SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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Probate Proceeding, Will of

STELIOS KALATHAKIS
a/k/a STELIOS D. KALATHAKIS,

Deceased.

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DECISION

File No. 2015-383734/C
Dec. No. 32132

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion..	1
Affirmation in Support with Exhibits.	2
Memorandum of Law in Support.	3
Affirmation of Counsel in Opposition with Exhibits.	4
Memorandum of Law in Opposition.	5
Affidavit of Objectant in Opposition.	6
Affidavits of Non-Parties in Opposition (6).	7
Reply Affirmation in Further Support of Motion.	8
Reply Memorandum of Law in Further Support of Motion.	9

In this contested probate proceeding, the proponents George Kalathakis and Anne Sifre move for an order pursuant to CPLR 3212 granting summary judgment, dismissing the objections of the respondent Nicole Pappas and admitting the propounded will dated March 26, 2008 to probate; the motion is opposed. For the reasons that follow, the motion is **GRANTED**.

Introduction

The decedent, Stelios Kalathakis, died on June 3, 2014, survived by two children, the proponents, George Kalathakis and Anne Sifre, and one grandchild, the objectant, Nicole Pappas, the daughter of a predeceased son James as his only distributees. The decedent's

wife, Eunice Kalathakis, predeceased on April 23, 2008 and his son James predeceased on August 13, 2006. The will offered for probate provides that the entire estate is payable to George and Anne; Nicole is expressly disinherited by the following language appearing in Article TWO,

> "I had a son James Kalathakis who predeceased me. James Kalthakis had a daughter Nicole Papadoulous[1] who is NOT to be a beneficiary nor is she to receive anything under this Will. Any reference to issue is to specifically exclude Nicole Papadoulous or any of her issue. I make this decision willingly and knowingly and do so due to an estranged relationship with Nicole Papadoulous."

The decedent Stelios Kalathakis was born in Greece in 1916 and it is believed he immigrated to the United States at about 19 or 20 years of age. He was 97 years of age when he died on June 3, 2014; his first language was Greek. His wife, Eunice, was born in New Hampshire in 1930; her first language was English. The decedent executed a series of wills culminating in the March 26, 2008 instrument that has been offered for probate. The last three wills disinherit the objectant, the last two of them explicitly. The issues of due execution and testamentary capacity are not raised as objections to the will. The objections are that the will dated March 26, 2008 is invalid because: (1) it was procured by the exercise of undue influence upon the decedent by George Kalathakis and Anne Sifre and/or some other person or persons; (2) it was procured by fraud upon the decedent by George Kalathakis and Anne Sifre and/or some other person or persons; (3) the will does not reflect

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[1] Nicole's surname was Papadopoulos after her marriage on July 24, 2004. She and her husband had their last name changed to Pappas in 2005. Her name before the 2005 name change is misspelled in the will.

the decedent's true intentions because it was not accurately explained to him, he thought the purpose of the will was for Medicaid planning, and it was too complicated for him to understand given his age, language barrier, etc.

The Motion

In support of the motion for summary judgment, the proponent submits, among other things: the transcript of the SCPA § 1404 examinations of Sandra Busell, Esq., the drafting attorney, and the attesting witnesses Dustin Cohen, Esq. and Valerie Burg, Esq.; deposition testimony of John Fishman, Esq., who drafted the prior instruments; and the deposition testimony of the objectant.

The drafting attorney, Sandra Busell, testified that she first met the decedent incident to her preparation of the will now offered for probate. Prior to that she did not know or ever provide legal services for the decedent, the proponents, or any other members of the Kalathakis family. Although both the decedent and his wife already had wills that had been prepared by John Fishman, they retained Ms. Busell for the purpose of executing new wills as part of Medicaid planning for the decedent's wife, Eunice. Ms. Busell, testified that at the time of her initial meeting with the decedent she believed that Eunice was in the hospital. When discussing the provisions of his will, Ms. Busell testified that she remembered specifically that the decedent had told her that his late son James had a daughter who was estranged from the family "and that under no circumstances was she to inherit anything under his will." When asked whether the decedent could understand the English language, her response was "Perfectly." Ms. Busell also testified that although she believes both petitioners

may have been at her office for the initial meeting, her practice is always to ask anyone other than the testator to leave the room so that the testator can feel that he or she can speak freely to her about their testamentary wishes outside the presence of family or any other person. She also testified that she insists that the person for whom she is drafting the will give her all of the information, including a family tree, names of children and their spouses, etc. After speaking privately with the testator she may ask the testator if he would like any of the people who accompanied him to the office to come back into the room. She testified she was not sure but believed that the decedent asked his son and daughter back into the room. Ms. Busell explained that her procedure for the execution of the will is initially for there to be no one in the room other than she and the testator and perhaps the attesting witnesses. If the attesting witnesses are not in the room at the outset, she has them come in after she has spoken with the testator for a few minutes. Regarding the decedent's ability to speak and read English, Ms. Busell testified it is also her usual practice to have the testator read aloud the first paragraph of the will unassisted so that the attesting witnesses can honestly attest that the testator was able to read in the English language. It is also her usual practice to have the testator read aloud any paragraph of the will that disinherits someone. She testified that she had a specific recollection of the decedent reading that provision of the will out loud. She reiterated that no other people are present in the room when the will is executed.

The attesting witnesses, Dustin Cohen and Valerie Burg, both attorneys who were in Ms. Busell's employ when the will was executed, largely corroborated her testimony

regarding the will execution ceremony. The court notes that the will has an attestation clause and a self-proving affidavit.

During the deposition of the objectant, the proponents' attorney elicited that she and/or her mother saved all of the many birthday and holiday cards that she received from her grandparents Stelios and Eunice practically from her birth in 1980. The last card produced was a Christmas card from the year 2003. The objectant was not able to explain why she did not receive any further cards from her grandparents after Christmas of 2003. The proponents contend the reason is that the objectant was estranged from the family at least since the time of her marriage in July 2004. The objectant herself conceded that her father did not want her to get married, thinking that she was too young to marry. She got married anyway, despite knowing his strong misgivings. The wedding took place in Greece, but no member of the Kalathakis family was present. The rift between the objectant and her father was evidently quite deep as the objectant's wedding invitation is from the groom's parents and the objectant's mother; her father is not even mentioned on the wedding invitation. Her testimony also reveals that although she claims that she spoke to her father "once or twice" in 2005, she did not see him at all in 2005 nor in 2006 prior to his death in August.

Opposition to the Motion

In opposition to the motion the objectant has offered excerpts of the deposition transcripts of George Kalathakis, Anne Sifre, John Fishman, Esq., and some documentary evidence including copies of memoranda of John Fishman dated October 25, 2006 and January 24, 2008, and a letter from attorney Sandra Busell to George Kalathaksi dated

April 25, 2008. In addition, the objectant has offered testimony in the form of affidavits from several of objectant's friends who have known over a period of many years as well as the affidavits of the objectant's husband and mother, as well as her own affidavit.

The affidavits from the friends generally depict a close family relationship between the objectant and her father and grandparents. The affidavit of the objectant's husband is replete with innuendo regarding the bad character of George Kalathakis and his own mother and contrasts that with his assessment of the good character and selflessness of his wife. The affidavit of the objectant's mother, a psychotherapist, is more direct in casting aspersions on the petitioners. Her affidavit is extraordinary in its suggestions regarding the psychological makeup of the petitioners and the Kalathakis family in general and its sweeping explanation of Greek family dynamics. What none of this proffered testimony does is offer any evidence of the exercise of any fraud or undue influence on the testator by the petitioners.

The memoranda and excerpts of the deposition testimony of John Fishman are offered to show that Fishman did not believe the testator was capable of executing a will that was not translated into Greek. An examination of his entire deposition transcript leads to an entirely different conclusion. Fishman had known the Kalathakis family since he was a boy, having gone to school with James Kalathakis, though at the time of the meeting in 2006 he had not seen James in years. He testified that after his return to Freeport to open his law practice, he rented an apartment from the decedent and his wife. Mr. Fishman's deposition testimony reveals that he prepared wills for the decedent and his wife in 1989 or 1990. He was then contacted by Eunice in the summer or early fall of 2006 because they wanted to have new

wills prepared. Fishman testified that the decedent was engaged in the conversation and as far as he could tell, the decedent understood everything he and Eunice said. The decedent and Eunice told Fishman they wanted him to prepare reciprocal wills that would provide that on the death of the second of them all of their assets would pass equally to their son George and daughter Anne. He testified that they told him the reason they did not want to leave anything to James's daughter was that there had been no contact between them and Nicole for a material period of time and that was upsetting to them. Fishman also testified to his usual practice, which is to go over each and every paragraph of a will with the client before it is signed.

Fraud and Undue Influence

The objectant bears the burden of proof on the separate issues of fraud and undue influence (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 182 AD2d 260 [2d Dept 1981]). To prove fraud, the objectants must show by clear and convincing evidence that a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the statement (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Coniglio*, 242 AD2d 901 [2d Dept 1997]). The record is devoid of any evidence that the will was the product of fraud. In fact, when asked directly if she had any basis for her possible belief that either of the petitioners made any false statements to the decedent, the objectant answered "No." The branch of the motion for summary judgment dismissing the fraud objection is therefore **GRANTED**.

Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 PJI, Civil, 7:55). It is seldom practiced openly, but it is the product of persistent and subtle suggestion imposed upon a maker fostered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). However, without a showing that such undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]).

In *Matter of Zirinsky* (10 Misc 3d 1052 [A] [Sur Ct, Nassau County [2005] *affd* 43 AD3d 946 [2d Dept 2007]), this court stated the factors to indicate the exercise of undue influence as: 1) the physical and mental condition of the testator; 2) whether the attorney who drafted the will was the testator's attorney; 3) whether the propounded instrument deviates from the testator's prior testamentary pattern; 4) whether the person who allegedly wielded undue influence was in a position of trust; and 5) whether the testator was isolated from the objects of his natural affection.

Here, there is no evidence in the record that the decedent suffered from any physical or mental condition that would affect his ability to execute a valid will.

The record is not clear as to how Sandra Busell came to be retained to draft the will offered for probate other than that she was knowledgeable in Medicaid planning. It is also important to remember that the first instrument that disinherited the objectant was not drafted

by Ms. Busell at all, but by Mr. Fishman who both the decedent and his wife had known since Mr. Fishman's childhood. And the record is clear that it was the decedent's wife and not either of the petitioners who first contacted Mr. Fishman about drafting wills and that both the decedent and his wife executed wills disinheriting the objectant.

The record is also devoid of evidence that the objectant was ever named as a beneficiary in any prior will of the decedent.

Even assuming that either or both of the petitioners were in a position of trust, that is only one of several factors to consider and even if a confidential relationship has been established, which is clearly not the case here, the presence of a family relationship is usually sufficient to rebut any adverse inference (*Matter of Swain,* 125 AD2d 574, 575 [2d Dept 1986] appeal denied 69 NY2d 611 [1987]; *Matter of Prevratil,* 121 AD3d 137, 143 [3d Dept 2014]; *Matter of Anella,* 88 AD3d 993, 995 [2d Dept 2011]). Nor is there any evidence that the decedent was dependent on either of the petitioners at the time the will was executed for day to day living. Although the petitioners drove the decedent to Ms. Busell's office, at that time he was no longer driving and while petitioner George Kalathakis conceded that he sometimes wrote out checks for the decedent, that does not amount to undue influence but merely reflects an elderly parent depending on his children for some assistance in his later years (*Matter of Tagliagambe,* 30 Misc3d 1235 [A] [Sur Ct, Kings County 2011]).

The record is also devoid of any evidence that the petitioners isolated the decedent from other members of the family. It would be difficult to conceive how petitioner Anne Sifre could accomplish this from her home in Poughkeepsie. And the objectant's own

testimony is that she continued to visit the decedent periodically during the six-year period from the execution of the will until the decedent's death.

To reiterate, the objectant's burden is to establish, based on admissible evidence, that an issue of fact exists that whatever influence either or both of the petitioners may have exerted on the decedent "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 his free will and desire . . . by a silent resistless power which the strong will often exercises against the weak and infirm . . . " (*Children's Aid Society v Loveridge,* 70 NY 387, 394 [1877]; *accord Matter of Kumstar,* 66 NY2d 691, 693 [1985]). The court finds that the objectant has not come close to meeting this burden.

Accordingly, the branch of the motion to dismiss the objection based on undue influence is also **GRANTED**.

Third Objection to Probate

The third objection interposed to the admission of the propounded instrument to probate is that the document does not reflect the decedent's true testamentary wishes because it was never adequately explained to him or he believed the purpose of the will was merely for Medicaid planning purposes and not to disinherit the objectant, and that it was too difficult for him to understand given his age, the existence of a language barrier, medical impairments, etc.

The court recognizes that where the testator is not fluent in English, the proponent has a greater burden in proving that the mind of the testator accompanied the act, and the

instrument executed speaks his intent (*Watson v Watson*, 37 AD2d 897, 898 [3d Dept 1971]), because if the decedent had difficulty with the English language, there is the possibility that he did not understand the significance of what he was doing (*Matter of Henig*, NYLJ, Dec. 24, 2001, at 29, col. 2 [Sur Ct, Kings County 2001]). There must be evidence showing that it was explained to him in a manner he could understand (*Matter of Henig*, NYLJ, Dec. 24, 2001, at 29, col. 2 [Sur Ct, Kings County 2001]). Even assuming for argument's sake that the decedent had difficulty with the English language, Ms. Busell's testimony satisfies the court that the will was, in fact, adequately explained to the decedent and the objectant has not offered any evidence to prove otherwise. The court notes that Mr. Fishman testified that he drafted two wills each for the decedent and Eunice, both of which disinherited Nicole. The first of the two wills was executed on October 24, 2016 and simply provided that the residuary estate was left to George and Anne without any mention of Nicole. Almost immediately thereafter, Mr. Fishman expressed his concerns to the decedent and Eunice that the will should make a more explicit statement as to why Nicole was being disinherited. Mr. Fishman also recommended having the will translated into Greek as a precaution in the event of a probate contest by the objectant. Mr. Fishman recommended this course even though he believed that the decedent knew precisely what he was doing and that the will reflected what the decedent wanted done. Mr. Fishman testified that drafts of these revised reciprocal wills of the decedent and Eunice were mailed under cover of a letter dated November 21, 2006 that notified the decedent and Eunice that these new wills contained a clause specifically disinheriting Nicole Papadopolous, their granddaughter by their son James.

These wills were executed at the decedent's church on January 31, 2007 and were translated into Greek by the priest. Mr. Fishman's deposition testimony was that the decedent was "slightly insulted" that Mr. Fishman wanted the will translated into Greek because he could read English and did not need a translator. Finally, Mr. Fishman testified that when the priest realized that the will was disinheriting Nicole, he tried to dissuade the decedent from executing the will, telling the decedent it wasn't right and that he shouldn't disinherit his granddaughter. Mr. Fishman testified however that the decedent was animated the whole time and told the priest that disinheriting his granddaughter was what he wanted to do. Although all of this testimony was in relation to the prior will dated January 31, 2007 and not the March 26, 2008 instrument being offered for probate, it establishes, contrary to the objectant's contention, that he was not mistaken or under any misunderstanding about disinheriting her from sharing in his estate.

Accordingly, the petitioners' motion for summary judgment is **GRANTED** and all objections to probate are dismissed.

Settle decree.

Dated: June 22, 2017
Mineola, New York

E N T E R:

_____
HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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