tangibles like a piece of artwork which she offered as repayment.

on her capacity (*Matter of Horton*, 26 Misc 2d 843, 847 [Sur Ct, Suffolk County 1960], *affd* 13 AD2d 506 [2d Dept 1961] [“Testamentary capacity is not destroyed retroactively by events happening after execution”]), which is measured at the time of the will’s preparation and execution (*Matter of Alibrandi*, 104 AD3d 1175, 1177 [4th Dept 2013]; *Matter of Martinico*, 177 AD3d at 884; *Matter of Hedges*, 100 AD2d at 588; *Matter of Walker*, 80 AD3d at 866 [“the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made” (citations omitted)]).

The speculative and conclusory statements of the non-treating physician, of friends/acquaintances, and of Objectant Melissa have not provided sufficient evidence from which a proper inference that decedent lacked capacity could be made. Objectants have thus failed to raise a material issue of fact regarding decedent’s testamentary capacity, and this objection is accordingly dismissed.

Due Execution

As laid out by Objectants’ brief, their arguments as to a lack of due execution are dependent explicitly on whether decedent lacked capacity, the objection based on which does not survive this motion as analyzed above. For their part, they reiterate that there could have been no “actual intent” to sign by decedent because she lacked the wherewithal to form it and that there could be no “meeting of the minds” with the attesting witnesses because she was incapable of understanding what she was doing in asking them to witness her signature. Rehashing their conclusory evidence as to capacity, however, fares no better when arrayed against their objection concerning the alleged undue execution of the March 4th instrument.

Here, as noted, the proof establishes that the requirements of EPTL 3-2.1 have been satisfied (EPTL 3-2.1; *Matter of Falk*, 47 AD3d 21 [1st Dept 2007]). The propounded

instrument was drafted by and executed in the presence of Amy Holzman, Esq., an experienced trusts and estates attorney. Holzman and her colleague, Hershkovitz, served as witnesses to the will's execution. There is a presumption of regularity where a will's execution is supervised by an attorney (*Matter of Moskowitz*, 116 AD3d 958, 959 [2d Dept 2014]). In addition to their deposition testimony, the joint affidavit of the attesting witnesses was executed contemporaneously with the propounded instrument and indicates that decedent declared the instrument to be her will.

Objectants suggest that decedent could have been more active or engaged during the execution ceremony, and they postulate that this is evidence that she could not adequately see and hear. The testimonial evidence, however, is that decedent responded when the dispositive provisions of the will were read to her and when asked questions directly before signing. As noted in the discussion of capacity, allegations of decedent's hearing and sight deficits are purely speculative on this record and are supported only by Melissa's statement that decedent was "hard of hearing" and a "self-report" by decedent of needing to use a magnifying glass to read very small print (*Matter of Dralle*, 192 AD3d 1239, 1242 [3d Dept 2021] [proof of decedent's poor vision insufficient to overcome the presumption of due execution or raise questions of fact as to whether she was unable to read the will or understand its terms]). Furthermore, the medical records for March 4, 2015 from the rehabilitation center state that no "deaf and hard of hearing services" were needed by decedent at that time. Similarly, the records from the nursing home where decedent stayed after the rehabilitation center indicate that no audiology services were needed.

Objectants having tethered claims regarding lack of due execution to those of capacity, which have been dismissed, and having provided no other evidence of a defective will execution ceremony, the court dismisses the objection as to due execution.

Undue Influence, Confidential Relationship, and Fraud

Relief under a claim of undue influence is available in situations where the instrument offered for probate is the product of someone else's wishes and not those of the decedent (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]; PJI 7:55). Proponent-movant accomplished her task of establishing that the propounded instrument is a natural will by providing the affidavit and testimony of the attesting witnesses stating that decedent was free from restraint in signing the will.

In opposition, to establish that a testator's own volition was overcome, a showing of influence alone is not sufficient, but rather it must be "undue." This means proof upon which an inference can be drawn that the actions complained of amounted to "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against h[er] free will and desire, but which [s]he was unable to refuse or too weak to resist" (*Children's Aid Society*, 70 NY at 394).

This showing requires evidence of a substantial nature, even if circumstantial, of Belinda's motive and opportunity, and that she actually exercised undue influence upon decedent (see *Matter of Walther*, 6 NY2d 49 [1959]). As to motive, Objectants rely on Belinda's disproportionate pecuniary share under the offered will compared to her siblings' and further argue that she wanted to control or manage the sale of decedent's Basquiat painting to further her reputation in the art business.

As to opportunity, the record before the court reflects that, at least up to the execution of the propounded instrument, Belinda's presence by her mother's side at the hospital and rehabilitation center was not infrequent and that decedent might have relied on Belinda to take care of some of her affairs during that period. In addition, there is proof that Belinda was acting as something of a "go-between" regarding communications with Holzman's office for the penultimate, February 19th instrument. As discussed previously, Belinda also had contact with attorney-drafter Holzman on February 26, 2015, in advance of the preparation of the propounded instrument.

The parties disagree on the issue of whether Belinda was in a confidential relationship with decedent. If such a relationship is established, the one benefiting from a transaction arising in the course of the relationship must show that the transaction was free from overreaching and fraud (*Matter of Greiff*, 92 NY2d 341, 345 [1998]). The discussion in this context also provides an opportunity to address Objectants' claims of constructive fraud, which are likewise premised on Movant's alleged improper use of confidential relations with her mother.

As discussed by the parties, this court has had occasion to address the quality of proof on questions of confidential relations between parent and child (*Cheney v Wells*, 2017 NY Slip Op 30021[U], 2017 NY Misc Lexis 37 at *3-4 [Sur Ct, NY County, Jan. 10, 2017]). In light of the natural affinity of a child for her parent, more than involvement in the parent's life was required to establish such a relationship. Instead, there needed to be evidence of a mature child exercising control of the affairs of a dependent parent (*id.*; see also *Matter of Zirinsky*, 43 AD3d 946, 948 [2d Dept 2007]; *Matter of Ryan*, 34 AD3d 212, 214 [1st Dept 2006]; *Matter of Anella*, 88 AD3d 993, 995 [2d Dept 2011]). Here, while there is no proof that Belinda assumed control of decedent's finances in general, there is proof that decedent was somewhat dependent on Belinda

during her hospitalization and her stay at the rehabilitation center after surgery. There is also proof that Belinda did act for decedent in that she advanced the funds for Holzman's retainer for legal services related to the will drafting and execution, in addition to discussing and framing decedent's testamentary terms with Holzman alone.

Movant does, however, properly contend that the mere fact that decedent executed a durable power of attorney and a health care proxy in favor of Belinda at the February 19th execution ceremony of the penultimate will does not meet Objectants' burden here. While such acts may indicate Belinda's position of trust and decedent's reliance upon her, Objectants have made no showing that Belinda actually used such documents to conduct any transactions on behalf of decedent (*see Matter of Giaquinto*, 164 AD3d 1527, 1530 [3d Dept 2018], *affd* 32 NY3d 1180 [2019]; *Matter of Bartel*, 214 AD2d 476 [1st Dept 1995]). Indeed, here, the record establishes that the power of attorney remained in the custody of the attorney.

Nonetheless, it is clear, that whether a confidential relationship exists between parties to a transaction is measured at the time of the subject transaction (*Matter of Greiff*, 92 NY2d at 345; *Henik v Darconte*, 189 AD3d 797, 798 [2d Dept 2020]; *Edelstein v Lieb*, 205 AD2d 491, 493 [2d Dept 1994]). The court cannot ignore the circumstances here which include Belinda's conduct of providing substantial assistance to decedent during her hospitalization; decedent's significant medical conditions, including a broken hip, surgery, and recovery, and her being in a situation of dependence; and Belinda's direct involvement in obtaining the will's execution including her communication with the attorney-drafter and, in particular, communicating testamentary wishes to the attorney-drafter.

The court concludes that Objectants have submitted sufficient evidence to raise a question as to whether Belinda could have and did assume such control of decedent's affairs

during decedent's hospitalization and rehabilitation that she could be considered to be in a confidential relationship with her mother at the time the propounded instrument was executed (*Ray v Ray*, 180 AD3d 472 [1st Dept 2020]; see *Cowee v Cornell*, 75 NY 91, 99-100 [1878]). Although some cases have held that the support, care, or natural affection provided by an immediate family member sufficiently explains a disproportionate bequest (*Matter of Walther*, 6 NY2d at 55; *Matter of Zirinsky*, 43 AD3d at 948), where there is doubt, as arises from all the circumstances present here, the issue is one for the trier of fact (*Matter of Nealon*, 104 AD3d 1088 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]; *Matter of Almasy v Ward*, 53 AD3d 946, 947 [3d Dept 2008] [familial relationships “often give rise to at least a factual issue regarding a confidential relationship”]; *Thomas v Thomas*, 70 AD3d 588, 591 [1st Dept 2010]; *Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]). In the end, the trier of fact should find whether such a relationship existed between decedent and Belinda (*Matter of Nealon*, 57 AD3d 1325, 1328 [3d Dept 2008] [concluding “direct and circumstantial proof in the record” raised issues of fact regarding undue influence, precluding summary judgment and warranting trial]; *Matter of Nealon*, 104 AD3d at 1089 [holding new trial necessary, and “respondents entitled to have the jury consider all the evidence regarding decedent’s relationship and to determine as a factual matter whether decedent maintained the ability to exercise free will”]; *Matter of Kotsones*, 185 AD3d 1473, 1475 [4th Dept 2020] [finding that Surrogate erred in determining, after trial, that petitioner had failed to establish that the relationship “was of such an unequal or controlling nature as to give rise to an inference of undue influence”]).

Turning now to the remaining element of the undue influence objection, the question is whether the proof proffered by Objectants can provide a basis for a finding that undue influence was actually exercised. Hallmarks of such exercise are involvement in the drafting and

execution of the will instrument, including procuring and communicating with an attorney for the transaction, holding a position of trust, working in secrecy and shielding a testator from contact with others, the condition of the testator, and a significant unexplained departure from a prior testamentary plan in favor of a trusted individual (*see Matter of Roberts*, 34 Misc 3d 1213[A] [Sur Ct, NY County 2011]; *see also Matter of Zirinsky*, 10 Misc 3d 1052[A] [Sur Ct, Nassau County 2005]; *Matter of Bach*, 133 AD2d 455 [2d Dept 1987] [listing relevant facts and circumstances to show undue influence and quoting *Rollwagen v Rollwagen*, 63 NY 504, 519 (1876)]).⁹

In this case, nothing in the record indicates that decedent was ever prevented from seeing or communicating with anyone. Melissa's affidavit in opposition, however, states that Belinda, when asked by Melissa, feigned ignorance of the provisions of decedent's newly executed will. Melissa further reports that decedent told her at some point after being released from the rehabilitation center, that Belinda and Alison Wolfson tricked her and that she might have executed a will which did not provide "what she wanted for her children." While such testimony may be excluded at trial under New York's "Dead Person's" statute (CPLR 4519), it is not the only evidence in support of an inference of actual exercise of undue influence that Objectants proffer (*Miller v Lu-Whitney*, 61 AD3d 1043, 1045 [3d Dept 2009]), and, therefore, is available to defeat summary judgment (*id.*, citing *Phillips v Kantor & Co.*, 31 NY2d 307, 314 [1972]).

Objectants also point to the facts that the attorney-drafter was procured by Belinda, following decedent's fall and while she was in the emergency room prior to the creation of the

⁹ Although the parties disagree about whether such factors should be called "suspicious facts," nomenclature is not the issue, but rather whether the evidence is substantial enough to show a possible overmastering of a testator's testamentary wishes. Movant for her part asserts that all the factors identified in the *Roberts* decision need to be present to substantiate the need for a trial on undue influence. While any one factor may not be enough, it has long been the rule, however, that all circumstances regarding the testator and the alleged undue influencer must be considered (*Matter of Elmore*, 42 AD2d 240, 241 [3d Dept 1973]).

February 19th instrument, that Belinda was involved in communicating decedent's wishes to Holzman, that Belinda did not remember meeting Holzman in her offices, that Belinda advanced or paid the funds for Holzman's retainer, and that the March 4th instrument was an unexpected departure from her 1999 estate plan in light of the professed good relations that decedent had with her children and grandchildren.¹⁰ Movant is correct that it was not Belinda directly who suggested the attorney-drafter, but such reference was still obtained, or through someone who could be considered aligned with her interests. Even though the reference was through another and may be of differing probative force as a result, it is still a factor to be considered as it was Belinda who initially made contact with Holzman's office in February 2015 (*cf. Matter of Giaquinto*, 164 AD3d at 1527).

Proof of no involvement in the will drafting and execution may result in summary dismissal of undue influence claims (*Matter of Camac*, 300 AD2d 11 [1st Dept 2002]), but that is not this case, and there appears to be more involvement by Belinda here than merely serving as an agreed-upon conduit for attorney document transmittals (*Matter of Prevratil*, 121 AD3d 137 [3d Dept 2014]) or a single email exchange (*Matter of Burrows*, ___ AD3d ___, 2022 WL 817536 [4th Dept, March 18, 2022]), including advancing payment for services and lengthy discussions with the drafter regarding decedent's wishes.

Objectants' evidence of no impaired relationships among decedent and her children's families also distinguishes this matter from the decision in *Prevratil*, where there was evidence of a change in affinities by the testator. Nor was decedent's plan to benefit Belinda primarily one of long standing (*cf. Matter of Llewellyn*, 135 AD3d 499). Moreover, movant's assertion that the changes by decedent were fully explained in the text of the instrument and in

¹⁰ The court notes also that Belinda denied receiving a copy of the March 4th instrument before it was signed, but there was proof that the instrument was emailed to her the day before execution.

conversations with the attorney-drafter is not completely precise: the change to benefit only Belinda's children to the exclusion of Melissa's is not explained (*see Matter of Williams*, 172 AD3d 514 [1st Dept 2019]).

As discussed previously, familial closeness may, in certain instances, counterbalance any inference of improper influence (*see Matter of Aoki*, 99 AD3d 253 [1st Dept 2012]), but, in light of the significant shift in decedent's estate plan, which was procured at least in part with the aid of its new primary beneficiary, and her involvement in the drafting of the instrument for the hospitalized and frail decedent, and all the facts and circumstances here, the question of whether Belinda acted out of family duty and affection or from a more personal motive, and exploited her position of trust to impose her wishes on decedent is an issue of fact requiring a full airing at trial (*Matter of Mary*, 202 AD3d 1418 [3d Dept 2022]; *Matter of Hirschorn*, 21 Misc 3d 1113[A] [Sur Ct, Westchester County 2008]; *see Matter of Henderson*, 80 NY2d 388 [1992]).

However, regarding affirmative, as opposed to constructive, fraud, Objectants have not provided evidence that a misrepresentation or deceptive false statement was made to decedent by Belinda or anyone else, let alone one which caused her to execute the propounded instrument disposing of her property differently than she would have in the absence of such a misrepresentation or false statement (*Matter of Ryan*, 34 AD3d at 215). This is fatal to their assertions of fraud (*Glinskaya v Zelman*, 128 AD3d 771, 772 [2d Dept 2015]; *see Gerschel v Christensen*, 143 AD3d 555 [1st Dept 2016]).

Although couched in stirring language by Objectants, the evidence on which they rely to show that a false statement was made to decedent, as set forth in their brief, are equivocal selections from Belinda's deposition transcripts indicating that decedent knew that Belinda's family may have been struggling financially, but that Belinda elsewhere denied disclosing it in

those terms to her mother or did not recall if she had disclosed it. Belinda also testified that she “might have” discussed what monies she was making with decedent, and that her mother knew that Belinda was not making money. Further, Belinda stated that sometimes she had in fact become nervous about buying food for her children. Objectants also point to the transcriptions of voicemails left by decedent for Belinda, in particular one from a November 10, 2015 phone call—eight months after the execution at issue here—indicating that decedent would pay for some food and meals and some tutoring for Belinda’s children, her grandchildren.

From this, Objectants would weave out of whole cloth a conspiracy that Belinda contrived poverty to extract assets from an unwilling, loving grandmother. Even if Belinda requested assistance from her mother, drawing from the evidence outlined above the conclusion that she misrepresented her financial condition to her mother and that such misrepresentation is what caused decedent to dispose of her assets in the manner that she did is purely speculative (*Matter of Capuano*, 93 AD3d 666, 668 [2d Dept 2012]).¹¹ The relative financial positions of the parties here are not controverted and argument is not proof, and, without more, requesting, importuning, or even begging a close relation for aid or assets does not constitute affirmative fraud (*see Matter of Seagrist*, 1 App Div 615, 619 [1st Dept 1896]; *Matter of O’Connor*, 51 NYS2d 549 [Sur Ct, NY County 1944]; *see also Tonzi v Nichols*, 24 Misc 3d 1249[A] [Sup Ct, NY County 2009], *aff’d* 77 AD3d 1450 [4th Dept 2010]).

The fraud objection to the extent premised on misrepresentations having been made to decedent is therefore dismissed.

¹¹ Similarly speculative on this record are claims that Belinda sought payments for tutoring from each parent. Even if there were instances of such dual requests, and that is not clear on this record, Belinda stated that decedent was aware of Hubert’s possible support, and in any event, Objectants have not shown how Proponent’s asking her parents for tutoring expenses, even asking both of them, is probative of the invalidity of the instrument offered for probate. That Belinda or her family may have had assets at any one time to purchase what Objectants characterize as luxury items or that certain of their expenses may have been paid from other sources also does not change this analysis.

Belinda's Appointment as Fiduciary

Belinda's fitness to serve as executor and trustee is only challenged here by the same allegations offered to show that she unduly influenced decedent. Consequently, issues regarding her serving as fiduciary pursuant to the will are properly addressed when the issues of possible improper influence are resolved.

CONCLUSION

Accordingly, the motion for summary judgment is granted to the extent of dismissing the objections regarding testamentary capacity, due execution, and affirmative fraud.

A trial of the remaining objections will be scheduled shortly.

This decision constitutes the order of the court.

Date: March 30, 2022



SURROGATE