

## TRUSTS AND ESTATE UPDATE

## Expert Analysis

# Duress as an Objection To Probate

In *Matter of Rosasco*, 31 Misc3d 1214(A), the Surrogate's Court, New York County (Glen, S.), engaged in a thorough analysis of the theory of duress as it applied to Surrogate's Court practice, and more particularly, the validity of a propounded will. Notably, in denying petitioner's motion for summary judgment on this issue, the court relied on the distinction drawn between undue influence and duress as set forth in the Restatement [Third] Property: Wills and Other Donative Transfers, §8.3, as follows:

8.3(b). A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.

8.3(c). A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that

By  
**Ilene  
Sherwyn  
Cooper**



the donor would not otherwise have made.

Since that time, Surrogate's Court decisions on the question of duress, though sporadic, have utilized the approach taken by the court in *Rosasco* and the Restatement[Third] Property in analyzing the issue. Recently, the opinions in

Recently, the opinions in 'In re Young' and 'In re Alini' have each addressed the question of duress, but with differing results.

*In re Young*, N.Y.L.J., March 22, 2017, at 22 (Sur. Ct. New York County), and *In re Alini*, N.Y.L.J., March 31, 2017, at 47 (Sur. Ct. Richmond County) have followed suit, each addressing the question of duress, but with differing results.

### 'In re Young'

In *Young*, the Surrogate's Court was confronted with a contested probate

proceeding, in which the petitioner moved for summary judgment dismissing the objections to probate based on lack of testamentary capacity, undue influence, duress, fraud and revocation. The decedent died survived by two sisters, one of whom was the petitioner, and the other, who was the objectant, as well as four nieces and nephews. The decedent was an attorney, and the draftsman of the propounded instrument, which was one page in length. Pursuant to its terms, he left \$1 million to a long-time friend, and the residuary estate to his nephew, the petitioner's son.

Despite the scope of objections raised to probate, the court noted that the gravamen of the objectant's challenge to the will related to the alleged conduct of the decedent's long-time friend, legatee under the instrument, in procuring its execution and inhibiting its revocation. To this extent, the court found that the petitioner had met her initial burden of demonstrating that the instrument was a natural will, and importantly, that the decedent was in control of his life, and continued to live independently for years after executing the instrument, even after being diagnosed with leukemia. Indeed, the record reflected that on the date the will was signed, the decedent,

ILENE SHERWYN COOPER is a partner with Farrell Fritz in Uniondale, where she concentrates in the area of trusts and estates. She is the past-chair of the New York State Bar Association's Trusts and Estates Law Section.

alone, orchestrated its execution, and thereafter, arranged for its safekeeping.

Nevertheless, the objectant maintained that the decedent's friend coerced him to leave her a substantial bequest under the instrument by threatening to implicate him in criminal conduct for which she was under federal investigation at the time the will was executed, and for which she was later convicted. Objectant further maintained that even after the conviction, the decedent's fear lingered, which prevented him from changing his will. In support of these contentions, the objectant offered the deposition testimony of the friend, her own affidavit, and the affidavit of the decedent's former girlfriend.

Despite the foregoing, the court noted that the decedent's friend could not have induced the bequest in her favor as alleged, inasmuch as the will was executed more than eight months *prior* to her arrest and criminal conviction, and there was no evidence indicating that she was aware that she was under investigation by the government beforehand. The court further found that objectant's affidavit was nothing more than conjecture and surmise, and that the affidavit of the decedent's former girlfriend was equally unpersuasive. Contrary to the facts in *Rosasco*, a case relied on by the objectant, the court concluded that there was no proof that the decedent was under duress or being threatened in any way at the time he executed his will, other than perhaps, that he had purportedly invested in his friend's business, which later became the subject of a criminal investigation.

But even so, the court held this argument unavailing. Indeed, the court

opined that even if the decedent might have feared changing his will as a result of a threat by his friend to implicate him in a crime, an act that his friend had *every legal right to do*, a threat to do something, or to refrain from doing something does not per se amount to duress if the threat was "to do an act that the wrongdoer had a right to do."<sup>1</sup> (Emphasis supplied) Rather, "[a] donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a *wrongful* act that coerced the donor into making a donative transfer that the donor would not have otherwise made."<sup>2</sup> (emphasis supplied).

Accordingly, the court dismissed the objections based on undue influence and duress, found the remaining objections without merit, and granted petitioner's motion for summary judgment.

### 'In re Alini'

As compared to the result in *Young*, the court in *In re Alini* granted summary judgment in objectant's favor, and denied probate on the grounds that the propounded instrument had been procured by duress. The court observed that, traditionally, while an objection on the ground of duress is subsumed in an objection based on undue influence, duress is quite distinct from a claim of undue influence. In pertinent part, the court noted that while undue influence concerns wrongdoing of a covert and oftentimes undefinable nature, duress encompasses wrongdoing that is more overt, such as threats of force or harm.

Citing the definition of duress as discussed in *Rosasco*,<sup>3</sup> the court relied on the testimony of the drafting attorney to conclude that the propounded will

was invalid. Significantly, counsel testified at his SCPA §1404 examination that, when asked, the decedent declared the instrument not to be her last will and testament, and further stated that the decedent had said "if she did not leave my office with a document to show her son, that there would be hell to pay, and she would eventually go see another— she would be taken to see another lawyer." In reference to the propounded will, the drafting attorney added: "it was truly for one purpose, to keep this lady, okay, from being harassed and continually argued with over it, and she said, clearly, that if she didn't go out with some sort of document to show him ... she couldn't live in her home." The testimony was not refuted by the petitioner.

Based on the foregoing, the court found that the objectants had met their burden of proving that the propounded will was not the product of the decedent's free will and intention, but rather was the result of duress. Accordingly, probate of the instrument was denied.

.....●.....

1. *In re Young*, citing Restatement [Third] Property: Wills and Other Donative Transfers §8.3.

2. *In re Young*, citing Restatement [Third] Property: Wills and Other Donative Transfers §8.3 [c].

3. The court also referenced the decision by the Surrogate's Court, Queens County in *In re Bellasalmo*, N.Y.L.J., Feb. 17, 2017, at 36.