**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**KENT, SC.** **SUPERIOR COURT**

**[FILED: July 18, 2019]**

**In re: ESTATE of EDWIN OGRODNIK : C.A. No. KP-2016-0684**

# DECISION

**MCGUIRL, J.** In this will contest, John Ogrodnik (John) appeals from the decision of the West Greenwich Probate Court to admit into probate the purported Last Will and Testament (Will) of decedent Edwin Ogrodnik (Edwin).[1] Jurisdiction is pursuant to chapter 23 of title 33 of the Rhode Island General Laws.

## I

## Facts and Travel

On May 13, 2014, eighty-two-year old Edwin signed a will for the first time in his life. At the time, he lived in his West Greenwich home with his forty-six-year old companion and caretaker, Metaxia Zarokostas. John is Edwin's only living child, and he has challenged the circumstances leading up to and surrounding the signing of the Will.

In approximately the year 2000, Edwin, who was a retired divorcee at the time, met Ms. Zarokostas while she was waitressing at a diner-restaurant called the Gentleman Farmer. They struck up a friendship, and sometime in 2005, Edwin offered to house her and her two children at his home in return for her companionship and caretaking abilities. In that capacity, Ms. Zarokostas purchased groceries, cooked meals, and cleaned the house. Although she and Edwin shared the

[1] As they share the same last name, the Court will refer to the father and son by their first names for clarity.

same bed, they did not have a physical relationship; rather, they were close friends with a platonic, loving relationship and, until he became too ill, they did almost everything together. Edwin told Ms. Zarokostas several times that he would take care of her after his death.

In 2011, Edwin, Ms. Zarokostas, and Scott Chase—a cook at the diner-restaurant—entered into a business relationship whereby Ms. Zarokostas and Mr. Chase each purchased a twenty-four percent interest in the diner-restaurant, while Edwin purchased a fifty-two percent interest in same. Attorney G. John Gazerro, Jr. (Mr. Gazerro, Jr.), an attorney who had been practicing law since 1965, represented the purchasers in this transaction. Thereafter, Mr. Gazerro Jr. managed the annual report and the annual minutes for the business, and Edwin's personal accountant, Conrad R. Burns (Mr. Burns), managed the business accounts. Upon Edwin's death, Ms. Zarokostas inherited Edwin's interest in the business.

Edwin's only child John currently lives in Florida. Before that, he lived out of state. John is the father of Edwin's only grandchild. Over the years, John regularly visited his father in Rhode Island, and Edwin also would visit John in Florida. Whenever John came to Rhode Island, he generally would stay with his mother, who was Edwin's ex-wife. The father and son frequently would go out to breakfast or watch sporting events on television during John's visits to Rhode Island. By most accounts, John and Edwin would get along very well, and there is no question that they loved one another. Edwin assured John that he would take care of him upon his death. Edwin helped John financially over the years, and in his final years, he purchased a Lincoln SUV for John. John inherited approximately $140,000 from Edwin's bank account.

In March 2014, Edwin spent several weeks in the hospital before being released to his home. Thereafter, various nurses from Assisted Daily Living (ADL) visited him on a weekly basis to check on his well-being. The primary nurse who visited Edwin was Susan Porter, RN.

Mr. Burns testified that he had known Edwin for decades and that he had been preparing Edwin's taxes since the nineties. On May 5, 2014, Mr. Burns received a call from Edwin asking for help in drawing up a will. He told Mr. Burns that he planned to leave John out of the will and to put Ms. Zarokostas in the Will instead. Mr. Burns stated that Edwin previously had told him that he did not like John telling him what to do and hollering at him. He believed that this was the reason why Edwin did not want to put John in his Will.

Mr. Burns explained to Edwin that Edwin would need an attorney, and he offered to contact Mr. Gazerro, Jr. in order to relay the information. Mr. Burns both wrote to and called Mr. Gazerro, Jr. about his conversation with Edwin. His letter stated in pertinent part:

> "Edwin O'Grodnik [*sic*], a mutual client called me today, to advise that [he] might be going to the hospital due to a lung problem.
> "He expressed a strong desire to have a will prepared as soon as possible in which he wanted to remove his son, John O'Grodnik [*sic*] as an heir to his estate.
> "He stated that he currently has no will and wants to have as his inheritor for his entire estate his current live in friend, Metaxia Zarokostas." (Letter, dated May 5, 2014.)[2]

Shortly thereafter, Mr. Gazerro, Jr., whose practice includes the drafting and execution of wills, spoke with Edwin over the telephone regarding Edwin's wishes and intentions with respect to his proposed Will. Edwin again stated that he did not wish to leave anything in his Will to John, and instead, wished his "companion," Ms. Zarokostas, to inherit the entire residue of his estate.

On the evening of May 12, 2014, Edwin fell in his house. Early the following morning, May 13, 2014, Ms. Zarokostas called ADL and requested that a nurse come to the house for an unscheduled visit. Later in the morning, at approximately 10:30 a.m., Mr. Gazerro, Jr. and Mr. Burns arrived at the house with the newly drafted Will. Ms. Zarokostas led the two men into the

[2] Although the letter was dated May 5, 2014, it appears that it was not faxed to Mr. Gazerro, Jr. until May 6, 2014.

living room where Edwin was sitting in an armchair. They asked Ms. Zarokostas to leave the room so that they could have a private conversation with Edwin. Ms. Zarokostas complied with the request and went to another part of the house for the duration of the visit. She testified that she did not know why they were there.

At that point, Mr. Gazerro, Jr. engaged Edwin in a conversation to determine the state of his mind. After some small talk, Mr. Gazerro, Jr. asked Edwin about his intentional omission of John from the Will. According to Mr. Gazerro, Jr., Edwin told him that he had become estranged from John after John had come up north and expressed interest in taking over his property. Edwin also allegedly expressed concern that his ex-wife was trying to influence John as a way to obtain more from Edwin than what she previously had received from their divorce.

After conversing with Edwin and going over the provisions in the Will, Mr. Gazerro, Jr. was satisfied that Edwin possessed the requisite testamentary capacity to sign a Will. After Edwin read the Will, Mr. Gazerro, Jr. gave him a pad to place under the document so that he could sign the pages without having to get out of his chair. Both Mr. Gazerro, Jr. and Mr. Burns testified that they witnessed Edwin initial and sign the Will in their presence. The two men left the house at approximately 11:30 a.m., and shortly thereafter, they signed a "self-proving" Affidavit attesting to having witnessed Edwin's signing of the Will.

Not long afterwards, Nurse Porter arrived at the house to perform an evaluation on Edwin. She determined that Edwin seemed a little confused and was unable to answer simple medical questions; however, she described him as being oriented as to time, place, and person. Nurse Porter noted that Edwin was suffering from fluid retention and that his fingertips were twitching; however, he did have function in his hands, which were not swollen. At 12:22 p.m., she placed a

non-emergency call for an ambulance to transport Edwin to Kent Hospital. Edwin signed Nurse Porter's report.

Witness statements from the Emergency Medical Technicians (EMTs) were submitted into the record by agreement. Rescue Lieutenant Christopher Connors stated that Edwin had fluid build-up in his hands, legs, and feet, and that although he seemed slightly confused, he "kinda had his whits [*sic*] about him." (Cristopher Connors' Witness Statement at 3, 4.) He also stated that he did not believe Edwin would have been physically capable of signing anything. *Id.* at 3. EMT Captain James Galligan stated that Edwin appeared weak and slightly confused. (James Galligan's Witness Statement at 3.)

A subsequent medical report from the Kent Hospital described Edwin as "unable to provide clear history and is an extremely poor historian . . . ." (Final Report at 1, May 13, 2014.) Edwin remained at the hospital until he was transferred to a nursing home. He spent two days at the nursing home where he passed away on May 31, 2014.

John came to Rhode Island soon after learning of his father's hospitalization. During this period, there was some conflict between Edwin and John. After Edwin's death, John asked Ms. Zarokostas to give him the keys to the house. Ms. Zarokostas agreed, but asked for a grace period of a few days to allow her to pack her belongings.

Meanwhile, Ms. Zarokostas learned about the existence of the Will and sought legal advice. Her attorney informed her that she did not have to vacate the house because Edwin had left it to her in his Will. She also learned that Edwin had named her as his Executrix, and that after the payment of the estate's debts, he left the "rest, residue and remainder" of all of his assets to Ms. Zarokostas. The will specifically provided: "I have made no provision in this my Last Will and Testament for my son John Ogrodnik. My failure to make any provision for my said son is

intentional and not occasioned by any accident or mistake on my part." (Will ¶ 3.) However, although Edwin did not make any provisions for John in his Will, John did receive approximately $140,000 from Edwin's bank account. Ms. Zarokostas denies any prior knowledge of the Will or its contents. John also said he was unaware of the Will. The principal asset in the estate was Edwin's house and several cabins located on the same property.

Thereafter, on behalf of Edwin's Estate, Ms. Zarokostas filed a petition with the Probate Court for the Town of West Greenwich to probate the purported Will. John duly objected on grounds that the signature was not Edwin's; that Edwin lacked testamentary capacity at the time; and that he had been unduly influenced by Ms. Zarokostas. The Probate Court of the Town of West Greenwich conducted a hearing on the matter on September 28, 2015, and October 2, 2015.

At the hearing, John presented Jean Joanne Berrie-Perrino, a board certified forensic document examiner who opined that the signature on the Will was not genuine because it did not match numerous samples of Edwin's signature that she had in her possession. Ms. Berrie-Perrino did not testify before this Court; accordingly, her testimony before the probate court will not be accepted.

In addition, Michael Lee (Mr. Lee), a longtime friend of Edwin and John, testified during the hearing about the loving relationship between father and son, and expressed surprise that John had been excluded from the Will.[3] John, Ms. Zarokostas, and Mr. Burns also testified, and various documents were submitted for review. On June 8, 2016, the Probate Court entered a written decision admitting the Will into probate.

[3] Edwin's ex-wife similarly testified at the probate hearing about the loving relationship between Edwin and his son.

In his decision, the probate judge rejected Ms. Berrie-Perrino's expert opinion, noting that both of the subscribing witnesses testified that they were present in the room and actually observed Edwin signing the Will. The Probate Court further found that there was no medical evidence in the record to indicate that Edwin lacked testamentary capacity due to any kind of mental illness. He pointed out that the subscribing witnesses both testified in their depositions that based upon their observations and conversations with Edwin, Edwin was mentally fit to sign the Will. With respect to the claim of undue influence, the probate judge found that there was no credible evidence in the record to support such a claim.

On July 1, 2016, John filed a Claim of Appeal in the Probate Court, and on July 13, 2016, he appealed the Probate Court's decision to this Court. He contended that (1) the Will was not properly executed, as required by statute; (2) Edwin lacked testamentary capacity due to his age and the fact that he was admitted into a hospital within hours of the purported Will; and, (3) Ms. Zarokostas unduly influenced him into purportedly executing the Will just hours before being admitted into a hospital.

This Court conducted a non-jury trial on the matter on July 17 and 18, 2018, with closing arguments being made on August 7, 2018. The following witnesses testified at the two-day trial: Capt. Galligan; Mr. Gazerro, Jr.; Mr. Burns; Nurse Porter; Mr. Lee; Ms. Zarokostas; and John. In addition, the Court received multiple exhibits for its review. The Court continued the case on at least two occasions to allow Appellant the opportunity to provide medical records, medical testimony, etc., to contradict and/or supplement the evidence on the record. After thoroughly reviewing the testimony and documentary evidence, the Court now will render its Decision. Additional findings of facts will be provided in the Analysis portion of this Decision.

## II

## Standard of Review

This Court's review of a Probate Court decision is governed by G.L. 1956 § 33-23-1, which provides in relevant part:

> "Any person aggrieved by an order or decree of a probate court, . . . unless provisions be made to the contrary, [may] appeal [therefrom] to the superior court for the county in which the probate court is established . . . ." Sec. 33-23-1(a).

Furthermore,

> "An appeal under this chapter is not an appeal on error but is to be heard de novo in the superior court. The record of proceedings, including the certified documents and the transcript (if any) from the probate proceedings, may be introduced in the superior court without further authentication. The findings of fact and/or decisions of the probate court may be given as much weight and deference as the superior court deems appropriate, however, the superior court shall not be bound by any such findings or decisions. Nothing herein shall preclude a witness who testified at the probate court proceeding from testifying at the superior court hearing, however, the transcript of such probate court testimony may be used for any evidentiary purpose, consistent with the Rhode Island rules of evidence." Sec. 33-23-1(b); *see also In re Estate of Taylor*, 114 R.I. 562, 564, 337 A.2d 236, 238 (1975) ("'On such appeals the superior court is not a court of review of assigned errors of the probate judge, but is rather a court for retrial of the case de novo.'") (quoting *Malinou v. McCarthy*, 98 R.I. 189, 192, 200 A.2d 578, 579 (1964)).

A person is considered to be aggrieved within the meaning of the statute if a Probate Court order or decree adversely and substantially affects some personal or property right of the one seeking review or imposes some burden or obligation upon that individual. *Lind v. McSoley*, 419 A.2d 247, 249 (R.I. 1980).

## III

## Analysis

### A

### Execution of the Will

In his appeal to this Court, John contended that Ms. Zarokostas failed to establish that the Will was properly executed in accordance with the statutory requirements set forth in § 33-5-5 because there is a question as to the genuineness of the signature. He also contended that the requisite number of witnesses were not present.

Section 33-5-5 provides in pertinent part:

> "No will shall be valid . . . unless it shall be in writing and signed by the testator, or by some other person for him or her in his or her presence and by his or her express direction; and this signature shall be made or acknowledged by the testator in the presence of two (2) or more witnesses present at the same time, and the witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary, and no other publication shall be necessary." Sec 33-5-5.

In Rhode Island, '"if [a] will has been signed by [the] testator and the required number of witnesses, there is a presumption that the statutory requisites for executing a will have been met."' *In re Estate of Picillo*, 99 A.3d 975, 981 (R.I. 2014) (quoting *Lett v. Giuliano*, 35 A.3d 870, 877 (R.I. 2012)). Furthermore, '"[t]he burden of proof in a will contest is a preponderance of the evidence.'" *Id.* at 981 (quoting *Pollard v. Hastings*, 862 A.2d 770, 776 n.3 (R.I. 2004)).

Mr. Burns and Mr. Gazerro, Jr., who both were disinterested witnesses, testified that Mr. Gazerro, Jr. first conversed with Edwin to assess Edwin's competency, and that he then went over the Will with Edwin. Mr. Burns noted that although Edwin seemed a little frail, he was coherent, and his speech was not slurred. Both men noted that Edwin read the Will and that they testified that they witnessed Edwin signing each page in their presence. Both men then signed the Will as

subscribing witnesses. Shortly thereafter, the men signed a "self-proving" affidavit attesting to having witnessed Edwin sign the Will. The affidavit was notarized by a notary public.

It is clear from the foregoing that the requirements set forth in § 33-5-5 were met in this case: the Will was signed by the testator in the presence of two witnesses, who also signed the Will. Consequently, the Court finds and concludes that the signature on the Will belonged to Edwin, and that the Will was executed in accordance with the requirements set forth in § 33-5-5.

**B**

**Testamentary Capacity**

John maintains that Edwin lacked the testamentary capacity necessary to sign a Will. He points to the fact that Edwin was admitted into the hospital very shortly after Mr. Burns and Mr. Gazerro, Jr. left the house, and that Nurse Porter testified that Edwin's "neuro-status was off" and that "he did not understand the severity of his condition." He also suggests that the medications that Edwin was taking somehow affected his testamentary capacity.

It is axiomatic '"that in a will contest, the proponent of the will bears the burden of proof of testamentary capacity by a fair preponderance of the evidence."' *In re Estate of Picillo*, 99 A.3d at 983 (quoting *Pollard*, 862 A.2d at 777). The well-established test for testamentary capacity, "requires that, at the time the will is executed, the [testator or] testatrix,

> 'has sufficient mind and memory to understand the nature of the business [he or] [s]he is engaged in when making [his or] h[er] will[;] has a recollection of the property [he or] [s]he wishes to dispose of thereby[;] knows and recalls the natural objects of [his or] h[er] bounty, their deserts with reference to their conduct and treatment of [him or] h[er], [and] their necessities[;] and the manner in which [he or] [s]he wishes to distribute [his or] h[er] property among them.'" *In re Estate of Picillo*, 99 A.3d at 983 (quoting *Rynn v. Rynn*, 55 R.I. 310, 321, 181 A. 289, 294 (1935)).

Furthermore, "[e]ccentricities, peculiarities, and oddities in either speech or behavior, or fixed notions and opinions upon family or financial matters will not render a person incapable of making a will . . . ." *Rynn*, at 310, 181 A. at 294.

The record reveals that one week before signing his Will, Edwin contacted Mr. Burns, whom he had known for approximately thirty-five years. He informed Mr. Burns of his intentions, and Mr. Burns put Edwin in contact with Mr. Gazerro, Jr. who previously had represented Edwin with respect to the incorporation of the diner-restaurant. Mr. Gazerro, Jr. drew up the Will in accordance with Edwin's wishes, and he brought it to Edwin's house the following week. Mr. Burns accompanied Mr. Gazerro, Jr. so that they both could witness the signing of the Will.

Mr. Gazerro, Jr. testified that upon arrival at Edwin's house, he asked Ms. Zarokostas to leave the room and then engaged Edwin in conversation to satisfy himself that Edwin knew what he was doing and could understand the nature and consequences of his actions. As previously stated, Mr. Burns observed Edwin to be a little frail, but he found Edwin to be coherent, and his speech was not slurred.

Mr. Gazerro, Jr. stated that he specifically asked Edwin about why he was intentionally excluding his son from the Will. Edwin informed Mr. Gazerro, Jr. that he had been estranged from John, and that after John had expressed an interest in taking over Edwin's property, he wanted to make sure that he took care of Ms. Zarokostas in his Will. Edwin also indicated that he believed his ex-wife was trying to influence John into getting more for herself than she received through their divorce.

After conducting this conversation, Mr. Gazerro, Jr. concluded that Edwin understood the nature and consequences of his actions. Then, given the fact that there was an exclusionary clause for an heir-at-law, Mr. Gazerro, Jr. proceeded to carefully review each line of the Will with Edwin.

Once he was satisfied that Edwin knew and understood the contents of the Will, he gave Edwin a pad to place under the Will so that he could sign each page of the document. Mr. Gazerro, Jr. and Mr. Burns both witnessed Edwin sign the Will and witnessed each other sign the document as well.

Not long after Mr. Burns and Mr. Gazerro, Jr. left the house, Nurse Porter arrived in response to the unscheduled visit request from Ms. Zarokostas. She testified that Edwin was oriented as to time, place, and person, and that he was alert and oriented most of the time. Nurse Porter further stated that Edwin was able to answer questions, but that she had concerns regarding his neurological status because he was unable to appreciate the severity of his medical condition. She additionally testified that Edwin had been deteriorating over time—both physically and mentally—and that he was in denial about the poor state of his health. She believed he was not capable of making medical decisions for himself on that particular day, and that his condition was the worst that she had seen of him. Accordingly, she decided to call for an ambulance to transport Edwin to the hospital. Nurse Porter observed that Edwin's fingers were twitching, but that his hands were not swollen and he was able to very slowly sign his name on the visiting nurse's notes.

John contends that Nurse Porter's testimony demonstrates that Edwin did not possess testamentary capacity to sign the Will earlier in the day. However, despite being given ample opportunity to do so, he has failed to provide the Court with any medical evidence to suggest that Edwin suffered from a mental incapacity. *See Landmark Medical Center v. Gauthier*, 635 A.2d 1145, 1148 (R.I. 1994) (citing *Sosik v. Conlon*, 91 R.I. 439, 442, 164 A.2d 696, 698 (1960)) (holding that absent probative evidence that shows individual was suffering from mental illness, a general allegation of chronic mental illness does not suffice to negate capacity). Indeed, Nurse Porter's own testimony is somewhat contradictory in that she said that Edwin was alert and oriented most of the time, and was able to answer questions. Furthermore, the questions she had

regarding his neurological status seemed to center on Edwin's denial of the severity of his medical condition, and the fact that he believed he was going to get better.

As previously stated, "[e]ccentricities, peculiarities, and oddities in either speech or behavior, or fixed notions and opinions upon family or financial matters will not render a person incapable of making a will . . . ." *Rynn*, at 310, 181 A. at 294. Here, an attorney with almost fifty years of experience assessed Edwin's capacity to understand the nature and consequences of his actions, and he concluded that Edwin possessed the requisite legal capacity to sign his Will. It is Edwin's testamentary capacity at the time he signed his Will that is relevant, not his alleged confusion over his medical condition after he had signed the Will. By producing Mr. Gazerro, Jr.'s experienced legal conclusion as to Edwin's testamentary capacity at the time he signed the Will, Ms. Zarokostas proved by a fair preponderance of the evidence that Edwin possessed testamentary capacity. *See In re Estate of Picillo*, 99 A.3d at 983 (declaring "that in a will contest, the proponent of the will bears the burden of proof of testamentary capacity by a fair preponderance of the evidence").

Without any supporting medical evidence, Nurse Porter's inconclusive testimony was incapable of overcoming Mr. Gazerro, Jr.'s testimony. Indeed, the Court observes that Nurse Porter admitted on the stand that she had made changes to and/or additions to a portion of the medical reports such that the two records were not identical, thereby, somewhat undermining her credibility as a witness. The Court continued the matter on two occasions to allow John's attorney to produce medical evidence of Edwin's mental condition during the relevant period—such as testimony from his treating physicians, personal doctors, his cardiologist, Kent Hospital emergency room records, other hospital records, and/or other medical witnesses and documents—no witnesses or additional documents were offered. John's attorney ultimately did produce a box

of medical records for the Court's review; however, said documents failed to support John's case. *In re Estate of Picillo*, 99 A.3d at 981-82. Consequently, based upon the available evidence, the Court concludes that Edwin possessed the requisite testamentary capacity when he signed his Will.

**C**

**Undue Influence**

John next alleges that Ms. Zarokostas unduly influenced Edwin into signing the Will. Essentially, he contends that undue influence can be inferred from the fact that a sick and ailing old man who lived with a woman thirty-six years his junior would not have been able to withstand that woman's undue influence to write a Will in her favor.

It is well settled that "[u]ndue influence is the 'substitution of the will of [the dominant] party for the free will and choice [of the subservient party].'" *In re Estate of Picillo*, 99 A.3d at 982 (quoting *Filippi v. Filippi*, 818 A.2d 608, 630 (R.I. 2003)). In making a determination as to "what constitutes undue influence, 'a trial justice ordinarily examines the totality of [the] circumstances, including the relationship between the parties, the physical and mental condition of the [subservient party], the opportunity and disposition of [the] person wielding influence, and his or her acts and declarations.'" *Id.* This involves "a fact-intensive inquiry[,]" *id.*, and "[t]he party contesting the will must prove undue influence by a preponderance of the evidence." *Caranci v. Howard*, 708 A.2d 1321, 1324 (R.I. 1998) (citing *Murphy v. O'Neill*, 454 A.2d 248, 250 (R.I. 1983)).

In *Caranci*, our Supreme Court succinctly set forth the circumstances to be considered when determining undue influence:

> "Because the perpetrator of such covert coercion generally applies the forbidden pressure in secret, one seeking to set aside such a will is often unable to produce direct evidence of the undue influence to the factfinder but rather must rely on circumstantial evidence.

> "Generally speaking, the unexplained, unnatural disposition of a decedent's property by will, when considered along with other factors, can give rise to an inference of undue influence. We have previously held that evidence that the person accused of unduly influencing the testator enjoys a relationship of trust and confidence with the testator and was instrumental in the testator's execution of the contested will may at least give rise to the drawing of a permissible inference that undue influence was exerted upon the testator. Nevertheless, the party seeking to avoid a will that he or she believes is due to undue influence must show more than mere evidence of an opportunity to exert such influence unaccompanied by evidence that the impermissible pressure was actually asserted. The evidence of influence whether direct or circumstantial must be connected with and relevant to the time that the challenged will was executed." *Caranci*, 708 A.2d at 1324 (internal citations omitted).

Before addressing the issue of undue influence, the Court first observes that it finds credible the testimony of both John and Ms. Zarokostas. *See Duffy v. Estate of Scire*, 111 A.3d 358, 363 (R.I. 2015). It is clear that both of them loved Edwin and that Edwin loved them both in return. The Court further observes that John's attorney repeatedly pointed out during the trial that Ms. Zarokostas' testimony regarding the time Nurse Porter arrived at the house differed from Nurse Porter's actual arrival; however, such minor discrepancy does not affect the Court's analysis of the issues in this case. With respect to the alleged undue influence, the Court makes its findings as follows:

Edwin first met Ms. Zarokostas while she was working as a waitress at a diner-restaurant that he frequented. At the time, he would have been approximately sixty-eight years old, and she would have been approximately thirty-two years old. Both were divorced, and Ms. Zarokostas was raising two children. Over time, Edwin and Ms. Zarokostas developed a close friendship. In 2005, Edwin invited Ms. Zarokostas and her children to live in his home in return for her taking care of him. Thereafter, they did everything together like a family, such as watching movies and going out to eat.

Edwin and Ms. Zarokostas shared the same bed, but the relationship was platonic. Often Edwin would tell Ms. Zarokostas that if she took care of him, he would take care of her after he died. Theirs was a loving relationship—a true, sincere, and caring relationship that lasted for well over a decade.

Edwin's trust and confidence in Ms. Zarokostas' abilities were evidenced by his entering into a business partnership with her and Mr. Chase, whereby Edwin purchased fifty-two percent of the diner-restaurant where they met, and both she and Mr. Chase each purchased twenty-four percent of the business. Ms. Zarokostas and Mr. Chase took care of the day-to-day operation of the diner-restaurant, while Edwin and Mr. Burns took care of the finances and taxes.

John had a loving relationship with his father. Although Ms. Zarokostas and John interacted courteously, they did not share a friendly relationship. John would visit his father over the years, and they also communicated by phone. When John visited, the two of them often would go out to eat. They also would watch sporting events on television. Edwin told John that he would take care of John after Edwin's death.

Ms. Zarokostas testified that when Mr. Burns and Mr. Gazerro, Jr. arrived at the house on May 13, 2014, she had no idea why they had come, and that upon their request, she left the room where Edwin was seated. Mr. Burns and Mr. Gazerro, Jr.'s credible testimony supports Ms. Zarokostas' statement that she left the room so that the men could conduct business. Prior to their arrival at the house, Ms. Zarokostas had called ADL and asked that it send a nurse for an unscheduled visit to check on Edwin. Such a call is inconsistent with the behavior one might expect from someone who was trying to unduly influence another person into making a will, as it easily could have interrupted, or even interfered with, the execution of the Will. *See Duffy*, 111 A.3d at 363.

Ms. Zarokostas credibly testified that she did not know the purpose of the visit from Mr. Burns and Mr. Gazerro, Jr. She also credibly testified that she did not know that Edwin had a Will, and that she was shocked to discover that he had left his estate to her. *See Vogel v. Catala,* 63 A.3d 519, 522 (R.I. 2013). Her conduct supports this statement. Both Ms. Zarokostas and John testified that John asked her to vacate the house and give him the key. They both testified that she agreed to move out, but asked for a few extra days in the house so that she could gather her belongings. Her response and actions were consistent with that of someone who knew nothing about the Will or its contents.

The Court finds that John has failed to provide the Court with any direct or circumstantial evidence that would give rise to a permissible inference of undue influence. Rather, his allegations appear to be based upon the fact that Ms. Zarokostas' mere presence in the house gave her an opportunity to unduly influence Edwin. *See Caranci*, 708 A.2d at 1324 (stating "the party seeking to avoid a will that he or she believes is due to undue influence must show more than mere evidence of an opportunity to exert such influence unaccompanied by evidence that the impermissible pressure was actually asserted").

It is unfortunate, but understandable, that John's feelings were hurt when Edwin specifically intended to cut John out of his Will. Indeed, this Court heard testimony from Mr. Lee and others as to the loving relationship between Edwin and John. However uncharacteristic of this loving relationship, Edwin did leave John's name on his bank account thus ensuring that John was "taken care of" as he previously had promised. By cutting John out of his Will, Edwin also kept his promise to Ms. Zarokostas that he would take care of her as well. Given the somewhat unfriendly relationship between John and Ms. Zarokostas, it is conceivable that Edwin feared John

would order her to vacate the house upon his death. If he had entertained such a fear, subsequent events would have proved them well founded.

The Court concludes that John has failed to prove by a preponderance of the evidence that Ms. Zarokostas unduly influenced any of the provisions in Edwin's Will. *See Caranci*, 708 A.2d at 1324 (""The party contesting the will must prove undue influence by a preponderance of the evidence.") Indeed, the record is absolutely devoid of any evidence which even suggests that undue influence was exerted over Edwin.

## IV

## Conclusion

After its *de novo* review, the Court concludes that (1) Edwin's Last Will and Testament was executed fully in accordance with § 33-5-5; (2) he understood the contents of the Will and possessed the requisite testamentary capacity to execute it; and, (3) nobody exerted any undue influence upon him in the execution of his Will.

Counsel shall submit an appropriate judgment for entry.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | In re: Estate of Edwin Ogrodnik |
| **CASE NO:** | KP-2016-0684 |
| **COURT:** | Kent County Superior Court |
| **DATE DECISION FILED:** | July 18, 2019 |
| **JUSTICE/MAGISTRATE:** | McGuirl, J. |

**ATTORNEYS:**

| | |
|---|---|
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