Matter of Roberts

Surrogate's Court of New York, New York County

December 5, 2011, Decided

2005/2087

Reporter
34 Misc. 3d 1213(A) *; 946 N.Y.S.2d 69 **; 2011 N.Y. Misc. LEXIS 6487 ***; 2011 NY Slip Op 52472(U) ****

[**1]** In the Matter of the Petition to Admit Will into Probate in the Estate of Mae V. Roberts, Deceased.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Subsequent History: Summary judgment denied by, in part, Motion denied by, in part, Without prejudice, Sanctions disallowed by, Motion denied by *Matter of Roberts, 2020 N.Y. Misc. LEXIS 10969 (N.Y. Sur. Ct., Oct. 30, 2020)*

Prior History: *Estate of Mae v. Roberts, 2006 N.Y. Misc. LEXIS 4577 (Dec. 4, 2006)*

Core Terms

decedent, proponent, codicil, summary judgment, attorney-draftsman, propound, undue influence, the will, testator's, brownstone, attesting witness, testamentary capacity, psychiatrist's, testamentary instrument, due execution, probation, dementia, power of attorney, residuary estate, burden of proof, cross-motion, testamentary, appoint, tenant, died

Headnotes/Summary

Headnotes

[*1213A] [69]** Wills--Probate--Testamentary Capacity. Wills--Probate--Undue Influence.

Judges: [*1]** Nora S. Anderson, J.

Opinion by: Nora S. Anderson

Opinion

Nora S. Anderson, J.

In this contested probate proceeding, decedent's grandniece (proponent) moves for summary judgement on the objections of lack of due execution, lack of capacity, undue influence, and fraud filed by three of decedent's siblings (one of whom died after objections were filed) and six of decedent's nieces and nephews (objectants).

Decedent died on April 16, 2005 at the age of 92 and was survived by three siblings and nine nieces and nephews. Decedent's estate consists of a Manhattan brownstone, real estate in Virginia and an undetermined amount of cash.

Between October 1999 and July 2004, decedent executed five wills, one codicil, and at least six powers of attorney, all drafted by, and executed under supervision of, decedent's attorney, who died in 2006, shortly after this proceeding was commenced. Each successive testamentary instrument leaves an increasingly larger share of decedent's estate to proponent, and a correspondingly smaller share to relatives and friends. Proponent seeks to probate a will executed by decedent in 2003 and a codicil executed by decedent in 2004 (collectively, "the propounded instruments").

The following facts **[***2]** are undisputed. For most of her adult life, decedent lived in the Manhattan brownstone and rented rooms to various tenants and family members. In 1998, decedent's grandnephew moved out, finding it too difficult to continue to live in close proximity to decedent. According to him, decedent frequently misplaced her belongings and then falsely accused him and other tenants of stealing from her.

Shortly after the grandnephew moved out, proponent and her mother (decedent's niece-in-law), re-established a relationship with decedent after many years of estrangement. Although proponent lived in Delaware, she soon became active in decedent's **[****2]** life, attending to her personal needs and managing her finances.

On October 11, 1999, decedent executed a power of attorney in favor of proponent, which she revoked three months later. On January 26, 2000, decedent executed a new power of attorney in favor of one her sisters. On the same day, decedent executed the first of five wills, wherein she bequeathed the brownstone and her residuary estate in equal shares to her two sisters and her brother. Proponent and her mother were not among the fourteen relatives and friends who also received bequests.

On April **[***3]** 13, 2000, decedent was hospitalized after falling in her home and was immediately referred to the psychiatric ward. Hospital records state that she suffered from paranoia, hallucinations, senility and dementia, and that she had a "history of psychosis." Decedent was discharged five days later to proponent's care. On April 27, 2000, proponent informed decedent's attorney that decedent had asked her to assist with selling the brownstone. She also told him that decedent, although "mentally competent and quite capable of making good sound decisions," could no longer live alone and was planning to relocate to Delaware to live with proponent. (Proponent also made vague reference to "some unpleasant situations" between decedent and family members and/or tenants.)

On May 4, 2000, decedent executed a second will, leaving proponent the contents and furniture in her brownstone, "all shares of stock," and a one-sixth share of one of her Virginia properties. Decedent left the residuary estate in equal shares to objectants and named proponent as executor. Decedent simultaneously executed a new power of attorney reinstating proponent as her attorney-in-fact.

Meanwhile, family members became increasingly **[***4]** concerned about proponent's influence over decedent. A psychiatrist conducted a three-hour examination of decedent at her home on December 11, 2000. Decedent's cousin and a friend were present during the examination. Objectants have submitted the psychiatrist's affirmation stating that decedent suffered from paranoia and was "unable to advocate for herself." However, he also stated that decedent was "attentive, had good concentration skills and could perform simple calculations." He diagnosed decedent with "age related cognitive decline with long standing personality dysfunction."

One day after the examination, decedent executed her third will, leaving proponent a one-fifteenth share of the brownstone, a one-fifteenth share of the residuary estate, and the one-sixth share of the Virginia property previously devised to her. The remainder of the estate was left to twenty-two relatives and friends of decedent.

In January 2001, decedent's grandnephew (her former tenant) filed a petition pursuant to *Article 81 of the Mental Hygiene Law*, requesting that he and/or one of two other relatives be appointed guardian of the person and the property of decedent. The court evaluator interviewed decedent, **[***5]** proponent, various family members and friends, and the attorney-draftsman. Her **[****3]** report stated that, although decedent was "high spirited" and "very independent and quite functional," she was also "quite forgetful" and "[kept] changing her mind." The evaluator recommended the appointment of an "independent person," rather than a relative, noting the hostilities among decedent's relatives, proponent, and proponent's mother, in particular, who complained to the evaluator that the guardianship proceeding constituted a "vendetta" against her and proponent. Decedent's two sisters, as well as others with whom the evaluator spoke, strongly favored the appointment of a independent guardian.

The evaluator reported that the attorney-draftsman had insisted that decedent did not need a guardian, was capable of handling her own affairs, and only required an aide to assist with her personal needs. The evaluator reported that she sent the attorney-draftsman a letter cautioning him against assisting decedent with changing her power of attorney in light of decedent's state of mind and the "undue influence being exerted upon her from many different sources." No guardian was appointed for decedent.

On March **[***6]** 2, 2002, decedent executed a fourth will, leaving to proponent a larger (one-fifth) share of the brownstone, a one-seventh share of the residuary estate, and the one-sixth share of the Virginia property previously devised to her in the two prior wills.

On February 5, 2003, decedent executed the fifth and last will, in which she left her brother $10,000 and all of the Virginia real estate, and left proponent the entire brownstone and 100 percent of the residuary estate. Decedent named proponent as executor and decedent's

nephew as substitute or successor executor.

Decedent's friend accompanied decedent to her attorney's office to execute the 2003 will. Anticipating objections from family members, the attorney-draftsman arranged for three individuals - himself and two of his associates - to witness the will's execution.

Decedent was hospitalized on July 6, 2004. According to the medical records, she suffered from dementia, confusion and forgetfulness.

On July 16, 2004, five days after her discharge, decedent executed a one-page codicil to the 2003 will. The codicil revoked the devise of the Virginia properties to her brother and instead left them to proponent. The codicil, which was executed **[***7]** in decedent's home due to her poor health, was witnessed by the attorney-draftsman and one of his associates.

Decedent died in Delaware in April 2005. According to proponent's testimony, decedent had lived with her in Delaware for several months before her death.

Proponent, represented by decedent's attorney-draftsman, petitioned the court in July 2005 for probate of the propounded instruments. One year later, the attorney-draftsman withdrew as proponent's counsel for health reasons. He died before he could be examined under *SCPA 1404*. Following the 1404 examinations of the other two attesting witnesses, objectants filed their objections.

In February 2007, proponent hired new counsel and produced a quitclaim deed showing that on April 16, 2004, decedent transferred ownership of the NY brownstone to herself and proponent as joint tenants with right of survivorship. The terms of the deed contradicted **[****4]** proponent's statements in her petition for probate, in which she had listed the NY brownstone as an asset of decedent's estate.

Summary Judgment and Burden of Proof

The law regarding summary judgment is well established and need not be repeated here *(see, e.g., Phillips v Kantor, 31 NY2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882 [1972]*; **[***8]** *Westhill Exports, Ltd v Pope, 12 NY2d 491, 191 N.E.2d 447, 240 N.Y.S.2d 961 [1963])*.

The burden of proof with respect to due execution is on proponent. (*SCPA 1408*; *Matter of Rosen, 291 AD2d 562, 737 N.Y.S.2d 656 [2d Dept 2002]*; *Matter of Tully, 227 A.D.2d 288, 642 N.Y.S.2d 878 [1st Dept 1996])*. In the interest of judicial economy, the court declines to evaluate the proofs in this connection so long as decedent's capacity is in issue, since proofs as to execution, even if credible on their face, might be rendered incredible as a matter of law if it is determined that decedent was without capacity to make a will (*see e.g., Matter of Martinez, 2007 N.Y. Misc. LEXIS, 6891, 238 NYLJ 56, Sept. 19, 2007, at 33, col 4*). Accordingly, the court will first assess objectants' challenge on the issue of capacity.

Testamentary Capacity

A testamentary instrument cannot be admitted to probate unless the court is satisfied that the testator, at the time of the instrument's execution, had the requisite capacity. (*SCPA § 1408*). Proponent bears the burden of proof on this issue. However, this burden is eased by the law's presumption that a testator has the capacity to execute a testamentary instrument (*Matter of Smith, 180 A.D. 669, 168 N.Y.S. 135 [2d Dept 1917]*; *Matter of Hollenbeck, 65 Misc 2d 796, 318 NYS2d 604 [1969]*, *affd*, *37 A.D.2d 922, 325 N.Y.S.2d 736 [4th Dept 1971])*. **[***9]** Less lucidity is required for the execution of a testamentary instrument than for the execution of contracts and other legal documents. (*Matter of Coddington, 281 AD 143, 118 N.Y.S.2d 525 [3d Dept 1952]*, *affd 307 NY 181, 120 N.E.2d 777 [1954])*.

Objectants argue that their submissions of the psychiatrist's affidavit and records from decedent's hospitalizations demonstrate that proponent cannot satisfy her burden of proof as to either of the propounded instruments, and therefore, they are entitled to summary judgment on their capacity objection.

Proponent proffers the contemporaneous affidavit of the attesting witnesses, wherein each affirmed that decedent "was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect her capacity to make a valid [will/codicil]" when she signed each of the propounded instruments.

Proponent also submits transcripts of the 1404 examinations of the attesting witnesses. While each described decedent as very hard of hearing, they nonetheless stated that she was competent at the time of the will's execution. One witness testified that, prior to the execution of the 2003 will, he had spoken with

decedent to ensure she was "of a sane, **[***10]** competent mind" and that such conversation satisfied him that she was.

Prior to the execution of the 2004 codicil, the other attesting witness testified that he asked decedent why she wanted to revise the 2003 will in favor of proponent as opposed to her brother. Decedent responded that proponent was the only one taking care of her.

The affidavits and testimony of the attesting witnesses constitute prima facie proof of decedent's capacity. (*See* *Matter of Schlaeger, 74 AD3d 405, 903 N.Y.S.2d 12 [1st Dept 2010])*.

Objectants offer the affirmation of the psychiatrist who examined decedent in 2000 and the hospital records from decedent's hospitalizations in 2002 and 2004 as evidence to support their objection. The court considers each of these items of evidence separately. **[****5]**

(1) Psychiatrist's Examination of Decedent

The psychiatrist conducted his examination of decedent more than two years prior to her execution of the 2003 will and more than four years prior to her execution of the 2004 codicil. It is well known that a testator's capacity must be assessed at the precise time of execution (*Matter of Minasian, 149 AD2d 511, 540 N.Y.S.2d 722 [2d Dept 1989]*; *Matter of Hedges, 100 AD2d 586, 473 N.Y.S.2d 529 [2d Dept 1984])*. The timing of the psychiatric **[***11]** examination of decedent was too remote from the execution of the propounded instruments to be of any relevance here. Moreover, the content of the psychiatrist's affidavit does not support the conclusion that decedent lacked testamentary capacity. On the one hand, he observed that decedent demonstrated "some short term memory loss" and "visual-spatial disorientation," and he opined that "Ms. Roberts was not competent to enter into any legal agreements on her own behalf." However, he also noted that decedent "was attentive, had good concentration skills and could perform simple calculations." Given that old age, physical weakness and even senile dementia are not inconsistent with testamentary capacity (*see* *Matter of Hedges, 100 AD2d 586, 473 N.Y.S.2d 529*, citing *Children's Aid Socy. v Loveridge, 70 N.Y. 387 [1877])*, the psychiatrist's diagnosis of "age related cognitive decline with long standing personality dysfunction" does not support a conclusion that decedent lacked testamentary capacity at the time of execution of either of the propounded instruments.

(2) Decedent's Hospitalization in April 2000

The records from decedent's April, 2000 hospitalization are likewise too remote and unavailing to objectants. **[***12]** Consisting of notations made almost three years prior to the execution of the 2003 will and more than four years prior to the execution of the 2004 codicil, these records, which state that decedent then suffered from "paranoid dementia" and other ailments, do not on their own raise a triable issue of fact, much less constitute prima facie proof, as to decedent's capacity at the time she executed either the will or the codicil. Courts have noted that only a lucid interval of capacity by the testator is necessary in order to execute a valid will, and courts have found that this interval may even occur contemporaneously with an ongoing diagnosis of dementia, or even incompetency (*see* *Matter of Walther, 6 NY2d 49, 159 N.E.2d 665, 188 N.Y.S.2d 168 [1959]*; *Matter of Friedman, 26 AD3d 723, 809 N.Y.S.2d 667 [3d Dept 2006])*.

(3) Decedent's Hospitalization in July 2004

Since decedent's five-day hospitalization in July 2004 occurred almost a year and a half *after* she signed the 2003 will, these hospital records, like those from her April, 2000 hospitalization, are too remote to be instructive as to whether decedent lacked testamentary capacity when she executed the 2003 will. While they may be more probative of decedent's mental state when she executed **[***13]** the 2004 codicil only five days after her discharge,[1] they can hardly be said to quell all questions of fact concerning her capacity at the time she signed the **[****6]** codicil. Among the proofs weighing against objectants' cross-motion, the most notable is testimony of the attesting witness to the execution of the 2004 codicil. The witness testified that he specifically asked decedent why she was changing her testamentary plan in favor of proponent, and her response to his question (which was that proponent was the only person taking care of her) appeared to be a

[1] According to notations in the hospital records, decedent then suffered from dementia, confusion and forgetfulness; she was "oriented to person, but not to time and place." The records document, among other things, an episode on July 7, 2004, in which decedent refused to return to her hospital room; she was "trying to buy some dumplings and frustrated by staff attempts to stop her roaming the floor."

reasonable one.

The court concludes that, given the conflicting evidence in the record, there are triable issues of fact as to whether decedent had testamentary capacity when she signed the 2004 codicil. Therefore, objectants' cross-motion **[***14]** for summary judgment on their capacity objection to the 2004 codicil is denied. With respect to the 2003 will, there is nothing in the record to bar a summary determination that decedent had capacity when she executed that instrument. Accordingly, the court, sua sponte, grants summary judgment in favor of proponent as to the capacity objection to the 2003 will, and such objection is dismissed.[2]

Due Execution

The court has previously concluded that there exists a question of material fact as to decedent's capacity with respect to the 2004 codicil. Thus, the question of whether the codicil was duly executed cannot be decided on summary judgment *(see Matter of Martinez, 2007 N.Y. Misc. LEXIS 6891, 238 NYLJ 56, Sept. 19, 2007, at 33, col 4*; *Matter of Barofsky, 2007 N.Y. Misc. LEXIS 8157, 238 NYLJ 98, Nov. 20, 2007, at 34, col 4*), **[***15]** and consequently, proponent's summary judgment motion, to the extent it seeks a summary determination that the *codicil* was duly executed, is denied. By contrast, in view of the determination that objectants failed to show that decedent lacked capacity to execute the 2003 will, the court now addresses proponent's summary judgment motion to the extent it seeks a summary determination that the *will* was duly executed.

Proponent bears the burden of establishing that the 2003 will was duly executed in accordance with *EPTL 3-2.1*.[3]

When the execution of a testamentary instrument is supervised by an attorney, the instrument is entitled to a presumption of regularity (*see Matter of Kindberg, 207 NY 220, 228, 100 N.E. 789, 1 N.Y. L. Cas. 469 [1912]*; **[****7]** *Matter of Esberg, 215 AD2d 655, 627 N.Y.S.2d 716 [2d Dept 1995])*. **[***16]** The inclusion of an attestation clause constitutes further evidence that the instrument was validly executed (*Matter of Collins, 60 N.Y.2d 466, 471, 458 N.E.2d 797, 470 N.Y.S.2d 338 [1983]*; *Matter of Cottrell, 95 NY 329, 5 Civ. Proc. R. 340 [1884]*; *Matter of Warsaki*, NYLJ, Jan. 4, 1996, at 27, col 2).

The execution of the 2003 will was supervised by the attorney draftsman. The will contained an attestation clause signed by the attesting witnesses, as well as affidavits of those witnesses affixed to each of the instruments. Proponent has thus met her prima facie burden. Apart from their claim that decedent lacked capacity, which this court has rejected, objectants' motion papers are devoid of any evidence as to the invalidity of the execution of the 2003 will. Objectants have therefore failed to raise any material question on the issue. Accordingly, proponent's motion for summary judgment dismissing the objection alleging lack of due execution is granted as to the 2003 will, and the objection is dismissed only insofar as it pertains to the 2003 will. Objectants' cross-motion for summary judgment as to the due execution of both the will and the codicil is denied.

Undue Influence

Objectants bear the burden of proof on the issue of undue influence **[***17]** (*Matter of Tabaczynski, 217 AD2d 965, 629 N.Y.S.2d 904 [4th Dept 1995]*; *Matter of Eastman, 63 AD3d 738, 880 N.Y.S.2d 157 [2d Dept 2009])*, and the court must view the evidence in the light most favorable to proponent (see *Matter of Katz, 15 Misc. 3d 1146[A], 841 N.Y.S.2d 820, 2007 NY Slip Op 51184[U] [2007]*).

Objectants must prove that proponent had both the motive and the opportunity to influence decedent (*Matter of Walther, 6 NY2d 49, 55, 159 N.E.2d 665, 188 N.Y.S.2d 168 [1959]*; *Matter of Zirinsky, 43 AD3d 946, 947, 841 N.Y.S.2d 637 [2007]*; *Matter of Fiumara, 47 N.Y.2d 845, 846, 392 N.E.2d 565, 418 N.Y.S.2d 579*

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[2] While proponent did not move for summary judgment dismissing the capacity objection, *CPLR 3212(b)* provides that, "if it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." On a motion for summary judgment, the court may "search the record and grant judgment where appropriate, regardless of which party is the movant" (*Matter of Gerard*, NYLJ, Nov. 3, 1998, at 27, col 5).

[3] The statute requires that the testator sign at the end of the instrument; that the testator affix such signature (or direct that it be affixed) in the presence of at least two attesting witnesses; that the testator make known to the attesting witnesses that the instrument is his/her will; that the attesting witnesses attest the testator's signature; and that, at the testator's request, they sign their names at the end of the will.

[1979]). Here, proponent clearly had both motive (financial gain) and opportunity (proximity) to exert such influence over decedent.

Objectants must also prove that proponent actually used such influence, and that the influence exerted "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which . . . constrained the testator to do that which was against [her] free will and desire, but which [she] was unable to refuse or too weak to resist." *(Matter of Walther, 6 NY2d at 53, citing Children's Aid Socy. v Loveridge, 70 N.Y. 387, 394 [1877]; see also Matter of Burke, 82 AD2d 260, 269, 441 N.Y.S.2d 542 [2d Dept 1981])*.

The actual exercise of such influence is often difficult to prove since

> [u]ndue influence **[***18]** is seldom practiced openly, but is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another."

Matter of Burke, 82 AD2d at 269. Undue influence is thus rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther, 6 NY2d at 55*). Here, the court considers the following factors: (1) the testator's physical and mental condition; (2) whether the attorney who drafted the instrument was the testator's attorney or was associated with the beneficiary; (3) whether the beneficiary had any direct involvement in the preparation or execution of the instrument; (4) whether the propounded instrument deviates from the testator's prior dispositive plan; (5) whether the person who allegedly wielded undue influence was in a position of trust; and (6) whether the testator was isolated from the natural objects of his affection. *See Children's Aid Socy. v Loveridge, 70 NY 387[1877]; Matter of Burke, 82 AD2d 260, 441 N.Y.S.2d 542*; **[****8]** *Matter of Zirinsky, 10 Misc 3d 1052[A], 809 N.Y.S.2d 484, 2005 NY Slip Op 51881[U], *8*, **[***19]** *affd 43 A.D.3d 946, 841 N.Y.S.2d 637 [2007]*.

With respect to the testator's physical and mental condition, there is ample evidence demonstrating that decedent was in poor physical and mental health in the years before her death. The 2000 and 2004 hospital records show that decedent suffered bouts of paranoia, dementia and confusion. These records, along with the Article 81 petition, the psychiatrist's affirmation, the court evaluator's report and the 1404 testimony of attesting witnesses, may support the conclusion that, although decedent may have had the requisite capacity to execute a will, her physical and mental condition from at least 1999 onward may have rendered her vulnerable to undue pressure from others.[4]

As to whether the attorney who drafted the instrument was associated with the beneficiary, and whether the beneficiary had any direct involvement in the preparation or execution of the instrument, the record is murky. It is similarly murky as to the precise nature of the relationship between proponent **[***20]** and the attorney-draftsman. There is evidence that, after an estrangement, proponent reestablished a relationship with decedent sometime between the fall of 1998 and mid-1999, and that decedent first contacted the attorney-draftsman (directly or through proponent) sometime in 1999. While proponent was not present during the execution of any of decedent's various testamentary instruments, the record contains correspondence which indicates that proponent at times facilitated communications between decedent and the attorney-draftsman regarding decedent's testamentary plans. In a letter to the attorney-draftsman dated August 29, 1999, prior to the execution of any of decedent's known wills, proponent writes

> "I am sending this letter at the request of my Aunt Mae Roberts of 247 W 137th St. in New York, along with a facsimile of her Last Will and Testament to correct the draft for her final copy. There are a few questions that we have concerning the draft copy. First, what are the qualifications for the executors and if both should qualify would either have equal authority to act on behalf of the estate or would it require both executors authorization?"

Proponent's letter also contained questions **[***21]** about land assignments and the inclusion of an *in terrorem* clause. The "draft" to which the letter refers is not before the court. However, handwritten notes on the letter indicate that proponent was appointed executor in this draft of the will.

On a fax cover sheet addressed to proponent a few weeks after the execution of the 2003 will, the attorney-draftsman wrote: "As you requested here is a copy of Mae's will and copy of living will."

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[4] The court evaluator's report states that decedent had undergone a hip replacement, had difficulty walking and was hard of hearing. The attesting witnesses both testified as to decedent's poor hearing.

This correspondence, taken together with other written correspondence between the **[****9]** attorney-draftsman and proponent,[5] is indicative of at least some significant degree of involvement on proponent's part in decedent's testamentary preparations.

The fourth factor considered by courts, i.e., whether the propounded instrument deviates from the testator's prior dispositive plan, requires a review of decedent's successive testamentary instruments to establish whether a pattern existed and whether the propounded instruments deviate from that pattern.

The difference between the propounded instruments and the prior instruments is stark. The propounded instruments name only two beneficiaries (proponent and decedent's brother), while all decedent's prior wills had included two of her sisters, along with a bevy of nieces and nephews and their children, and a few friends. The 2004 codicil represented a further departure from decedent's prior testamentary plan in that, for the first time, decedent's brother received no interest in any of the real property; his bequest was limited to $10,000, and the rest of the estate, including all the real property, went to proponent.

The final factors considered by this court are whether the person who allegedly exercised undue influence was in a position of trust, and whether the testatrix was isolated from the objects of her natural affection. **[***23]** These factors are often considered together. *See* Matter of Zirinsky, 10 Misc 3d 1052[A], 809 N.Y.S.2d 484, 2005 NY Slip Op 51881[U], *10-11, *affd* 43 A.D.3d 946, 841 N.Y.S.2d 637 [2007]. The record contains scant evidence as to whether decedent was isolated from the natural objects of her affection.[6] However, there is ample evidence that proponent was in a position of trust. During the five or six years prior to decedent's death, proponent was very involved in decedent's financial and personal affairs and at most points held decedent's power of attorney. In her letter to the attorney-draftsman dated April 27, 2000, proponent stated that,

> "I will be representing [decedent] with her personal affairs. She has indicated to me that you should be in receipt of her request to reinstate me as her power of attorney and we intend to execute it. She has asked me to be involved in selling her house.... Recently, she was released from the Harlem Hospital into my care... she is planning to relocate to Delaware and we are planning to live together."

[**10]** During her 1404 examination, proponent testified that decedent had lived with her in Delaware in 2004 and 2005 under circumstances which suggest some dependency on decedent's part.

Closely related to the issue of trust is the question of whether a confidential relationship existed between the testatrix and the person who allegedly exercised undue influence over her (*Matter of Zirinsky, supra at *11*). When such a relationship exists, an inference arises that the influence was undue, and consequently, the proponent has the burden of coming forward with proof supporting an alternate explanation for the bequest (*id.*; Matter of Bach, 133 AD2d 455, 456, 519 N.Y.S.2d 670 [2d Dept 1987]. The adequacy of proponent's alternate explanation is generally considered to be a question of fact. *(Matter of Zirinsky, supra at *11*, quoting Matter of Elmore, 42 AD2d 240, 241, 346 N.Y.S.2d 182 [3d Dept 1973]; Matter of Bach, 133 AD2d at 457.)

Given the substantial evidence of decedent's *reliance* on proponent regarding matters *medical and financial*, this court concludes that a confidential relationship existed between decedent and proponent giving rise to an inference of undue influence.

It is thus incumbent **[***25]** on proponent to offer evidence tending to show that decedent's change of testamentary plan in proponent's favor was not prompted by undue influence. In her reply affidavit dated June 8, 2009, proponent claims that she and decedent enjoyed a "very close relationship for over 30 years," that she "lived with decedent during the summer months as a teenager," and that, at decedent's request, she moved to New York after graduation from college and lived with decedent for several years. She further asserts that she "assisted decedent with her personal affairs at her request . . . and was very supportive for

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[5] Much of this correspondence consists of short memos on fax cover sheets. For instance, on a cover sheet dated February 27, 2002, proponent writes to the attorney-draftsman: "Please be advised that at my Aunt's request I fax you a revised copy of her Dec. 2000 Will. She is at the St. Luke Hospital... please give her a call and she would like to meet with you this Friday if at all possible...." Decedent executed a new will a week later, on March 2, 2002, which bequeathed to proponent a larger share of the estate **[***22]** than had been bequeathed to her under decedent's prior will.

[6] Proponent **[***24]** testified that decedent lived with her in Delaware for several months before decedent died, and it is likely that decedent was isolated from her other relatives and friends in New York while she was living in Delaware.

the last ten years of her life." This court notes that, at his 1404 deposition, one of the attesting witnesses testified that, at some point prior to the execution of the 2004 codicil, decedent identified proponent as the only one who was taking care of her. A trier of fact might conclude that such evidence adequately explains decedent's favoring proponent with virtually all of her estate.

In short, the record contains sufficient evidence to give rise to a triable issue of fact as to whether or not proponent exercised undue influence over decedent, precluding summary judgment as to this **[***26]** objection.

Fraud

Finally, the court addresses the allegation that the propounded instruments were products of fraud. To substantiate such a claim, objectants are required to demonstrate that someone knowingly made a false statement to decedent which caused her to dispose of her property in a manner materially different from the disposition she would have chosen in the absence of that statement (*Matter of Eastman, 63 AD3d 738, 880 N.Y.S.2d 157 [2d Dept 2009]*; *Matter of Evanchuk, 145 A.D.2d 559, 560, 536 N.Y.S.2d 110 [2d Dept 1988]*).

Objectants have failed to produce any proof whatsoever that anyone induced decedent to execute either of the propounded instruments based on a false statement. Indeed, objectants' motion papers contain no reference to any specific statement made to decedent which they claim to be false. Thus, their cross-motion for summary judgment as to their objection grounded in fraud is denied, and summary judgment is awarded to proponent dismissing this objection (*see* *CPLR 3212[b]* and note 8, *supra*).

Conclusion

Proponent's motion for summary judgment dismissing objectants' due execution objection is granted as to the 2003 will and denied as to the 2004 codicil. This court further awards **[****11]** summary judgment to **[***27]** proponent dismissing the testamentary capacity objection as to the 2003 will and dismissing objectants' fraud objection as to both the 2003 will and the 2004 codicil. Objectants' cross-motion for summary judgment is denied in its entirety. The parties are directed to proceed to trial on the issues of lack of due execution and testamentary capacity as to the 2004 codicil, and undue influence as to both propounded instruments.[7]

This decision constitutes the order of the court.

Dated: December, 2011

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[7] It is noted that objectants have raised various deficiencies concerning proponent's submissions on her summary judgment motion and in opposition to objectants' cross-motion. Since none of proponent's submissions have factored into the rulings contained herein, there is no need to address these deficiencies. Top of Form