Matter of Loe
2019 NY Slip Op 30310(U)
February 13, 2019
Surrogate's Court, New York County
Docket Number: 2013-1058
Judge: Nora S. Anderson

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New York County Surrogate's Court
Date: February 13, 2019

SURROGATE'S COURT : COUNTY OF NEW YORK

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In the Matter of a Petition for Probate in the Estate of

JUDITH DORNSTEIN LOE,

Deceased.

File No. 2013-1058

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ANDERSON, S.:

Proponent, the nominated executor, moves for summary judgment (CPLR 3212) dismissing objections to probate of an instrument executed on January 25, 2011. The propounded instrument bequeaths $200,000 to decedent's "doorman and friend," leaves the residuary estate to Brown University (the alma mater of decedent's predeceased son), and expressly disinherits decedent's two surviving children.

Factual Background

Decedent died on February 13, 2013, at the age of 73, survived by her daughter and son (objectants). She left an estate valued at approximately four million dollars, most of which consisted of proceeds from settlements of her claims for the wrongful death of her oldest child in the 1988 bombing of a Pan American flight over Lockerbie, Scotland.

By the time of her death, decedent had lived in New York City for more than 30 years, having moved from Pennsylvania following her 1974 divorce from her children's father. Objectants allege that at some points before and after the divorce decedent had been a patient in unidentified mental-health facilities, although they fail to provide any details or proof in that connection. Even if the unsubstantiated allegation is true, the record is silent as to the location and duration of decedent's stays, the specific nature of the problems that led to her confinements, and whether those confinements were voluntary or involuntary. The record contains some evidence of an episode, prior the 1974 divorce, in which decedent used LSD to her subsequent

regret. There is further evidence that she blamed her then husband for having encouraged her to take the drug (or, in her later complaint to third parties, for "poisoning her"). But beyond surmise the record does not show what, if any, long-term harm was caused by the alleged drug use.

Objectants offer sworn statements of witnesses who had dealt with decedent before and after she executed the instrument in which they collectively agree that decedent appeared to have been chronically lonely, uncomfortable in her own skin, and socially maladroit.

In another sworn statement, objectant son avers that, despite his years-long "extraordinary effort" to maintain contact with decedent "regularly," decedent remained emotionally and geographically distant from him and his siblings–a characterization that is echoed by his sister in her own affidavit. Both objectants further aver that decedent never evinced any significant interest in their professional achievements or, after they married and had their own children, in their families (whom decedent never met, either by her choice, according to objectants, or by her children's, as she complained to third parties).

To the extent reflected by the record, decedent's other interactions were with her brother and his wife; with a psychiatrist whom she regularly consulted for some 18 years; with other medical doctors; with the staff of the building where she lived, including the long-time doorman to whom she left the bequest of $200,000; with lawyers in the Lockerbie litigation and, after she collected settlement proceeds, in relation to her estate planning; and with financial advisers and managers of her investment accounts.

The record is clear that decedent's oldest child eventually came to be the dominant figure in her life, even after his death. Following his graduation from college, he moved to New

York City in 1985, to seek opportunities as a writer. According to objectants, the son reported to them that during the three-or-so years that he resided in New York he and decedent lived only two streets apart but had very little personal contact and what contact he and she had caused him agitation. Affidavits from decedent's brother and sister-in-law, in whose apartment the son lived, tell a different story. According to them (neither of whom has an interest under the propounded will), the son joined them in visits to decedent at her home, and the son and decedent occasionally spent time alone together. A lengthy, somewhat teasing, hand-written note from the son to decedent, penned during his sojourn in Israel a few months before his death and ending, "Love you ma," suggests that their relationship may have been less unremittingly dark than objectants contend.

Whatever the truth as to decedent's relationship with the eldest of her children, her expressions of grief following the Lockerbie bombing were typical of a parent who had lost a child. In both of her wills, the first in September 2010 and the propounded instrument a few months later, she honored her son's memory by giving her entire residuary estate to the son's alma mater for a permanent scholarship fund in his name. Both instruments contained a substantial pecuniary bequest to a doorman of decedent's apartment building, with "thanks for the aid[] and comfort" he had given her in the wake of her son's death, and both instruments nominated the same attorney-drafter as executor. The most significant difference between the two instruments is that the later propounded will omits the former's sizeable pecuniary bequest to a bank employee who managed decedent's investment account. Decedent made the new will after the bank employee asked her to retract the bequest to him in order to avoid violating a policy of his employer. Both wills, however, unequivocally disinherited objectants and their

children, "for reasons best known to them."

The settlement awards that decedent received were the product of a years-long wrongful-death litigation in which decedent and her ex-husband were jointly represented, she as the victim's mother, he as the victim's father and administrator of the victim's estate. As described by the lawyer who represented the two, the litigation with the airline and Libya (the "Lockerbie litigation") had a sub-text, the clients negotiating inter se their respective and potentially competing shares in the prospective wrongful-death recoveries. In the end, the recoveries by the clients were not equal, the ex-husband receiving a somewhat larger share than decedent. The inequality aroused some bitterness on decedent's part, as expressed in witness letters that she wrote to her lawyer at the time.

During the Lockerbie litigation, decedent and objectants had contact by telephone, although the record is not clear as to the frequency of the calls or to what point they continued. Ojbectants claim that these communications had a disquieting effect on objectants and decedent alike. Among their disturbing aspects, as reported by objectants in their affidavits, were decedent's boasts that a highly publicized missing person might be found in a hotel that abutted decedent's apartment building and that decedent had been instrumental in obtaining settlement concessions from Libyan strongman Muammar Gaddafi. On the other hand, in the aftermath of such discussions, decedent for her part reported bitterly to third parties that objectants resented the prospect, and then the reality, of her being financially enriched by the son's death, and that it was objectants themselves who discouraged any overture by decedent toward reconciliation. As objectants' papers put it, she repeatedly complained to them and to others that they had tried to "'steal'" from her what was, in her view, her rightful share of the wrongful death settlement

proceeds.

Decedent died after battling leukemia for more than a year. Objectants proffer that the various medications prescribed for her over the preceding decades indicate that this was not her first struggle with a physical-health issue. There is considerable evidence that she was dependent on pain-killers (perhaps initially prescribed to treat a back problem) during much if not all of her adult life and that at some unspecified time and duration in her past she had been dependent on alcohol.

Principles applicable to a motion for summary determination (CPLR 3212)

The premise of a motion under CPLR 3212 is that there is no triable issue of material fact to stand in the way of an adjudication based on the present record alone. If the movant fails to make a prima facie case for his position as to the merits, the motion must be denied, without need to consider the papers in opposition. If the movant does make such a case, however, his adversary can resist a summary ruling only by submitting evidence that creates a genuine question of material fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

The movant cannot use hearsay evidence to make his case for summary determination (*see Zuckerman v City of New York*, 49 NY2d 557, nor can he use evidence that would violate the Dead Man's Statute (CPLR 4519). By contrast, the opposing party may use evidence that is hearsay or would be subject to a 4519 objection at trial, provided that such evidence is not the only proof for establishing the existence of a genuine question as to a material fact (*see Phillips v Kantor & Co.*, 31 NY2d 307; *People v Greenberg*, 95 AD3d 474 [1st Dept 2012]).

Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such a ruling should be considered with caution (*F. Garofalo Elec. C.*

v NY Univ., 300 AD2d 186, 188 [1st Dept 2002]. On the other hand, "timidity in exercising the power [to rule summarily] in favor of a legitimate claim and against an unmerited one ... contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation" *(Di Sabato v Soffes,* 9 AD2d 297, 299 [1st Dept 1959]).

The party opposing the motion must be allowed the benefit of any reasonable inference in that party's favor. However, a credibility issue cannot be resolved on such a motion (*Dauman Displays v Masturzo*, *supra*, at 205). Finally, the opposing party's allegations must be "substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 (2d Dept 1981).

The objections

Objectants raise two discrete grounds for denial of probate, (1) lack of capacity and (2) lack of due execution. As the papers before the court make clear, however, objectants question due execution only on the theory that decedent did not have capacity to execute the propounded instrument and thus could not have duly executed it. In substance, therefore, lack of capacity is objectants' sole ground for challenging the instrument.

The mental capacity required to create a valid will is less than that required to take any other type of legal step (*see Matter of Coddington*, 281 AD 143 [3d Dept 1952], *aff'd* 307 NY 181 [1954]). For purposes of executing a will, an individual "need not have perfect mind or memory" (*Matter of Horton*, 26 Misc 2d 843, 847 [Sur Ct, Suffolk County 1960, *affd* 13 AD2d 506 [2d Dept 1961]). Nor does "old age, physical weakness [or even] senile dementia" per se disqualify an individual from having capacity to execute a will (*see Matter of Hedges*, 100 AD2d 586, 588 [2d Dept 1984]).

As a general rule, to have sufficient capacity an individual must have at least a rudimentary understanding of the nature and extent of her property and the function and content of the will disposing of that property, as well as the awareness of the identity of those who would ordinarily be the natural objects of her bounty (*see Matter of Kumstar*, 66 NY2d 691), *rearg denied* 80 NY2d 752 [1992]). But even where this general standard of testamentary capacity has been satisfied, the will at issue may nonetheless be invalidated if its provisions are or may be traceable to a delusion on the decedent's part (*see Matter of Honigman,* 8NY2d 244 [1960]; *Matter of Zielinski*, 208 AD2d 275 [2d Dept 1995]. The objections in this case allege that decedent did not have testamentary capacity in its general sense, but that, even if she did, the propounded instrument was in any event the product of her delusions as to objectants and was thus invalid.

Movant makes a prima facie case that decedent had testamentary capacity at the relevant point, *i.e.*, at or near the time that she executed the will (*Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]. Toward that end, he is aided by a presumption of capacity created by the attesting witnesses' averments, in their contemporaneous affidavit, as to the soundness of decedent's mind (*see Matter of Leach*, 3 AD3d 763 [3d Dept 2004]) when she executed the will. He is further aided by the testimony of, among others, the psychiatrist who treated her for many years, to the effect that he had observed her to be, although chronically depressed, at all times in touch with realty; her brother; proponent (to the extent that he speaks from direct knowledge), who had several discussions with decedent before he drafted the propounded (as well as penultimate) instrument and who supervised its execution; individuals at the bank who serviced decedent's accounts and whom decedent consulted with some frequency at or near the time she executed the

propounded instrument; and members of the custodial staff at the apartment building in which decedent resided. The witnesses' descriptions of decedent's verbal exchanges with them during the time proximate to the will's execution indicate that she well understood the extent and composition of her assets and the purpose and content of the will that she was executing, and further understood that objectants might ordinarily have been expected to be objects of her bounty. Indeed, the language in the will that she was disinheriting her children "for reasons best known to them" demonstrates her recognition of her children as the natural objects of her bounty.

The court must now consider whether objectants' proofs create a genuine factual issue as to decedent's testamentary capacity. To support their proposition that decedent did not meet the general standard for testamentary capacity, objectants refer to decedent's unspecified hospital confinements many decades before she executed the propounded instrument; decedent's medical records, showing that decedent had for years been dependent on prescribed drugs; affidavits and depositions in which several individuals, objectants included, attest to decedent's problematic comportment toward others; purportedly telling evidence of the disarray in which decedent had left her apartment when, near death, she was taken by ambulance to the hospital; and a psychiatrist's report offered by objectants as expert testimony.

The court finds that the foregoing is insufficient to create a *genuine* issue of fact as to whether decedent satisfied the general standard for capacity. As noted above, capacity is to be gauged as of the time at which the decedent executed her will. Thus, even if objectants' references to decedent's long-ago hospitalizations were supported and detailed by medical records (which they are not) and were therefore meaningful for *present* purposes (*see Zuckerman v City of New York*, 49 NY2d 557), they are of dubious relevancy in view of their remoteness in

time from the propounded instrument's execution, especially in view of decisional authority to the effect that,

> "even where a person is at times wholly insane, a will may properly be executed during a lucid interval. In numerous cases, wills have been sustained that have been executed during such period even after committees have been appointed .... [Thus, in] 'Carter v Beckwith (128 N.Y. 312) it was held that one who has been judicially determined to be a lunatic ... is incapable of entering into a contract ... [but t]his, however, does not apply to the making of a will'" (*Matter of White*, 2 NY2d 309, 320 [1957]).

By extension, in the absence of evidence that decedent was actually impaired at the time she executed the propounded instrument, evidence of past alcohol dependency is in no way probative as to whether she was lucid at the time the propounded instrument was executed. Nor is the fact that she was taking prescription drugs at the relevant time per se proof that she was too mentally impaired to execute a will with the requisite competence (*see Hagan v Sone*, 174 NY 317, 321 [1903]); *see also Poluliah v Fidelity High Income Fund*, 102 AD2d 720, 723 [1st Dept 1984]). As for a reference by objectants to "psychotic schizophrenia" noted in the autopsy ordered by objectants in the report of the medical examiner, it does not add to objectants' position, since the reference is identified in the report as "anamnestic" (*i.e.*, from the recollection of an informant–who in this case was one of the objectants). This is not to ignore that objectants have submitted an affidavit from an expert, a psychiatrist, who expresses his opinion that decedent suffered from, among other things, a "chronic psychotic disorder" compounded by her use of prescription drugs and alcohol. But, significantly, the expert never treated or examined decedent and never discussed decedent's mental condition with any of her medical providers. Instead, his opinion as to decedent's testamentary capacity under the general standard is based

upon his review of her medical records and non-medical documents before the court on this motion, as well as his interviews with objectants. The non-medical documents do not begin to create a genuine question as to decedent's capacity under the general standard. Thus, in effect, the medical records constitute the sole basis for the expert's opinion. Where, as here, there is direct evidence of general capacity drawn from the observations of witnesses (including her treating physicians) at the relevant time period, precedents have rejected the proposition that a non-treating medical expert can create a genuine fact issue based on review of medical records alone (*see, e.g.*, *Matter of Katz*, 103 AD3d 484 [1st Dept 2013]; *Matter of Van Patten*, 215 AD2d 947 [3d Dept 1995]; *Matter of Redington,* NYLJ, Jul. 18, 2014, at 24, col 1 [Sur Ct, NY County]; *see also Matter of Van Patten,* 215 AD2d 947 [3d Dept 1995]; *Matter of Vukich*, 53 AD2d 1029 [4th Dept 1976]; *Matter of Boyd*, 27 Misc 3d 1230[A] [Sur Ct, Dutchess County 2010]).

It remains to be determined, however, whether objectants' proofs create a genuine question of fact as to whether the propounded instrument was, or may have been (*see Matter of Zielinski, supra*), the product of a delusion that deprived decedent of the requisite capacity to execute a will ("Even if it could be said that decedent had general testamentary capacity, she could, at the same time, have an insane delusion which controlled the testamentary act, thus rendering it invalid ..." *Matter of Zielinski*, 208 AD2d 275, 279 (3d Dept 1995).

The nature of a delusion that invalidates a testamentary instrument is as follows:

> "Insane delusion is characterized by a 'persisten[t belief in] supposed facts [having] no real existence' coupled with conduct taken upon the 'assumption of their existence ..." *Matter of Pilon*, 9 AD3d 771, 773 (3d Dept 2004)(*quoting American Seamen's Friend Socy v Hopper*, 33 NY 619).

Objectants contend that decedent suffered from several delusions. A few of them would be of the grandiose or hyper-dramatic variety, *i.e.*, her alleged claims to a critical insight as to the whereabouts of a much-publicized missing person and to an important role in the U.S. State Department's dealings with Gaddafi in the Lockerbie litigation. But even if decedent did in fact suffer from those delusions, that could not avail objectants here, since nothing in the record connects such delusions to the provisions or execution of the propounded instrument (*see Matter of White*, 2 NY2d 309, 320 ["'A man may even have an insane delusion and yet be able to make a valid will; for the will to be invalid must be the result itself of the delusion'," *quoting Dobie v Armstrong,* 160 NY 584, at 593]; *Moritz v Moritz*, 153 AD 147, 152 [1st Dept. 1912]). Objectants have failed to show how the testamentary instrument was the result of the above described delusions.

But the crux of objectants' delusion theory is that decedent labored under delusions that amounted to a twisted view of them and their interrelationship with her. As to one such alleged delusion, objectants testify to the hearsy report of a great-aunt that decedent at some unspecified point had accused them of complicity in the bombing that caused the death of their brother. However, objectants' hearsay testimony as to that report is not supported by any other evidence, and it therefore cannot be used to resist summary judgment (*see Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011]; *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246,2447 (1st Dept 2002); *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1st Dept 1999]).

Furthermore, objectants do not attempt to trace their disinheritance to a belief on decedent's part that they had a role in the bombing over Lockerbie. Nor do they attribute their

disinheritance to a belief that they had tried to "steal" her wrongful death recovery. Instead, their theory as to delusion (described in their respective affidavits) is that decedent disinherited them as the result of her "clearly distorted view of her relationship with all three of her children," including the "unfounded belief" that objectants colluded with their father to try to cheat her of her share of the recovery. Hence the documents that they submit in support of such theory, consisting of two letters written by decedent, in the 1990's, to the lawyer who was then representing his parents in the Lockerbie litigation. In the earlier letter, decedent lamented – as a "triple tragedy"-- the "loss of" her "beautiful ... bright and sharp" surviving children (in addition to the death of her "favorite" child) in the "fight[] over money." Her younger son, she explained, "consistently and emphatically warned me about the "battle" that he believed would ensue between my ex-husband, his wife, and all of this side if I even got a "penny" of this money." In the second letter, written almost three years later (and at least 10 years prior to the will's execution), decedent expressed concern that she might be deprived of her share of the settlement proceeds, a concern that, according to her, was prompted by objectants' "threat[] that if I did not 'turn over' the entire amount to them I face serious consequences of never having contact with them ever again." "I know it sounds bazarre [sic]," decedent added, but this kind of 'terrorist tactic' prompted me to ,,, write this note" (emphasis in original).

Objectants have submitted considerable proof that decedent claimed to have suffered a grievous loss (in the death of her eldest child) that entitled her to monetary reparation and that she thought objectants resented those claims. As indicated above, objectants have also submitted evidence of decedent's bitter suspicion that they and their father would have prevented her from collecting any part of a wrongful death recovery if they had been able to do so. Moreover, other

proof – *i.e.*, the testimony of various third parties – shows that decedent retained those perceptions to the time she executed the propounded instrument, and, indeed, thereafter.

It remains to be determined, however, whether objectants' proofs bespeak a "delusion" on decedent's part within the meaning of legal precedents. As it happens, that question must be resolved against objectants in view of their own submissions on this motion and in light of the relevant authorities. The guidance furnished by such authorities includes the following observation by our Court of Appeals in a seminal decision:

> "On questions of testamentary capacity courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation. These qualities of mind may exist in a high degree and yet ... the subject may be sane and competent to perform a legal act ..." (*American Seamen's Friend Socy. v Hopper, supra*, at 625).

For present purposes it may be accepted that objectants' disinheritance by decedent was but an extension of maternal deprivations that they had suffered (as one of the objectants puts it, after being "abandon[ed]" at tender ages, objectants "had none of the normal loving, parent-child relationship that we very much desired"). Still, in light of the foregoing precedents, such assumption cannot stretch objectants' proofs to the point at which a genuine issue as to capacity would be raised. For objectants' own version of their relations with decedent provides more than adequate basis for the beliefs that they claim were delusional on her part.

Thus, objectants' effort to show that decedent was deluded in her belief that there had ever been a loving mother-child relationship, including with the child who died, in effect proves too much. Their own testimony discloses that from objectants' perspective decedent was fooling both herself and the world when she expressed a deep sense of loss at the death of her eldest and

when she applied for, and ultimately received, damages for such loss. Objectants have not attempted to show that their opinion as to the mother-child relationships had been different while decedent was still alive. To the contrary, objectants submit an extract from a writing by one of them, published during decedent's lifetime, to the effect that decedent's concern in the wake of her eldest child's death was merely "to be one of the grief celebrities " created by the Lockerbie bombing. Whether or not decedent ever read that publication, it expressed its author's then view of her (a view shared by his sister, as witness her testimony on this motion), which he in words or substance reiterates here. Objectants have offered no evidence to show that they had tried to keep their strongly negative opinion of their mother hidden from her during their strained discussions with her, much less that they could have succeeded in doing so if they had tried.

As to decedent's purported delusions concerning objectants' "intentions" with respect to the settlement funds that decedent at first pursued and then ultimately collected, their own testimony on this motion is also tellingly against them. At the least, that testimony reflects objectants' disapproval of decedent's claims to moneys designed to compensate her for the loss of her eldest child's love and companionship – which objectants are adamant that she never had – and of his future support – which they are also adamant he would never have wanted to give her had he lived. Objectants' respective affidavits provide no basis for deeming decedent as "deluded" to have thought that they resented her lifetime and testamentary control of such funds. Thus, for example, the objectant son discloses that he had chastised decedent for having used an advance on the settlement to pay for some cosmetic surgery, rather than for a charitable donation, and for failing to make a lifetime donation to charity of at least part of what she collected. Moreover, both objectants, in nearly identical terms, explain that, "Given that essentially all of

the money in [decedent's] estate came not from her life's work – she did not work at all during the last several decades of her life – but as part of a settlement award relating to the death of our brother – [we] felt it particularly important that this settlement money be distributed in the appropriate manner" – *i.e.*, at this point, to themselves as decedent's intestate distributees.

For purposes of this motion, the court need not determine whether decedent's claim to have had a loving relationship with the son who died was a fiction that she sold to herself and others. Nor need the court determine the degree to which decedent's explanations to others (and perhaps to herself) for her estrangement from objectants accorded with reality. Instead, in the end the court need only note what objectants' own proofs make clear, *i.e.*, that decedent's own answers to these questions was critically important to her. Thus, the reality with which decedent clearly was in touch – *i.e.*, that objectants' view of these matters was the very opposite of hers and utterly unflattering to her -- could only have been, for her, a most bitter pill to swallow.

None of the foregoing is to say that objectants were or are necessarily wrong to protest the familial circumstances that they describe in their papers. It is only to recognize that where, as here, a testamentary instrument passes legal muster, a probate court cannot deny probate in the hope of easing pain that the testator may have caused outside the ambit of the will. As a prior Surrogate noted in summarily dismissing objections alleging insane delusion on the part of the decedent in the case before her,

> "[T]o show lack of testamentary capacity because of insane delusion, objectant must show more than that the testatrix'[s] belief ... was incorrect. The right of a testator to dispose of his estate ... depends neither on the justice of his prejudices nor the soundness of his reasoning. ... If there be no defect of testamentary capacity, ... the law

> gives effect to his will, though its provisions are unreasonable and unjust (Clapp v Fullerton, 34 NY 190, 197)" *(Matter of Dwyer*, NYLJ, Sept. 12, 1996, at 22, col 1 [NY County 1996]).

See *Matter of White, supra* [the decedent's belief that son conspired to cheat him not "insane delusion" even if it was "perverse and "unreasonable"]; *Matter of Turner*, 56 AD3d 863, at 865 [3d Dept. 2008][summary judgment dismissing insane-delusion theory of objecting daughter: "misunderstandings and unjust opinions standing alone are insufficient ..."; *Matter of Pilon,* 9 AD3d 771[3d Dept. 2004][dismissal of objection alleging "insane delusion" as to the decedent's belief that four of his grandchildren "did not care about him," the *Pilon* court echoing an earlier court's observation that a "'belief may be utterly preposterous and unfounded ..., but it is not an insane delusion if there was the slightest basis for the testator's belief'," at 773]). Finally, to the extent that objectants would depend upon their expert's opinion and review of medical records to compensate for the insufficiency of their non-medical evidence as to a relevant delusion, that reliance would be misplaced for the same reasons discussed above in relation to his opinion as to her capacity under the general standard.

For the foregoing reasons, proponent's motion is granted, and the objections are dismissed. This decision constitutes the order of the court.

Dated: February 13, 2019

SURROGATE