

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Sorting Out Claims Of Undue Influence

Undue influence is an issue commonly associated with Surrogate's Court proceedings—whether it is a proceeding for the probate of a will, a proceeding to determine the validity of a gift, or even a proceeding for the appointment of a fiduciary. Indeed, it is often the linchpin to the outcome of a matter, and as such, relevant to its strategy. This is most pointedly revealed by opinions rendered within the past three months in which the issue of undue influence played a primary role in the courts' determinations.

### Decree Affirmed

In *Matter of Marin*, 2011 NY Slip Op 02011, the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Putnam County (DiBella, S.), which, inter alia, determined that the propounded will was duly executed, and was not the product of fraud or undue influence.

The decedent died at the age of 77 survived by five children, three daughters and two sons. She left a handwritten instrument purporting to be her last will and testament, which she executed before a notary public and two witnesses on June 26, 2000. In pertinent part, the instrument appointed her two sons the executors of her estate, bequeathed certain real property to two of her daughters, and the residue of her estate to her two sons and her third daughter. The decedent's two sons petitioned for probate of the instrument, and objections were filed by one of the decedent's daughters on the grounds, inter alia, of lack of due execution, fraud and undue influence.

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The court held, based on the testimony of the notary public and the witnesses to the instrument, each of whom knew the decedent well, that the propounded will had been duly executed. The court found that although one of the witnesses could not recall whether the decedent's signature appeared on the will at the time she signed it, the Surrogate's Court had properly found that the decedent had acknowledged her signature to the witness.

Further, the court concluded that the objectant had failed to establish that the will was the product of fraud, i.e., that it was the result of false statements made to the decedent by any one of the petitioners which caused her to dispose of her property in a manner differently than she would have, or that undue influence had been exerted by the petitioners upon the decedent.

### Inference of Undue Influence

The existence of an inference of undue influence can often play a pivotal part in the outcome of a probate proceeding as learned through the opinions in *In re Moles* (Anderson S.) and *In re Carter* (Torres, S.).

In *In re Moles*, NYLJ, April 18, 2011, p. 23, the preliminary executors of the estate moved for summary judgment dismissing the objections of the decedent's nephew, who was the beneficiary of a prior will executed 30 years earlier than the propounded instrument. The objections alleged that the

instrument was not duly executed, that the decedent lacked testamentary capacity on the date of its execution, and that it was procured by the fraud and undue influence of the decedent's long-time companion, who was the sole beneficiary of the estate, and the named executor along with the attorney-draftsperson.

The undisputed record revealed that the decedent had a history of alcohol abuse for which she was hospitalized and later rehabilitated. Upon completion of her rehabilitation, she returned to New York City where she retained the services of a personal aide who resided with her until her death 20 years later.

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Over the course of her employ, the decedent's aide assisted her with medical issues that arose as a result of her Crohn's Disease, including accompanying her on doctor's appointments, and visiting her when she was hospitalized as a result of flare-ups. There was no dispute that the decedent and her aide became inseparable, spending every day together, and traveling domestically and overseas. Further, there was no dispute that the decedent was capable of making financial and personal decisions regarding her investments and health care.

The decedent's treating physician testified that she always found the decedent fully responsive and rational. This was substantiated as well by the attorney-

draftsperson of the instrument, who stated that he found the decedent alert, coherent and able to convey detailed information regarding her life situation and family. Specifically, when discussing the provisions of her will, the draftsperson testified that the decedent had expressed strong affection for her aide, and thus wanted her to be the sole beneficiary of her estate.

Notably, the will execution was videotaped and supervised by the draftsperson's colleague.

In granting the proponent's summary relief, the court found that sufficient proof had been submitted to establish a prima facie case on the issues of due execution and testamentary capacity. Specifically, on the issue of testamentary capacity, the court relied upon the self-proving affidavits of the attesting witnesses, as well as the testimony of the draftsperson and his colleague that the decedent was fully aware and competent at the time the instrument was executed. Further, the court found compelling the videotaped execution ceremony which revealed that the decedent was alert, spontaneous in her responses to questions and cognizant of her distributees and the dispositive provisions of her will.

The court rejected the notion that the decedent's early alcoholism impaired her capacity to execute a will, as well as the testimony of the videographer relied upon by the objectant, who testified that the decedent had difficulty identifying the President of the United States. The court held that this evidence paled in light of the reports and testimony of the professionals who treated and worked with the decedent during the period surrounding the execution of the instrument, all of which indicated that she possessed the minimal capacity required to make a valid will.

Similarly, the court rejected the objectant's claims regarding the due execution of the instrument, finding that he had failed to overcome the presumptions of regularity arising from the fact that the execution was attorney-supervised and that it had an attestation clause.

As to the issue of undue influence, the court concluded that the objectant had failed to submit any evidence that the decedent's aide had compelled or constrained the decedent to do anything against her free will. In fact, the objectant

admitted that he saw the decedent at most one to two times a year, and that her other family members rarely visited her.

The court found it significant that the attorney-draftsperson of the instrument testified that the provisions of the will were derived from instructions given to him by the decedent with no involvement of the decedent's aide. To this extent, the court opined that the lack of involvement by the proponent in a will's drafting and execution is inconsistent with any inference of undue influence, even where the disinherited party is a close family member. Further, the court held that even assuming the existence of a confidential relationship between the proponent and the decedent, it was counterbalanced by the evidence of the strong affection between the decedent and her aide during their twenty year relationship, the decedent's expressed desire to leave her aide her entire estate, and her aide's lack of involvement in the drafting of the will.

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In 'Carter,' the court concluded that a self-described caretaker had engaged in a systematic course to take over the personal and financial affairs of the decedent, whom he knew had been diagnosed with dementia, much as he did in the case of countless other elderly and frail women to whom he ingratiated himself.

Finally, the court concluded that the objectant had failed to produce a modicum of proof that anyone induced the decedent to execute her will based upon a false statement.

Accordingly, based upon the foregoing, the objections to probate were dismissed.

In comparison to the holding in *In re Moles*, the court in *In re Carter*, NYLJ, April 18, 2011, p. 25, found that the inference of undue influence required that the propounded instrument be denied probate. The facts of the case are in stark contrast to those in *Moles* and substantiate the differing opinions.

In *Carter*, the propounded instrument left the decedent's entire estate, but for 25 percent of any cash due and owing to the decedent's sole surviving heir, her sister, to a complete stranger, William E. Frazier, who was also named the executor. The

instrument also directed that in the event the decedent's sister should be admitted to a nursing home, her share should pass instead to Mr. Frazier, and that Mr. Frazier pay an amount, not to exceed 11 percent of the residuary estate, to charities of his choice.

The record revealed that Mr. Frazier was 40 years the decedent's junior, was not related to the decedent, yet, was her self-described caretaker, and that he was an instrumental force behind the execution of the propounded instrument. The court held that, under these circumstances, as well as events described in its own files and through the testimony of Mr. Frazier, an inference of undue influence existed requiring a hearing. Notably, the court found that Mr. Frazier had been previously appointed as fiduciary in a number of other estates of women significantly older than him, and with whom he had no relationship, that were strikingly similar to the factual situation involving this decedent.

Based on the testimony and evidence adduced at the hearing, the court concluded that Mr. Frazier had engaged in a systematic course to take over the personal and financial affairs of the decedent, whom he knew had been diagnosed with dementia, much as he did in the case of countless other elderly and frail women to whom he ingratiated himself. He moved into her home, put his name on her bank accounts, monitored her telephone calls, put her under surveillance and held her health care proxy. Significantly, the record also disclosed that in 2006, when the decedent was overtly suffering mentally, and when no attorney would draft a will for her, he allegedly acceded to her insistence upon executing a new will by retyping a prior will of the decedent, with the decedent's handwritten changes, and taking the decedent to her doctor's office to have it signed and witnessed.

At the conclusion of the hearing, the Attorney General recommended that the propounded instrument be denied probate. The court agreed, finding that the purported will had not been duly executed, that the decedent lacked capacity on the date of its execution, and that it was the result of undue influence.

Specifically, the court concluded that Mr. Frazier's testimony gave rise to a strong inference of undue influence, based in particular, upon his complete insinuation into the decedent's life and financial affairs,

the decedent's dependence upon him for her basic needs, and his involvement in the preparation and execution of the instrument which made him the primary recipient of her estate. The court held that Mr. Frazier offered nothing to rebut this proof, but rather buttressed the result that the will of the decedent was the product of his own decision-making, and control over its preparation and execution.

Additionally, the court held that the record failed to support any claim that the decedent had the capacity to execute her will, especially given the proof that at or about the time the instrument was executed she suffered from confusion, was described by her neighbors as acting oddly, allowed a total stranger to have access to her personal finances and her daily, most intimate, health care needs, and the document was inconsistent in its terms.

Finally, the court found that Mr. Frazier had failed to prove that the will had been duly executed, that the decedent ever read the will, that she ever declared the instrument to be her will, and that the witnesses signed at her request.

Accordingly, probate was denied.

### **Triable Issues of Fact**

In *In re Besdansky*, NYLJ, April 18, 2011, p. 24, the Surrogate's Court, Kings County (Johnson, S.) denied a motion for summary judgment in a contested probate proceeding, on the grounds that triable issues of fact existed on the issues of testamentary capacity and undue influence.

The propounded will was dated April 26, 2004. The record revealed that approximately seven months prior to the execution of the instrument, the decedent was hospitalized for a three-day period. He was discharged from the hospital to an assisted living facility where he remained until his death. Shortly after his admission into the facility, the decedent contacted an attorney for purposes of drafting a will on his behalf. When counsel was questioned, he was unsure how the decedent obtained his name, and stated that he had never prepared a will for any resident of the adult home beforehand.

Counsel recommended that the decedent undergo a psychiatric examination prior to executing his will, inasmuch as he had stated he wanted to leave his entire estate in equal shares to the administrator of the adult home and the director of its Community Relations and Resident Care, and to nominate them as executors. The director of the home and the administrator's

spouse accompanied the decedent to the examination. At the conclusion thereof, the doctor reported that although the decedent evidenced some decline in memory and concentration, there were no noticeable signs of dementia, and as such, the decedent was deemed competent to make decisions and manage his financial affairs.

Several months later, the decedent executed his will, and also signed a notarized statement authorizing several financial institutions to add the names of the administrator and director to his bank accounts, bonds, safe deposit boxes, and other assets. In addition, he subsequently executed a durable power of attorney in favor of the attorney-draftsman.

Objections to probate were filed by the public administrator who alleged that the decedent lacked testamentary capacity and that the propounded instrument was procured by undue influence.

On the issue of capacity, the court found that the petitioners had established prima facie the decedent's mental capacity to execute the propounded will. Nevertheless, because the objectant submitted proof, in the way of an expert medical opinion, directly contradicting the evidence of capacity offered by the petitioners, the court concluded that a triable issue of fact existed concerning the decedent's testamentary capacity.

With respect to the issue of undue influence, the petitioners conceded that they were in a confidential relationship with the decedent, and the court indeed found that the decedent depended upon them for his care. The court opined that under such circumstances, transactions between the parties must be carefully scrutinized in order to insure that they were understood, and that there was no fraud, mistake or undue influence.

To this extent, the record revealed that the decedent, while generally a frugal man, who led a very solitary life, had nevertheless made a gift of \$250,000 to each of the petitioners within several months of taking up residence at the adult home, and disposed of the balance of his estate, amounting to an additional \$447,747, to each of the petitioners upon his death. The court concluded that this drastic change in the decedent's parsimonious ways was sufficient circumstantial evidence of undue influence to raise a triable issue of fact.

The court held that this determination was buttressed by the fact that petitioners had involved themselves in the psychiatric

examination of the decedent, which served as a prerequisite to the execution of the will in their favor. In so doing, the court concluded that they had insinuated themselves in the drafting of the instrument, which, when combined with their confidential relationship, caused an inference of undue influence to arise.

Accordingly, petitioners' motion for summary relief was denied.