SURROGATE'S COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
* *

Probate Proceeding, Will of

SAVERIO P. TEDESCO,

Deceased.
* *

DECISION and ORDER

File No. 2012-781/B

SCARPINO - S.

In this contested probate proceeding, Alma Fein (Alma), a beneficiary and legatee under the propounded instrument, dated March 8, 1995 (propounded instrument), moves, pursuant to CPLR 3212, for an order: (i) granting summary judgment, admitting the propounded instrument to probate and dismissing the objections thereto filed by Michael DeBruin and Lisa Alpert (collectively, objectants); and (ii) granting sanctions against petitioner Josephine Williams (Josephine) and objectants. Josephine and objectants oppose the motion. Respondents Christopher Mergardt (Christopher), Margaret Marstan (Margaret) - Alma's nephew and niece - and The Society for Relief from Incurable Cancer (Rosary Hill) adopt Alma's position in seeking to admit the propounded instrument to probate and dismiss the objections, and respondent New York State Attorney General (NYSAG) takes no position on the motion. For the reasons set forth, *infra*, the motion is hereby granted in part, and denied in part.

BACKGROUND

The following pertinent facts have been taken from the transcripts of the pre-trial testimony given by Alma, Josephine, objectants, William Osterndorf (the attorney draftsman and one of the attesting witnesses), and Anne Hannon (the other attesting

witness), and from affidavits submitted on behalf of the parties.

Decedent died on February 13, 2012 at age 85, survived by his sister Josephine and objectants, who are the children of his predeceased sister, Ann DeBruin. Alma had been decedent's girlfriend and companion for 47 years at the time of his death. They met in 1964 at IBM, where they then both worked, and started dating shortly thereafter. Although they never formalized their relationship in marriage, they spent significant time together, socialized as a couple, mostly with his friends, and spent most holidays with her family. In addition, the couple spent most weekends at one another's homes, and Alma kept several of her possessions at decedent's house in Mount Vernon. They also owned property together in a South Carolina resort, and had been partners in this real estate enterprise since the early 1980s.

In 1995, decedent was diagnosed with lung cancer and was scheduled to have surgery in March of that year. Approximately three weeks prior to the surgery, he met with Mr. Osterndorf for estate planning purposes. At the time, decedent worked with Mr. Osterndorf's father as a patent attorney at IBM, and it was he who referred decedent to Mr. Osterndorf. Following his surgery (and notwithstanding follow-up treatment for a collapsed vocal cord), decedent recovered well.

Approximately a month after decedent's death, Josephine filed a petition to become administratrix of his estate, and the court issued letters of administration to her *(File No. 2012-781)*. Shortly thereafter, Alma filed a cross petition under SCPA 1407, seeking to probate a copy of the propounded instrument and for the issuance to her of letters of

administration c.t.a. (*File No. 2012-781/A*). On September 20, 2012, having located the original propounded instrument and filed it with the court, she amended her cross petition and offered the original propounded instrument for probate. Thereafter, Josephine, who is the nominated executrix under the propounded instrument, filed a petition for probate thereof and for the issuance to her of letters testamentary (*File No. 2012-781/B*). On March 18, 2013, pursuant to a "so-ordered" stipulation of the parties under the captions of all three proceedings, the court revoked letters of administration previously issued to Josephine and issued preliminary letters testamentary to her. The instant motion is made only in Josephine's proceeding for probate (*File No. 2012-781/B*).

According to Josephine's petition, decedent's estate is valued at between $6.5 and $7 million. Under the propounded instrument, decedent makes various gifts to his sisters, and his nieces and his nephews, and he provides for a specific bequest to Alma, upon her retirement, of up to $18,000.00 per year from a testamentary trust. The propounded instrument also names Alma as one of eight legatees of decedent's tangible personal property, which is to be divided in such manner as the executor determines. It also provides for gifts of $10,000.00 each to Rosary Hill, Christopher, and Margaret. The residuary beneficiaries are Josephine and objectants. Appended to the propounded instrument, following the signature pages, is a one-page document labeled "Schedule A", which lists on its left side certain items of tangible property next to a list of names on its right side.

Objectants filed objections to the propounded instrument on the following grounds:

(i) the propounded instrument is not the last will and testament of decedent; (ii) it was not duly executed pursuant to EPTL 3-2.1; (iii) at the time of its execution, decedent was not of sound mind or memory; (iv) decedent lacked testamentary capacity on the date of execution; (v) the propounded instrument was not freely and voluntarily made by decedent in that it was obtained by the fraud and undue influence of Alma or by others acting in concert or privity with her; and (vi) the signature on the will is a forgery.

Discovery, which included the depositions of Mr. Osterndorf, Ms. Hannon, Josephine, Alma and objectants, is complete, as is jurisdiction pursuant to SCPA 1411.

APPLICABLE LAW AND CONCLUSIONS

Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must submit sufficient evidence to show that there are no material issues of fact and that she is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden then shifts to the party opposing the motion to show the existence of triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). While a court must construe the facts in the light most favorable to the non-moving party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997], mere conclusions, unsubstantiated allegations, or expressions of hope, are insufficient to defeat a summary judgment motion (*Zuckerman v New York*, 49 NY2d at 562). Summary judgment is appropriate in a probate proceeding where the proponent establishes a prima facie case for probate, and the objectant fails to raise a material, triable issue of fact (*Matter of Korn*, 25 AD3d 379 [1st Dept 2006]). To

defeat summary judgment upon a prima facie showing, an objectant must come forward with evidence, not mere conclusory allegations or speculation, that the will was not properly executed or that there was undue influence or fraud in its drafting or execution (*see id.* at 380).

Decedent's Last Will and Testament

As to the objection that the propounded instrument is not decedent's last will and testament, Alma bears the burden of proving the genuineness of the will (*see* SCPA 1408).The record indicates that she has met her burden through the testimony of the Mr. Osterndorf, the attorney draftsman who supervised the execution ceremony and served as an attesting witness, and the testimony of Ms. Hannon, who served as the other attesting witness. Both attesting witnesses identified their signatures after the attestation clause, and neither benefits under the propounded instrument. There is no evidence that anyone other than Mr. Osterndorf, Ms. Hannon and decedent was present at the time of execution, which occurred 17 years before decedent died. Objectants have not submitted any evidence to contradict the genuineness of the propounded instrument. Although they point to discrepancies in several components of the witnesses' testimony as to when and how the copy and original of the propounded instrument were found, and as to how Alma obtained a copy, they do not show how such inconsistencies are material to its genuineness.

Accordingly, the objection as to genuineness is dismissed.

Due Execution

In a probate proceeding, the proponent bears the initial burden of proving, by a preponderance of the evidence, that the will was executed in compliance with EPTL 3-2.1 and that the testator had testamentary capacity at the time the will was made (*Matter of Korn*, 25 AD3d 379 [1st Dept 2006]). Specifically, to prove due execution, the proponent must show that: (i) the testator signed at the end of the instrument; (ii) the testator either signed in the presence of at least two attesting witnesses or acknowledged his/her signature to them; (iii) the testator declared to each of the attesting witnesses that the instrument was his/her will; and (iv) the witnesses signed at the request of the testator or his/her agent (*Matter of Kelum*, 52 NY 517, 518-19 [1873]; *see* EPTL 3-2.1). Where the will execution is supervised by the attorney draftsman, there is a presumption of regularity that the will was duly executed (*Matter of Moskowitz,* 116 AD3d 958, 959 [2d Dept 2014]; *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007], appeal denied 9 NY3d 802 [2007]). Moreover, the presence of an attestation clause, which sets forth the elements of due execution, raises a presumption of compliance with the required formalities of execution (*see Matter of Hirschorn*, 21 Misc 3d 1113 [A] [2008]; *Matter of Halpern,* 76 AD3d 429, 431 [1st Dept 2010]; *see also Estate of Ruso*, 212 AD2d 846 [3d Dept 1995] [attestation clause is prima facie evidence of proper execution]; *Matter of Derrick*, 88 AD3d 877 [2d Dept 2011][same]).

Alma has established a prima facie case for due execution. Mr. Osterndorf, the attorney draftsman and experienced trusts and estates practitioner, supervised the

execution, and therefore, there is a presumption of regularity that the will was duly executed (*see Matter of Tuccio*, 38 AD3d 791). The propounded instrument also contains a full attestation clause, signed by Mr. Osterndorf and Ms. Hannon, thereby giving rise to an inference of compliance with the formalities of EPTL 3-2.1 (*see Matter of Halpern*, 76 AD3d at 431). Although the attesting witnesses did not specifically recall the execution of the propounded instrument, each testified as to Mr. Osterndorf's usual practice with respect to will execution ceremonies (*see, e.g., Matter of Piech*, 2013 NY Slip Op 33575 [U]; *Matter of Wilkinson*, 2010 NY Slip Op 33075 [U]). More specifically, Mr. Osterndorf testified that it is his usual practice: to ask the testator, with the witnesses present, if he has read the will and understood it; to ask if the testator wishes the witnesses to serve as witnesses to the will execution; after the testator then signs the will, to read the attestation clause and ask the witnesses to sign it and the self-proving affidavit. Ms. Hannon, who had served as a witness at other will ceremonies conducted by Mr. Osterndorf, corroborated Mr. Osterndorf's testimony about his usual practice at will executions.

In opposition, objectants assert that the will was not duly executed because: (i) decedent's signature is not genuine; (ii) Ms. Hannon's is the only self-proving affidavit submitted, and it is defective because Mr. Osterndorf did not properly notarize it by including the number and expiration date of his notary stamp; and (iii) there was no evidence that the testator declared to each attesting witness that the instrument was his last will and testament and that the witnesses signed at his request as required by EPTL 3-2.1 (3) and (4).

(i) Forgery

The court finds that objectants have not submitted any proof to raise a question as to the genuineness of decedent's signature on the propounded instrument. More specifically, objectants did not submit any expert testimony to substantiate their allegation that decedent's signature on the propounded instrument is a forgery. Even objectant Michael Debruin, who is familiar with decedent's signature, testified that the signature on the propounded instrument appeared to be that of his uncle. Moreover, the fact that Alma may have signed decedent's name on financial documents (purportedly at his direction) for a period of time 17 years after the propounded instrument's execution, in and of itself, does not give rise to a factual question as to the genuineness of the signature on the propounded instrument, in light of the fact that it was witnessed and attested to by two disinterested witnesses at the time he signed it. Upon the record before the court, including the testimony of the attesting witnesses, both of whom are attorneys, and the attestation clause signed by them, the court finds no evidence that decedent's signature on the propounded instrument is a forgery *(see, e.g., Matter of Dane*, 32 AD3d 1233 [4th Dept 2006], rehearing denied 38 AD3d 1369 [2007], appeal dismissed 9 NY3d 953 [2007] [handwriting expert did not conclusively establish forgery and therefore respondents did not overcome presumption of regularity and due execution arising from attorney draftsman's supervision of the will execution]; *In re James*, 17 AD3d 366 [2d Dept 2005] [granting summary judgment to proponent because objectants' reliance on attesting witnesses' failed recollection of the will execution and on a "highly selective" reading of

their deposition testimony did not overcome presumption of regularity, and their handwriting expert did not establish as a matter of law that the will was forged].

(ii) Ms. Hannon's Self-Proving Affidavit

Objectant's assert that the presumption of regularity of due execution should not apply because there is only one self-proving affidavit and it is defective. As to the lack of a second self-proving affidavit, Mr. Osterndorf testified that where, as here, he acts as the second witness, he does not sign a self-proving affidavit himself because he does not notarize his own signature. Objectants also argue that Ms. Hannon's affidavit cannot be considered as prima facie evidence because Mr. Osterndorf's notarization lacks a stamp, his certification number and an expiration date. Mr. Osterndorf signed his name on the signature line under the jurat on her affidavit. Beneath the signature line, it states: "Commissioner of the Superior Court". There is no notary stamp, number or expiration date.

An attesting witness may make a self-proving affidavit before any officer authorized to administer oaths (*see* SCPA 1406). Oaths and affirmations are addressed in CPLR 2309, which provides that an oath may be administered by any person authorized to take acknowledgments of deeds by the Real Property Law (*see* CPLR 2309 [a]). That section further provides that an oath taken outside the state shall be treated as if taken within the state if it is accompanied by such certificate as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath (*see* CPLR 2309 [c]).

Furthermore, Real Property Law § 299-a (1) provides:

> An acknowledgment or proof made pursuant to the provisions of section two hundred ninety-nine of this chapter may be taken in the manner prescribed either by the laws of the state of New York or by the laws of the state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof is taken. The acknowledgment or proof, if taken in the manner prescribed by the such state, District of Columbia, territory, possession, dependency, or other place, must be accompanied by a certificate to the effect that it conforms with such laws.

(Real Property Law § 299-a [1].[1]

Failure to accompany an out-of-state affidavit with a certificate in conformity with CPLR 2309 (c) has been held not to be a fatal defect because certification may be provided nunc pro tunc (*see US Bank, NA v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012] [citing CPLR 2001 which permits correction of defects at any stage of an action]; *Soboroff v Belkin Burden Wenig & Goldman*, 2011 NY Slip Op 30547 [U] n.2; *but see Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012] [failure to provide certificate in conformity with CPLR 2309 (c) not fatal where defendant was not prejudiced because he rebutted prima facie proof established by defective affidavit].

Attorneys admitted to practice law in Connecticut are commissioners of the Connecticut Superior Court, and in such capacity may, within the state, administer oaths (*see* Conn Gen Stat § 51-85). Ms. Hannon identified her signature on the affidavit and

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[1]The statute further provides that such certificate may be made by an attorney admitted in New York and resident in the place where the acknowledgment was taken, or by an attorney admitted in such place or by any other person deemed qualified by any New York state court if, in any action or proceeding, it be deemed necessary to determine if such acknowledgment conforms with the laws of such place (Real Property Law § 299-a [1] [a-c]).

testified that it was Mr. Osterndorf's practice, when she served as a witness to a will, to have her execute the self-proving affidavit in his office in New Canaan, Connecticut at the time the will was executed. Mr. Osterndorf signed the jurat at the end of Ms. Hannon's affidavit as a commissioner of the Connecticut Superior Court. Although the affidavit may have been properly notarized under Connecticut law, it lacks the required certificate stating that it conforms to the laws of the State of Connecticut (*see* CPLR 2309 [c] and Real Property Law § 299-a). Inasmuch as objectants have objected to the validity of Ms. Hannon's affidavit, it will not be considered (*see, e.g.*, *Rivers v Birnbaum*, 102 AD3d at 44; Real Property Law § 299-a; CPLR 2309 [c]). Nonetheless, upon consideration of the record, including the testimony of both attesting witnesses, as described previously (*supra*, at 6-7), the lack of self-proving affidavits does not rebut the presumption of regularity that applies here by reason of the attorney's supervision of the propounded instrument's execution.

(iii) EPTL 3-2.1 (3) and (4)

Objectants assert that there was no testimony that decedent declared to Mr. Osterndorf and Ms. Hannon that the propounded instrument was his will, or that he asked them to serve as witnesses. As previously set forth, the attestation clause, signed by both Mr. Osterndorf and Ms. Hannon, provides an inference that the execution formalities were satisfied (*see Matter of Halpern*, 76 AD3d at 431), and objectants have not provided any proof to the contrary. Although the witnesses did not recall the execution, which had taken place 18 years earlier, Mr. Osterndorf testified clearly as to his usual practice, including that

he asks the testator if he wishes the witnesses to serve as witnesses. He further testified that he was confident that he followed his usual practice when decedent executed the propounded instrument. Moreover, objectants have submitted no evidence to overcome the presumption of regularity that arises from the fact that Mr. Osterndorf supervised the will execution. A will may be admitted to probate even though the attesting witnesses do not recall its execution, as long as the court is satisfied from all the evidence that the will was properly executed (*Matter of Collins*, 60 NY2d 466 [1983]). Based on the record, the court is satisfied that the propounded instrument was duly executed (*see Matter of Piech*, 2013 NY Slip Op 33575 [U] [attestation clause, attorney-supervised execution and testimony concerning usual law office practice was found sufficient to establish due execution].

Accordingly, the objection as to due execution is hereby dismissed.

Testamentary Capacity

Testamentary capacity is defined as being of sound mind and memory and over the age of 18 (EPTL 3-1.1). A testator enjoys a presumption of sanity and mental capacity (*see Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). The capacity to execute a will is minimal and lower than that required to execute a contract or most other legal documents (*Matter of DeMaio*, 43 Misc3d 1218 [A] [2014]; *Matter of Coddington*, 281 App Div at 146]). A proponent bears the burden of showing that decedent knew or understood, in a general way, the nature and consequences of executing a will; the nature and extent of his property; and those who would be the natural objects of his

bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Makitra*, 101 AD3d 1579, 1580 [4th Dept 2012]).

Alma has met her burden of demonstrating that decedent had the requisite capacity to make a will. In February 1995, approximately three weeks prior to scheduled surgery for lung cancer, at a time when he reasonably might have been thinking about the consequences of making a will, decedent met with Mr. Osterndorf for the first time to discuss his estate plan. They met once or twice thereafter, including at the time the propounded instrument was executed. Mr. Osterndorf testified that decedent was working as a patent attorney at IBM at the time. Ms. Hannon also testified that she would not have witnessed a will if she did not believe the testator had the requisite mental capacity. Objectants' conclusory assertions that decedent was "upset" and "very rattled" by his lung cancer diagnosis and upcoming surgery are insufficient to raise a factual question regarding his overall testamentary capacity at the time he executed the propounded instrument.

Moreover, a review of the propounded instrument shows that decedent knew the nature and extent of his property, and the natural objects of his bounty. The propounded instrument references his tangible personal property, real property, money, securities accounts and a partnership interest. In addition, it provides that the bulk of his estate should go to his two sisters, or their issue if either predeceased him. He provided that his tangible personal property (other than money) should be divided, in such manner as his executor determines, among his two sisters, their children, Alma, and her niece and

nephew. The fact that decedent included Alma, her niece and her nephew as objects of his bounty is hardly surprising. According to the testimony of both Josephine and Alma, at the time the propounded instrument was executed, decedent and Alma had been companions for 30 years, and spent most holidays with Alma's family.

Objectants point to minor errors and the omission of a niece in Schedule A in an attempt to show decedent lacked knowledge and understanding of the extent of his property and the natural objects of his bounty. Although one niece's name did not appear on Schedule A, the instrument itself included her by name in the paragraph relating to tangible personal property. With respect to decedent's inclusion in his personalty of crystal and paintings belonging to Alma, she testified in her deposition that the crystal was in his house for so long, he may have forgotten it was hers. In any case, a mere mistake of fact as to ownership does not demonstrate lack of testamentary capacity *(see In re Gerdjikian*, 8 AD3d 277, 278 [2d Dept 2004]). Upon review of the record, objectants have not submitted any evidence to raise a material issue of fact that contradicts Alma's prima facie showing that decedent was of sound mind and memory at the time he executed the propounded instrument.

Accordingly, the objection based on decedent's testamentary capacity is hereby dismissed.

Fraud

An objectant seeking to establish that the will is a product of fraud bears the burden of proving by clear and convincing evidence that the proponent of the will knowingly made

false statements to the testator to induce the testator to make a will disposing of his property in a manner contrary to that which the testator would otherwise have effected (*Matter of Rothkamp*, 95 AD3d 1338 [2d Dept 2012]). In order to defeat a motion for summary judgment on the issue of fraud, an objectant must lay bare his proof (*see Matter of Leone*, NYLJ Feb. 3, 2000, at 31, col 2), and come forward with more than "mere 'conclusory allegations and speculation'" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004] [quoting *Matter of Young*, 289 AD2d 725, 727 [3d Dept 2001]. A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is required (*see Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]. On the instant record, the court finds that objectants have failed to specify any misrepresentation by Alma, or anyone else, which led decedent to execute the propounded instrument. Accordingly, they have failed to meet their initial burden as to this issue, and the objection based on fraud is hereby dismissed.

Undue Influence

Objectants allege that the propounded instrument was the product of undue influence by Alma or others acting in concert with her. Where an objectant alleges that the will was procured by undue influence, the objectant must show, by a preponderance of the evidence, not only opportunity and a motive to exercise undue influence, but also he must produce evidence that such influence was actually exercised (*see Matter of Walther*, 6 NY2d 49, 55 [1959]. The influence must amount to a "moral coercion, which restrained independent action and destroyed free agency.... It must not be the promptings of

affection...but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted" (*Matter of Walther*, 6 NY2d 49, 53 [1959]; *see Matter of Aoki*, 99 AD3d 253, 265 [1st Dept 2012]; *see*). Undue influence may be proven by circumstantial evidence, but such evidence must be of a substantial nature, and when the evidence is equally consistent with the decedent's own voluntary intent, an inference of undue influence cannot reasonably be drawn (*id.* at 55). Among the factors considered are: (i) the testator's physical and mental condition; (ii) whether the attorney who drafted the propounded instrument was the testator's attorney; (iii) whether the propounded instrument deviates from the testator's prior testamentary plan; (iv) whether the person who allegedly wielded undue influence was in a position of trust; and (v) whether the testator was isolated from the natural objects of his bounty (*see Matter of Katz*, 15 Misc 3d 1146 [A] [2007]).

Additionally, an inference of undue influence arises, requiring the beneficiary under the instrument to explain the circumstances of the bequest, when the beneficiary was in a confidential relationship with the testator and was, in some way, involved in the drafting of the will (*see Matter of Putnam*, 257 NY 140 [1931]; *Matter of Collins*, 124 AD2d 48 [4th Dept 1987]). This inference places the burden on the beneficiary to explain the circumstances of the bequest (*see Matter of Collins*, 124 AD2d 48). The foregoing inference may be counterbalanced, and the attendant requirement of an explanation eliminated, where the person who allegedly exerted undue influence is in a close familial or personal relationship with the decedent (*Matter of Walther*, 6 NY2d at 54; *see also*

Children's Aid Socy of City of N.Y. v Loveridge, 70 NY 387, 395 [1877] ["lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence the testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation"]; *Matter of Eastman*, 63 AD3d 738, 739 [2d Dept 2009]). To defeat a motion for summary judgment, an objectant must demonstrate that there is a genuine triable issue of undue influence, by allegations that are specific, detailed and substantiated by admissible evidence (*Matter of Katz*, 15 Misc 3d 1146 [A]).

Objectants do not specify any moral coercion that Alma or anyone else exercised upon decedent at the time he executed the propounded instrument. Rather, they attempt to place the burden of explaining lack of undue influence on Alma because of her "confidential relationship" with decedent. However, Alma has testified--and objectants have produced no evidence to the contrary-- that she did not know that decedent had executed a will until after it was signed. She also testified that she did not know Mr. Osterndorf at the time decedent executed the propounded instrument and did not meet him until several years thereafter. Mr. Osterndorf's deposition testimony corroborates Alma's testimony. Mr. Osterndorf testified that his father referred decedent to him, and that decedent came alone when they met to discuss decedent's estate planning. Moreover, there is nothing in the propounded instrument itself to suggest that Alma unduly influenced decedent. As noted, the purported instrument provides for the bulk of decedent's estate to pass to Josephine and objectants. The fact that decedent provided for Alma in the propounded instrument,

"as an expression of [his] strong affection and love for her" (as stated therein), is unsurprising given their 30-year relationship, which continued another 17 years until his death (*see Matter of Walther*, 6 NY2d at 53; *Matter of Eastman*, 63 AD3d 738, 739 [2d Dept 2009]). In addition, relative to the size of his estate, the gift to her bears no suggestion that she unduly influenced him.

For the foregoing reasons, the objection based on undue influence is hereby dismissed.

Sanctions

Alma seeks sanctions against Josephine and objectants on the grounds that the objections are frivolous and the alliance of Josephine and objectants is improper. Rule 37.1 of the Rules of the Chief Judge authorizes the imposition of sanctions in civil actions and proceedings for frivolous conduct by parties (Rules of the Chief Judge [22 NYCRR] § 37.1), and the decision whether to impose sanctions is within the discretion of the court (Rules of the Chief Administrative Judge [22 NYCRR] § 130-1.1 [a]). Upon a review of the record, the court declines to impose sanctions on Josephine and objectants.

In the post-objection Discovery Order dated April 17, 2013, the court, inter alia, set a schedule for the submission of dispositive motions. Alma's initial notice of motion for summary judgment was filed in accordance with that order, as amended by stipulation of the parties, and was submitted for decision on February 19, 2014. By Decision and Order dated March 13, 2014, the court denied the motion, without prejudice, because Christopher, Margaret, Rosary Hill and the Attorney General, all of whom were named

respondents who had filed appearances in this proceeding, had not been served with the moving or opposition papers, and had not participated in discovery. At a subsequent court conference, after these respondents had waived additional discovery, Alma's counsel was directed to notice the motion again; re-submission of the original moving or opposition papers was not required. In her subsequent notice of motion, Alma included, for the first time, a request for sanctions against Josephine and objectants. The purpose in requiring her to submit a new notice of motion, however, was simply to restore it to the court's list of matters for decision, not to provide her with an opportunity to request additional relief that could have been requested in the original submission. Alma has not come forward with any additional evidence or raised any new issues that were not available to her at the time this motion was submitted originally. Accordingly, pursuant to the discretion of the court, that component of Alma's motion requesting sanctions is denied.

Probate of the Propounded Instrument

With respect to that component of the motion that seeks to admit the propounded instrument to probate, the court notes that two petitions for probate are pending, each seeking probate of the propounded instrument. More specifically, Alma's proceeding seeks issuance of letters of administration c.t.a. to her (*File No. 2012-781/A*), and the instant proceeding (*File No. 2012-781/B*) - the sole proceeding under which the instant motion is captioned - seeks issuance of letters testamentary to Josephine. A decision on probate of the propounded instrument must await clarification of these conflicting positions. Accordingly, the matter is restored to the calendar, and counsel are directed to appear for

a conference immediately following the call of the calendar on **Wednesday September 17, 2014 at 9:30 a.m.** to discuss the possibility of resolving the issue as to who should serve as the estate's personal representative.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

The following papers were considered on this motion:

Notice of Motion for Summary Judgment and Sanctions, dated May 14, 2014, with affidavit sworn to May 14, 2014;

Affirmation of Aldo Vitigliano in Opposition, dated June 10, 2014;

Affirmation of Anthony Piscionere, dated June 10, 2014 and exhibit;

Affidavit of Gerald Tobin sworn to March 15, 2014;

Affidavit of Christopher Mergardt, sworn to March 28, 2014;

Affidavit of Margaret Marstan, sworn to April 1, 2014;

Notice of Motion for Summary Judgment dated December 30, 2013, with supporting affirmation dated December 30, 2013, affidavit sworn to December 27, 2013, exhibits and memorandum of law;

Affirmation in Opposition, dated February 6, 2014 and exhibits; and

Reply Memorandum of Law, dated February 19, 2014.

Dated: White Plains, NY
August 13, 2014

HON. ANTHONY A. SCARPINO, JR.
Westchester County Surrogate

ESTATE OF SAVERIO P. TEDESCO
File No. 2012-781/B

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ESTATE OF SAVERIO P. TEDESCO
File No. 2012-781/B

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STATE OF NEW YORK
SURROGATE'S COURT : WESTCHESTER COUNTY
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Probate Proceeding, Will of

SAVERIO P. TEDESCO

Deceased.

File No. 2012-781/B

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

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STATE OF NEW YORK)
)ss:
COUNTY OF WESTCHESTER)

Julie Montgomery, being duly sworn, deposes and says: I am not a party to the proceeding, I am over 18 years of age, and I work in Westchester County, New York.

On August 18, 2014, I served the **NOTICE OF ENTRY OF THE DECISION AND ORDER,** by depositing a true copy thereof, enclosed in a postpaid wrapper with first class mail postage, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to the following addressee, which are designated by the addressee for the purpose or, if none are designated, which are the last known addresses of the addressees:

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Assistant Attorney General
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Julie Montgomery
JULIE MONTGOMERY

Sworn to before me on this
18th day of August 2014.

Susan L Lampasona
Notary Public

SUSAN L. LAMPASONA
Notary Public - State of New York
No. 01LA5011744
Qualified in Dutchess County
My Commission Expires June 15, 2015