

**THE WESTCHESTER COUNTY BAR ASSOCIATION'S
TRUSTS & ESTATES SECTION PRESENTS**

Revocable Trusts: The Will Substitute, Part II- Litigation

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June 20, 2013

White Plains, NY

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**The Westchester County Bar Association acknowledges the work of
the Trusts & Estates Section Chairs for putting on this CLE:**

Nancy Rudolph, Esq., Bleakley, Platt & Schmidt, LLP

&

Laurence Keiser, Esq., LLM (Tax), CPA- Stern, Keiser & Panken, LLP

Thank you!

Timed Agenda: June 20, 2013 WCBA CLE as to “Revocable Trust Litigation”

- 6:00-6:15 INTRODUCTION OF FACT PATTERN AND TIME LINE –
MICHELE ORLOWSKI
- 6:15-6:30 STANDING
MICHAEL FRIEDMAN and GAIL BOGGIO
- 6:30-6:45 CHALLENGES TO REVOCABLE TRUST
– JAMES REDUTO
- A. Degree of capacity necessary to execute a Will vs. execute a Trust
 - B. Execution Requirements (EPTL 7-1.17(a); See, also, EPTL 3-3.7)
 - C. EPTL 3-3.7: NY does not allow incorporation by reference. Trust needs to be signed before the Will. If Trust dispositive provisions are not spelled out in the Will, but instead just “incorporated by reference,” the dispositive provisions will fail if the Trust was not created prior to the execution of the Will, or if the Trust otherwise fails.
 - D. Fraud
 - E. Undue Influence
 - F. Capacity
- 6:45-7:00 JURISDICTION AND VENUE
– MICHAEL FRIEDMAN
Supreme and Surrogate’s Court have concurrent jurisdiction
- PLEADINGS
- A. Petition in Surrogate versus Complaint in Supreme
- 7:15-7:30 STATUTE OF LIMITATIONS and RIGHT TO A JURY
– NANCY RUDOLPH
- 7:30-7:45 BURDENS OF PROOF (proponent of Will v. challenger of Trust)
– GAIL BOGGIO
- DISCLOSURE ISSUES AND EVIDENCE
- A. SCPA Art. 14 vs. CPLR Art. 31
 - B. NYCRR 207.27 (3-2year rule)
 - C. CPLR 4503(b), “Will” exception to Attorney-Client Privilege, refers only to “any action involving the probate, validity or construction of a will...”
 - D. Dead Man Statute
- 7:45-7:50 PANEL DISCUSSION –
- A. If the Revocable Trust is set aside, what are the issues the Co-Trustee may need to defend in an Accounting?
 - B. What are the issues in multi-party representation of Co-Trustee and corporate successor Co-Trustee in initial proceeding?...in subsequent Accounting?
- 7:50 Q & A and CONCLUSION

Revocable Trusts: The Will Substitute Part II: Litigation

I. INTRODUCTION OF FACT PATTERN AND TIME LINE – Michele Orlowski

II. STANDING – Gail Boggio and Michael Friedman

WHO CAN CONTEST TRUST VALIDITY? –A Party Having an Interest in a Trust May Contest its validity.

Beneficiary under prior instrument

- A. There is a correlation between will and trust contests that would allow a beneficiary under a prior instrument to contest the validity of the trust
 - 1. *Inter vivos* trusts have been held to be the functional equivalent of a testamentary instrument, and the nature of relief requested to set aside a trust is the same as the nature of relief to set aside a will to recover estate assets.
 - a. Matter of Tisdale, 171 Misc.2d 716 (Surr. Ct., NY 1997).
 - b. Matter of Solomon, NYLJ Sept. 9, 1997, p. 18, col. 3 (Surr. Ct. Kings 1997) - a revocable trust, which was executed the same day as a will and contained mirror provisions, was indeed a testamentary substitute.
 - c. Matter of Davidson, 177 Misc.2d 928, (Surr Ct N.Y. Co., 1998) – revocable trusts must be treated as will equivalents and the “rights of the parties interested in a revocable trust must be consistent with the rights and remedies of the parties interested in a decedent’s will”
 - d. Fourth Report of the SCPA-EPTL Legislative Advisory Committee and noted the increased use of *inter vivos* trusts as will substitutes: “the reality is that revocable trusts essentially serve the same purpose and perform the same functions as wills, and now are created with some of the same formalities as wills. Simply put, they are no less than will substitutes. It follows that proceedings to set aside the two instruments seek the same relief.” *Id.*
- B. SCPA §1410 provides that any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof except a fiduciary nominated in an earlier will.
- C. Case law supports the proposition that a person who is not a distributee can object if he was a beneficiary under an earlier will and is given less in the will sought to be admitted to probate. Earlier Will must be filed in the court. Wigand v. Murphy, 263 A.D.2d 724 (3d Dept 1999); Matter of Shanok, NYLJ 10/12/2010 at 30., col. 6 (Surr Ct Queens Co.); Matter of Dubelier, 138 Misc.2d 180 (Surr. Ct. NY Co. 1987). See also Matter of Gibbs, NYLJ 4/22/2008 at 34 col. 2 (Sur. Ct Kings Co.) – court denied standing to objectant who was a beneficiary under a prior will which had been revoked.

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D. Application to the Fact Pattern:

1. James Brown, as an EPTL 4-1.1 intestate distributee of the Decedent, has standing to contest the Pour-Over Will (SCPA 1403(1)(a); SCPA 1410).
2. Amy Scott Black, as a person beneficially interested in a prior will whose interest would be adversely affected by admission of the propounded Will to probate, if the prior Will has been filed in the Surrogate's Court, has standing to contest the Pour-Over Will (SCPA 1403(1)(c); SCPA 1410).
3. Standing to contest the Trust: To have standing, one must have a "sufficiently cognizable stake in the outcome" of the proceeding. Community Bd 7 of Borough of Manhattan v Schaffer, 84 N.Y. 2d 148, 155 (1995). The issue of standing is jurisdictional and must be resolved before reaching the merits of an action. See The Society of the Plastics Industry, Inc. et al., Respondents, v. County of Suffolk, 77 N.Y.2d 761, 769 (1991) (holding that standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation"). Where standing is put into issue by the defendant, the plaintiff must prove his standing in order to be entitled to relief. See Wells Fargo Bank Minnesota, National Association v Mastropaolo, 42 A.D.3d 239, 837 N.Y.S.2d 247, 249-50 (2d Dept. 2007).

III. CHALLENGES TO A REVOCABLE TRUST James Reduto

A. Setting aside a will or a trust generally involves at least one of four possible objections:

- Improper Execution
- Lack of Capacity
- Undue Influence
- Fraud

In the context of a will contest or a proceeding to set aside a trust, proving undue influence or fraud generally require the same showing. However, the facts you need to show to be successful on a claim of improper execution or lack of capacity in connection with a revocable trust may differ greatly than those you need to show when contesting a will.

B. LACK OF CAPACITY

Degree of Capacity Necessary to Execute a Will vs. a Revocable Trust:

1. Testamentary Capacity. EPTL §3-1.1 states that a person must be “of sound mind and memory” to make a will. A person has testamentary capacity when he “understands the nature and extent of his assets and the identity of the natural objects of his bounty.” Matter of Kumstar, 66 NY 2nd 691 (1985). Less faculty is required to execute a will than any other legal instrument. In Re Coddington’s Will, 281 AD 143, *aff’d* 307 NY 181 (1954).
2. Capacity to Make a Revocable Trust: In order to determine the capacity necessary to make a revocable trust, it must first be determined if the trust document is more in the nature of a will, or a contract. In the Matter of the Estate of Donaldson (38 Misc. 3rd 841 (Richmond County Surrogate’s Court 2012)).

If a revocable trust is found to be more in the nature of a contract than a will, then the settlor must have had the capacity to contract in order for the trust to be valid. A person has capacity to contract if they can “comprehend and understand the nature of the transaction” and make rational judgments in relation thereto. This is a higher standard than the capacity to make a will. In the Matter of the Estate of ACN, 133 Misc. 2nd 1043 (NY County Surr. Ct. 1986).

Matter of ACN distinguishes wills from trusts by stating that a will is a “unilateral disposition” while a trust is a “bilateral transaction” where there is a present or future exchange of benefits.”

Ten years after deciding Matter of ACN, the same court stated in a footnote that Matter of ACN set the standard for the capacity to enter into an *irrevocable* trust, but that there is “no controlling authority as to which standard should apply to a revocable trust, although persuasive authority suggests that the will standard ought to apply to revocable trusts” Matter of the Estate of Aronoff, 171 Misc. 2d 172 (NY County Surr. Ct. 1996). The proposition that a revocable trust is more in the nature of a will than a trust is supported by commentaries, RESTATEMENT (THIRD) OF TRUSTS §11 (2003), 76 Am Jur 2nd Trusts, §49, and the UNIFORM TRUST CODE §601 (not adopted in New York).

Thus, the capacity required to create a revocable trust is higher than the capacity required to make a will, unless it can be shown that the revocable trust is more in the nature of a will (i.e. a unilateral disposition) than a trust. When attempting to set aside a trust, it is

good practice to assume that a higher standard of capacity will apply to a revocable trust.

Query: If a settlor creates a revocable trust and makes herself the sole trustee, is this a “unilateral disposition” such that the revocable trust is more like a will? If a settlor creates a revocable trust with another person or a bank as the trustee, is that a “bilateral transaction” where there is an exchange of benefits (the trustee manages the assets in exchange for a commission). Does the standard for capacity turn on whether or not the settlor acts as a sole trustee? Note that the draft Gabriella Brown Scott Revocable Trust names a co-trustee to act with the settlor.

C. IMPROPER EXECUTION

Execution Requirements for a Will vs. a Revocable Trust:

1. *Execution of Wills.* EPTL §3-2.1 generally requires that a will be signed at the end by the testator in the presence of at least two witnesses, who must also sign the will. At some point during the execution ceremony, the testator must declare to the witnesses that the document is his will.
2. *Execution of a Trust.* EPTL §7-1.17(a) provides that a “lifetime” trust must be in writing, and 1) executed and acknowledged by the settlor, and at least one trustee in the manner required for recording a deed, or 2) executed in the presence of two witnesses.

Note: Real Property Law §§309-a and 309-b set forth the form of the uniform forms of certificates of acknowledgement for use within and without the state. Although the statute states that the form of certificate of acknowledgement must be in “substantially” the form set forth in the statute, it would be the best practice to use the exact wording set forth in the statute. See the recent Court of Appeals case *Galetta v. Galetta* 2013 WL 2338421 (5/30/13) where the court voided a prenuptial agreement because the certificate of acknowledgement for the husband’s signature inadvertently left out language indicating that the notary public either knew the husband, or had been shown identification. While this case arose in the context of a prenuptial agreement, it is certainly a cautionary tale. The use of a defective certificate of acknowledgement could be grounds to invalidate the revocable trust.

Incorporation by Reference and the “Pour Over” will Exception

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EPTL §3-3.7 provides that a will may “pour over” the estate into the trust so long as the trust was 1) executed in accordance with EPTL §7-1.17, and 2) *prior to or contemporaneously* with the will. EPTL §3-3.7 stands as the statutory exception to the New York rule against incorporation by reference set out in *Booth v. Baptist Church* 126 NY 215 (1891).

Drafting Tip: When making a bequest in a pour over will to a revocable trust, it is good drafting to state, in some form, that the beneficiary trust “was executed immediately prior to this will” so as document compliance with EPTL §3-3.7.

Also, since a revocable trust can be 1) revoked by the settlor, 2) set aside in litigation, 3) or rendered moot because the trust was shown to be created at a later date than the will, the dispositive provisions contained in the revocable trust should be repeated in the “pour over” will as a failsafe. This necessarily means that when the dispositive provisions of the revocable trust are amended, the pour over will must also be amended.

IV. JURISDICTION AND VENUE - Michael Friedman

Supreme Court and Surrogate’s Court have concurrent jurisdiction over lifetime trusts.

A. Surrogate’s Court

1. SCPA 207 provides the Surrogate’s Court with **jurisdiction** “over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state.
2. SCPA 207 also provides that “the proper **venue** for proceedings relating to ... lifetime trusts is the county where (a) assets of the trust estate are located, or (b) the grantor was domiciled at the time of the commencement of a proceeding concerning the trust, or (c) a trustee then acting resides, or, if other than a natural person, has its principal office.
3. SCPA 208(6) provides the Surrogate’s Court with the power to “determine any and all matters relating to lifetime trusts.”

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B. Supreme Court

CPLR 7701 provides the Supreme Court with **jurisdiction** over lifetime trusts. Proceedings concerning lifetime trusts may be brought in the Supreme Court either by summons and complaint or as special proceedings by Order to Show Cause and Petition.

V. PLEADINGS – Michael Friedman

A. Sample Petition in Surrogate's Court (attached)

B. Sample Complaint in Supreme Court (attached)

C. A party contesting the validity of an Intervivos Trust, revocable or irrevocable, may allege a variety of facts which, if proved true, would invalidate the Trust. The most common allegations include the following:

1. Improper execution of the Trust (EPTL 7-1.17(a); See, also, EPTL 3-3.7).
2. That the Grantor did not have the requisite mental capacity to execute a Trust. See, amongst a host of cases, Matter of ACN, 133 Misc.2d 1043 (1986).
3. Undue influence. To be legally sufficient, a pleading asserting a claim of undue influence must contain factual allegations establishing:
 - (a) motive;
 - (b) opportunity; and
 - (c) the actual exercise of undue influence "such that the party acts contrary to her wishes because she cannot refuse or is too weak to resist".

Matter of Fellows, 16 A.D.3d 995, 792 N.Y.S.2d 664 (3d Dept. 2005). Conclusory statements unsupported by such factual allegations will not be deemed sufficient. See e.g., Hart v Scott, 8 A.D.3d 532, 778 N.Y.S.2d 718 (2d Dept. 2004) (affirming dismissal of complaint where allegations regarding the respondents' conduct were impermissibly vague and conclusory).

4. Fraud. To state a legally cognizable claim of fraud under New York law, the complaint must allege:
 - (a) a false representation of material fact; (b) scienter; (c) reliance; and, (d) injury.

See e.g., Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 57 (1999); (Channel Master Corp. v. Aluminium Ltd. Sales, 4 N.Y.2d 403, 406-408 (1958) (to state a cause of action for fraud, the complaint must allege the representation of a material existing fact, falsity, scienter, deception and injury). To survive a motion to dismiss, the complaint must make factual allegations sufficient to support each element of the cause of action for fraud. See Kaufman v. Cohen, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dept. 2003).

Moreover, as with a claim of undue influence, where a cause of action based upon fraud or breach of trust is alleged, each of its essential elements must be supported by factual allegations sufficient to satisfy the particularity requirement of CPLR 3016(b) that “the circumstances constituting the wrong shall be stated in detail”.

Complaints based on fraud or breach of trust which fail to meet this standard of particularity have consistently been dismissed. See e.g., Sargiss v. Magarelli, 50 A.D.3d 1117, 858 N.Y.S.2d 209 (2d Dept. 2008) (affirming dismissal of complaint on the ground that the cause of action alleging fraud was not pleaded with sufficient particularity where complaint contained only conclusory allegations of fraud, without any facts to support a finding that any fraudulent act was committed); Thaler & Gertler v. Weitzman, 282 A.D.2d 522, 722 N.Y.S.2d 891 (2d Dept. 2001) (affirming dismissal of counterclaims alleging breach of contract and fraudulent misrepresentation on motion to dismiss for failure to state a cause of action where defendants failed to plead the facts underlying the alleged causes of action with specificity and counterclaims consisted of conclusory allegations without details).

VI. APPLICABLE TIME PERIOD TO COMMENCE AN ACTION/PROCEEDING TO SET ASIDE A REVOCABLE TRUST – Nancy J. Rudolph

A. Applicable Statute of Limitations to Set Aside a Revocable Trust for Fraud is Six Years.

“Public policy underlying the statute of limitations is to give response to legal affairs citing Matter of Hoppenfeld, NYLJ, 9/30/1994 , page 27, col 1 (Surr. Ct. N.Y. Co.). In particular, the statute of limitations is essential to ensure the finality of the dispositions of property whether it is by the settlement of an estate or trust or the transfer of property by gift.” Gibbs and Crew, *Absent Actual Notice, When Does the Clock Commence a Proceeding?* 227 NJLY 9, col. 1)

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B. Key Factor is Determining When the Period of Limitations Ends.

1. A revocable trust has been characterized by court as an instrument that “actually functions as a will since it is ambulatory instrument that speaks at death to determine the disposition of the settlor’s property.” See, Matter of Tisdale, 171 Misc. 2d 719 (Surr. Ct. N.Y. Co, 1997) which recognized the similarities between a trust contest and a will contest.
2. A proceeding by distributees to set aside a revocable trust may be commenced only after the settlor’s death. In Re Davidson, 177 Misc. 2d 928 (Surr. Ct. N.Y. Co., 1998). The statute of limitations, therefore, begins to run on the date the settlor died rather than upon the date any alleged fraud occurred. Harris New York Estates: Probate Administration and Litigation, 6th Ed., §25.10.
3. Example: See Matter of Heumann, N.Y.L.J. 10/30/2006, page 5, col. 1 (Surr. Ct. West. Co.) The Court denied a motion seeking to dismiss the miscellaneous proceeding to set aside a revocable trust based upon fraud. The amendment to the decedent’s revocable trust deleted one of her three children as remainder beneficiaries. The proceeding was not time-barred under the six-year even though it was commenced more than six-years after the trust amendment was executed. Surrogate Scarpino noted that the proceeding could not have been commenced during the settlor’s lifetime. The Court found that the proceeding was timely, having been commenced two years from the Decedent’s death.
4. Query: Would an action/proceeding to set aside a revocable trust be timely if the plaintiff/petitioner knew about the fraud? CPLR 213(8) provides that an action based upon fraud must be commenced within six-years of the event or two years from discovery.
5. Duty to Inquire: In Heumann, *supra*, the Court never reached the duty to inquire, siding with petitioner that he could not have commenced the proceeding until the settlor died. Yet, if petitioner knew or could have known, is the action/proceeding time-barred if not commenced with two years? Compare with In the Matter of King, N.Y.L.J. October 15, 2001, at 25, col. 6 (Surr Ct. Westchester Co.), the Court examined the circumstances that create an affirmative duty to discover whether the fraud may have been created. Even though the King petitioner was seeking to set aside

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letters testamentary and not a revocable trust, her failure to inquire mandated a dismissal of her action to set aside letters testamentary based upon fraud which was not commenced within two years. Would not the same duty to inquire apply in setting aside a revocable trust, based upon fraud?

- C. Applicable Statute of Limitations Based upon Undue Influence is a Species of Fraud and the Six-Year Statute Should Apply.
- D. Applicable Statute for Duress, as Part of Undue Influence, if continuous, Would Apply the Six-Year Period.
- E. Often Laches is Asserted to a Claim When the Statute of Limitations is not a Technical Bar to Bar an Affirmative Defense.
- F. The Affirmative Defense of the Statute of Limitations Must be Asserted in the Responsive Pleading or be Waived.

VII. RIGHT TO A JURY IN A CONTEST CONCERNING THE VALIDITY OF AN INTER VIVOS TRUST- Nancy J. Rudolph

- A. The Right to a Jury is a Fundamental Constitutional Right.

However, the right may be waived. See generally, 8-38 MOORE'S FEDERAL PRACTICE – CIVIL § 38.10, citing, Bellmore v. Mobil Oil Corp., 783 F. 300, 306 (2d Circ. 1986). Actions at law, dealing with legal rights, as opposed to suits in equity, dealing with equitable matters, are jury actions. *Id.* This distinction is true in the Surrogate's Court, as well as under Federal and State Rules, provided the demand for a jury is timely made.

- B. In Probate Proceedings, the Right to a Jury is Governed by SCPA § 502.

A right to jury trial on a will contest is expressly stated therein. Since 2003, this statute now expressly states that the right to a jury applies to a contest involving a lifetime trust, at least in the usual instance where the case is brought after the death of the settlor, in conjunction with a probate contest. See 3-42 WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 42.09. Prior to the 2003 amendment, the leading case on the right to a jury trial for a consolidated trust and probate proceedings was In re Aronoff, 177 Misc. 2d 172 (Surr. Ct. N.Y. Co, 1996) wherein the jury was empaneled to hear evidence on the will contest which are issues of law and to serve as advisory for the trust serve as an advisory jury on the equitable claims. In re Stralem, N.Y.L.J. July 14, 1997, desirable to

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have one trial for both proceedings for the will contest and to set aside a trust as they were so intertwined and related. But see In re Estate of Blumenkrantz, 2009 WL 632452 (Surr. Ct., Bronx Co. 2009), no right to a jury on objections to an accounting which are equitable in nature.

Query: Do Parties Have a Right to Jury to Set Aside A Revocable Trust in Supreme Court? The answer appears to be yes because the issues of fraud, undue influence, duress, are matters of law.

- C. Assertion of the Right to a Jury:
 - 1. Subject to Waiver if Demand Untimely, SCPA § 502 (5)(a)(i);
 - 2. Right to Jury Must Be Demanded in Responsive Pleading. SCPA § 502 (2). Respondent/Defendant must assert this right in the Answer or Objections;
 - 3. Petitioner Must Serve the Jury Demand within Six (6) Days of the Service of Responsive Pleading. *Id.* Since either party may withdraw a jury demand, it is good practice for both sides to demand the jury.
- D. Advisory Jury May Determine an Issue of Fact But Such Verdicts Are Not Binding and Seldom Used. SCPA 502 (6). See In Re Manny, File Nos.: 1992-1319(A) and (B) two unreported decisions and orders entered on January 2, 2009 (Surr. Ct. Westchester Co).

VIII. BURDEN OF PROOF – Gail Boggio

The Tisdale court noted that a proceeding to challenge a revocable trust would involve the same factual issues regarding execution, capacity, fraud and undue influence.

Objectant has burden for undue influence and fraud:

- A. Undue Influence – Testator’s free will overcome, must produce substantial evidence, but may be circumstantial in nature
Undue influence “must be proved, and not merely assumed to exist” Loder v. Whelpley, 111 N.Y. 239 at 250 (1888). See also Matter of Dowdle, 224 A.D. 450 (4th Dept., 1928). The party who alleges the exercise of undue influence must submit “evidence beyond conclusory allegations and speculation.” Matter of Wetz, 791 N.Y.S. 2d 141 (2nd Dept., 2005). There must be affirmative proof that fraud or undue influence was actually exercised or exerted. See Matter of Walther, 6 N.Y.2d 49 (1959), In re Estate of Bush, 85 A.D.2d 887 (4th Dept., 1981). Facts must be proved from which undue influence is “an unavoidable inference.” Matter of Schillinger, 258 N.Y. 186 at 190 (1932).

It has been held that “[i]n order to have an undue influence exercised over a person who is about to make a will, it must be such an influence as to amount to moral coercion, and must be such as to destroy the free agency of the testator and substitute the will of another in place of his own. Matter of Dowdle

It is well established that a beneficiary’s involvement in the drafting of the decedent’s Will provides strong evidence of undue influence. See, e.g., Matter of Collins, 124 A.D.2d 48 (4th Dep’t 1987).

The testator’s medical and mental condition are critical factors in determining whether pressure, if any, exerted by a beneficiary amounted to undue influence. See, e.g., Matter of O’Brien, 182 A.D.2d 1135 (4th Dep’t 1992); Matter of O’Donnell, 91 A.D.2d 698 (3d Dep’t 1982); Matter of Elmore, 42 A.D.2d 240 (3d Dep’t 1973). This is because a weakened physical or mental state may indicate a susceptibility to undue influence by a beneficiary.

Another important factor in determining undue influence is whether, as in this particular case, there has been a substantial change in the testator’s testamentary scheme. See, e.g., Matter of O’Donnell, 91 A.D.2d 698 (3d Dep’t 1982).

B. Fraud

To state a claim for fraud, Objectants must show that someone “knowingly made false statements to the testator to induce [him] to execute a will that disposed of [his] property in a manner contrary to that in which [he] would otherwise have disposed of it.” Matter of Gross, 242 A.D.2d 333, 333-334 (2d Dep’t 1987). See also Matter of Seelig, 13 A.D.3d at 777-778; Matter of Katz, 192 A.D.2d 327 (1st Dep’t 1993). It is well settled that the elements of a common law fraud are: (i) a representation or omission of a material fact, (ii) falsity, (iii) scienter, (iv) deception, and (v) injury.” See Matter of Mayo, 11 Misc.3d 1072A (Surr. Ct. Nassau Co.), quoting Matter of Colonna, NYLJ, Oct. 13, 1998, at 33 (Surr. Ct. Westchester Co), *aff’d* 271 A.D.2d 444 (2d Dep’t 200). Further, fraud must be proven by clear and convincing evidence. Matter of Evanchuck, 145 A.D.2d 559 (2d Dep’t 1988).

As with undue influence, the mere fact that the individual or individuals alleged to have perpetrated the fraud had the opportunity or the motive to influence the testator does not support a finding that he, she or they actually did so. See Matter of Eastman, 63 A.D.3d 738, 740 (2d Dep’t 2009); Matter of Gross, *supra*, 242 A.D.2d at 334.

As to the first element of fraud, the Objectants must identify a “material misrepresentation which led to the [Decedent’s] execution” of the Will or Trust. See Matter of Hirschorn, *supra*, 2008 WL 4602454 at *7.

Objectants must show that “but for” Petitioner’s representations, the Decedent’s Will or Trust would have differed. See Matter of Khazaneh, 15 Misc.3d 515, 524 (Sur. Ct. New York Co. 2006) (dismissing fraud objection and not that the testator’s clear and emphatic reasons for disinheriting the objectant dispelled any possibility that the objectant could meet the “but for” test inherent in the claim).

Matter of Cavallo, 6 A.D.3d 434 (2d Dep’t 2004) (noting, on appeal, “the objectants failed to present any evidence of a false statement knowingly made by the proponent. Thus, the Surrogate’s Court should have granted the proponent’s motion for summary judgment with respect to the issue of fraud.”

C. Capacity to execute trust

Unlike testamentary capacity with respect to wills, where a proponent of a will bears the burden of proving testamentary capacity, with a trust document, the burden of proving incapacity is on the one who asserts it. In re Donaldson, 38 Misc.3d 841 (Surr ct, Richmond Co., 2012), Matter of

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Goldberg, 153 Misc.2d 560 (Surr. Ct, NY Co. 1992); Matter of Obermeier, 150 AD2d 863 (3d Dept 1989).

D. Due Execution.

Burden is on the proponent. See prior program outline for requisites for executing a trust versus a will.

IX. DISCLOSURE- Gail Boggio

- SCPA Article 14 v. CPLR Article 31
- SCPA Article 14: Probate Proceedings; Construction of Wills; Right of Election

A. CPLR Article 31: Disclosure

Uniform Rules For Surrogate's Court - NYCRR 207.27:

"In any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of article 31 of CPLR. Except upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period."

On a motion to compel disclosure, this Court has applied the test of relevant, usefulness and reason to determine whether the demanded document is material to, and probative of, the ultimate resolution of the moving party's claims. (See Matter of MacLeman, 9 Misc.3d 1119(A), 2005 WL 2679677, at *4)

CPLR §4503(b) " Wills. In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent."

FACT PATTERN
June 20, 2013 Presentation
Revocable Trust Litigation

Gabriella Brown Scott has just died six years after being diagnosed with Alzheimer's disease. She leaves behind two nieces, Ellen Brown Jones and Marie Brown Smith, and a great nephew (the out of wedlock son of her pre-deceased nephew), James Brown. Both Gabriella and her nieces lost touch with James after his father's death fifteen years ago in May 1998 and do not know his whereabouts. In addition, Gabriella had a stepdaughter, Amy Scott Black, the daughter of her deceased husband, George Scott, who died eight years ago in June 2005.

Both George and Gabriella came from families with substantial wealth. In April, 1998, George and Gabriella signed Wills in which they left all of their assets to each other. Upon the second of Gabriella's and George's deaths, the survivor's estate would pass in equal shares to Ellen, Marie and Amy.

Upon George's death in June, 2005, the vacation home George had inherited from his parents, Blueberry Hill, in Kennebunkport, Maine had passed to Gabriella. The balance of George's wealth was held in family trusts which passed to Amy upon his death.

During their lives, Gabriella and George had paid for both private schools and college for Amy's, Ellen's and Marie's children. When George died Gabriella continued doing so and the youngest of Amy's and Ellen's children graduated from college at about the same time Gabriella was diagnosed with Alzheimer's disease in June, 2007. Marie's children were younger and the youngest graduated from college about a year before Gabriella's death. Gabriella and George had also made annual exclusion gifts to each of Ellen, Marie, Amy and their children during George's life and Gabriella continued to do so after George's death.

All of Ellen, Marie and Amy have been devoted in taking care of Gabriella during her illness. They have consulted each other about care decisions, although Ellen holds the Health Care Proxy, and have each made it a point to visit with Gabriella once or twice every week.

When Gabriella was first diagnosed with Alzheimer's disease in June, 2007, Ellen's husband who is a mergers and acquisitions partner at one of the large New York City law firms, suggested to Ellen that it would make sense for Gabriella to have Revocable Trust. Ellen spoke to Gabriella and she went with Gabriella to an estate planning attorney. The attorney also suggested to Gabriella that since she had real property outside of New York, had substantial investments that would need to be managed, had an heir at law who would need to be found if probate were necessary and her ability to handle her own financial affairs would decline a Revocable Trust was an appropriate vehicle for her. After further discussion, of the terms of the trust Gabriella went home and the attorney drafted a pour over Will and Revocable Trust for her. Within a month the documents were signed.

Under the terms of the Revocable Trust, Marie was appointed as the co-trustee with Gabriella and would serve alone upon Gabriella's incapacity. Upon Gabriella's death, Westchester Trust Company was appointed as co-trustee with Marie. Gabriella's entire estate was divided equally between Ellen and Marie with the exception of a few family heirlooms located in the Blueberry Hill home which were given to Amy. The terms of the Revocable Trust also contained a provision allowing the trustees to make gifts in accordance with Gabriella's pattern of giving during her life and so once Gabriella became incapacitated Marie continued to make annual exclusion gifts and pay her children's tuition. Amy was unaware that Gabriella had created a Revocable Trust or that Gabriella had changed the plan that George and Gabriella had had during George's life for the disposition of their assets.

Upon Gabriella's death, Amy discovered that she will receive only a few items of personal property from Blueberry Hill and James, who is a struggling artist, having read about his great aunt's death has contacted the family about his inheritance.

GABRIELLA BROWN SCOTT REVOCABLE TRUST

THIS IS A TRUST AGREEMENT (sometimes referred to as "this Trust Agreement") dated _____, between GABRIELLA BROWN SCOTT of White Plains, New York (the "Grantor"), and GABRIELLA BROWN SCOTT and MARIE BROWN SMITH as Initial Trustees (the "Trustees").

WHEREAS, the Grantor desires to create a trust and the Trustees are willing to accept the trust hereby created;

NOW, THEREFORE, the Grantor transfers the property listed on Schedule A to the Trustees, in trust, and the Trustees accept the property and agree to hold, manage and distribute the property under the terms of this Trust Agreement.

ARTICLE I

Trust Name

This Trust Agreement and the trusts hereunder may be referred to as the Gabriella Brown Scott Revocable Trust.

ARTICLE II

Trust Provisions During Lifetime

During the Grantor's life, any property held under this Trust Agreement shall be referred to as "the Trust Estate" and shall be disposed of as follows:

A. **Distributions.** The Trustees shall distribute to or for the benefit of the Grantor as much of the net income and principal of the Trust Estate as the Grantor may from time to time direct, and such additional amounts of net income or principal thereof as the Trustees may at any time and from time to time determine.

B. **Undistributed Income.** Any net income of the Trust Estate not so distributed shall be accumulated and annually added to principal.

C. **Intention.** The Trustees shall liberally distribute income and principal of the Trust Estate for the Grantor's benefit and the rights of the successor beneficiaries hereunder shall be considered secondary. The Trust Estate is established to ensure that the best available care and support are provided to the Grantor to meet all lifetime needs. All assets of the Trust Estate

are to be considered available for that purpose, and the Trustees shall at all times be guided by that purpose and intent.

D. **General Directions to Trustees.** The Trustees shall make every effort to involve the Grantor in decision-making regarding both financial matters and personal care. The Trustees shall make every effort to determine the Grantor's wishes and make decisions that conform to them. If the Grantor is unable to make her wishes known, the Trustees shall make decisions that the Trustees believe that the Grantor would make, bearing in mind that the least restrictive alternatives for living arrangements are desirable so that the Grantor may live with the greatest degree of dignity possible. The Trust Estate is to be used to provide the Grantor with the best available care and support for the Grantor during the Grantor's lifetime.

E. **The Grantor's Residence.** The Trustees are specifically authorized to hold and maintain any real property used by the Grantor as a personal residence and transferred to the trust for the Grantor's use and benefit during the Grantor's lifetime. If the Trustees determine that it would be in the Grantor's best interest to maintain a residence for the Grantor's use but that the residence or residences then held in any trust hereunder should not be used for such purpose, the Trustees are authorized to sell said real property and to purchase such other residence, or to make such other arrangements as the Trustees deem suitable for the purpose.

The Trustees are authorized to pay all carrying charges of such residence, including but not limited to any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including, but not limited to, independent contractors) and other expenses incident to the running of a household for the Grantor's benefit. Having in mind the extent to which funds will be available for expenditure for the Grantor's benefit, the Trustees are authorized to expend such amounts as the Trustees may determine to maintain the Grantor's current lifestyle including, but not limited to, complete authority to provide for the Grantor's personal care and comfort in any manner. The Trustees are authorized to engage the services of any individuals or organizations to provide for the Grantor's personal care and comfort. The Grantor is not married as of the date hereof.

F. **Gifts.** Whenever the Grantor is incapacitated (as defined below), the Trustees may make gifts from the Trust Estate as expressly authorized in this Article.

1. The Trustees may make gifts to the Grantor's nieces, ELLEN BROWN JONES and MARIE BROWN SMITH, and her stepdaughter, AMY SCOTT BLACK, and their descendants in an amount not exceeding the annual Federal gift tax exclusion under Code Sec. 2503(b). The Trustees may make unlimited transfers for the descendants of the Grantor's nieces, ELLEN BROWN JONES and MARIE BROWN SMITH, and stepdaughter, AMY SCOTT BLACK, for those expenditures described in Code Sec. 2503(e). The Trustees may not use any of the Trust Estate in a manner that would discharge the legal obligation of any Trustee to support such Trustee's descendants.

2. The Trustees may make gifts from the Trust Estate to any charitable organization, the gifts to which qualify for the Federal income and gift tax charitable deduction, and to which the Grantor shall have previously made gifts, and pay the Grantor's charitable pledges and dues in a manner that the Trustees shall determine reflects the Grantor's general donative history.

3. The Trustees shall make gifts from the Trust Estate only as the Trustees shall deem to reflect the Grantor's wishes, and the Trustees shall consider the Grantor's history of making such gifts and the Grantor's estate plan.

4. No gift may be made from the Trust Estate to any donee who is also a Trustee except as is appropriate for that donee's health, education, maintenance or support, determined without taking into account any other available income and assets.

5. The Trustees may make gifts under this Article either outright or to a trust for the primary benefit of a permissible donee or multiple permissible donees, or to any legal guardian, conservator or similar fiduciary of such donee, or to a custodian under any applicable Uniform Transfers (or Gifts) to Minors Act, as the Trustees shall deem appropriate, even if one or more of the persons acting as the Trustees is a guardian, conservator, similar fiduciary or custodian.

ARTICLE III

Payments After Death

Upon the Grantor's death, the Trustees shall dispose of the Trust Estate which shall include all property distributable to the Trustees as a result of the Grantor's death, whether under the Grantor's Will or otherwise (such property shall be referred to as the "Trust Fund"), as follows:

A. **Pay Estate Obligations.** If the Grantor's probate estate (excluding income) is insufficient to pay the Grantor's funeral expenses, all claims against the Grantor's probate estate and the expenses of administering the Grantor's probate estate, the Trustees shall make available to the Grantor's Executor under the Grantor's Will (including by direct payment thereof as directed by the Grantor's Executor) out of the Trust Fund such sums as the Grantor's Executor shall certify to be required to make good such insufficiency; provided if no such Executors are serving, then the Trustees are authorized to pay such debts and expenses directly without direction by the Grantor's Executors. Nothing herein, however, shall be deemed to authorize the Trustees to make any such payment of property where such property was not otherwise subject to the claims to be paid. Without limiting the foregoing, the Trustees are also authorized to pay or reimburse, in the manner set forth above, any reasonable and necessary costs of the Grantor's funeral (and related expenses) in excess of any limit thereon imposed by applicable state or Federal law. In addition, if the Grantor's Will gives the Grantor's entire residuary estate to the Trustees under this Trust Agreement, the Trustees shall satisfy any unsatisfied preresiduary pecuniary gift (to the extent of such insufficiency) in the Grantor's Will and shall distribute real property, tangible personal property and intangible personal property in the way and to the recipients specified in the preresiduary provisions of the Grantor's Will (to the extent not satisfied thereunder). Such gifts and provisions shall be construed and applied as if the trust property had been owned outright by the Grantor and disposed of under the Grantor's Will, but distribution shall be made directly to the recipients named in the Will and not to the Grantor's Executor, so that the trust property does not pass through the Grantor's probate estate.

B. **Death Taxes.** The Trustees shall pay any death taxes that result from the Grantor's death out of the Trust Fund in the manner provided below in the provisions governing payment of death taxes.

C. **Balance of the Trust Fund.** After the foregoing payments, the Trustees shall dispose of the balance of the Trust Fund in the manner provided below.

ARTICLE IV

Tangible Personal Property

A. **Gift.** The Grantor gives the following items located in her estate known as Blueberry Hill in Kennebunkport, Maine to her stepdaughter:

1. Grandfather clock located in front entrance hall;
2. Seascape painting hanging over fireplace in living room;
3. Chippendale table located in living room;
4. Diamond Tiffany & Co. engagement ring; and
5. Portrait of her grandmother hanging in upstairs hall.

B. **General Gift of Tangible Personal Property.** The Grantor gives all the rest of the Grantor's tangible personal property held in the Trust Fund to her nieces, ELLEN BROWN JONES and MARIE BROWN SMITH.

C. **Tangible Personal Property.** The term "tangible personal property" includes personally held art, antiques, stamp and coin collections and other collectibles. Such term does not include ordinary currency and cash or bullion.

D. **Gift Includes Insurance.** A gift of property under this Article includes the Grantor's rights under any insurance policies related to such property or the proceeds of such policies.

E. **Payment of Packing, Shipping and Delivery Expenses.** The expense of packing, shipping, insuring and delivering tangible personal property to an individual under this Article at such individual's residence or place of business shall be paid by the Trustees as an administration expense.

ARTICLE V

Residue

The Grantor gives the balance of the Trust Fund ("the Grantor's Residuary Trust Fund"), real and personal, including any property mentioned above but not effectively disposed of in equal shares, per stirpes, to her nieces, ELLEN BROWN JONES, and MARIE BROWN SMITH.

ARTICLE VI

Takers of Last Resort

The Trustees shall distribute any property that is not otherwise disposed of under this Trust Agreement to the KENNEBUNKPORT HISTORICAL SOCIETY, Kennebunkport, Maine if it is in existence and an organization, described in Section 170(c) and 2055(c) of the Code. If the KENNEBUNKPORT HISTORICAL SOCIETY, is not in existence or is not an organization described in Section 170(c) and 2055(c) of the Code, the Trustees shall distribute such property to such organizations described in Section 170(c) and 2055(c) of the Code as shall be selected by the Trustees.

ARTICLE VII

Payment of Death Taxes

A. **All from Residue.** All estate, inheritance, legacy, succession, generation-skipping or other wealth transfer taxes (other than any additional estate tax imposed by Code Secs. 2031(c)(5)(C), 2032A(c) or 2057(f), any generation-skipping transfer tax on any generation-skipping transfer other than a direct skip or any comparable tax imposed by any other taxing authority) that result from the Grantor's death and that are imposed by any domestic or foreign taxing authority with respect to all property taxable by reason of the Grantor's death, together with interest and penalties on those taxes, shall be charged against and paid without apportionment out of the Grantor's Residuary Trust Fund as an administration expense.

ARTICLE VIII

Trustees

A. **Appointment of Successor Trustee.** If MARIE BROWN SMITH shall fail or cease to act as Trustee the Grantor appoints ELLEN BROWN JONES as Trustee hereunder.

B. **Successor Trustees.** A Trustee (the "appointing Trustee") may appoint successor Trustees in accordance with this paragraph:

1. Any trustee serving at any time may appoint a successor trustee to serve when the appointing trustee fails or ceases to serve as trustee.

2. If an appointing Trustee names a successor Trustee, and if the Grantor has also named or provided for the appointment of one or more successor Trustees herein, the appointments the Grantor has made herein shall take priority.

3. Any appointment of a successor Trustee shall be made by an acknowledged instrument delivered to any and all other Trustees who may then be serving.

C. **Filling Trustee Vacancies.** If there is neither an effectual appointment of a successor Trustee nor any effectual provision otherwise hereunder for the appointment of a successor Trustee, a majority of the current adult and competent Beneficiaries of the trust shall have the right to appoint an individual, corporation or other entity with fiduciary powers to replace the removed Trustee or whenever the office of Trustee becomes vacant.

D. **Compensation of Trustees.** Individual Trustees shall receive compensation in accordance with the law of the State of New York in effect at the time of payment, unless the Trustee waives compensation. A corporate Trustee shall be compensated by agreement with the individual Trustee or, in the absence of such agreement, in accordance with its fee schedule as in effect at the time of payment. The Grantor authorizes a corporate Trustee to charge additional fees for services it provides to a trust hereunder that are not comprised within its duties as Trustee; for example, a fee charged by a mutual fund it administers in which a trust hereunder invests, a fee for providing an appraisal or a fee for providing corporate finance or investment banking services. The Grantor also recognizes that a corporate Trustee may charge separately for some services comprised within its duties as Trustee; for example, a separate fee for investing cash balances or preparing tax returns. Such separate charges shall not be treated as improper or

excessive merely because they are added on to a basic fee in calculating total compensation for service as Trustee. In calculating any compensation based on the value of a trust, a policy of insurance on the life of a living person shall be deemed to have no value.

ARTICLE IX

Fiduciary Provisions

A. General Provisions Regarding Changes in Fiduciaries.

1. To the extent not prohibited by applicable law, any Trustee may resign at any time without court approval, whether or not a successor has been appointed, provided the resigning Trustee complies with any applicable state law governing the resignation of the Trustee that may not be waived by a governing instrument. Such resignation shall be by acknowledged instrument executed by the resigning Trustee and delivered to any other fiduciary acting hereunder, or if none, to the beneficiary of the trust.

2. If any Trustee is removed, resigns or otherwise ceases to act as Trustee of any trust hereunder, the Trustee shall immediately surrender all records maintained by the Trustee with respect to such trust to the then acting Trustees or, if no other Trustee is then acting with respect to such trust, to the successor Trustee upon receipt of written notice of the designation of the successor Trustee from the person appointing such successor Trustee.

B. Accountings and Other Proceedings.

1. The Grantor directs that a trust hereunder be subject to independent administration with as little court supervision as the applicable state law allows. The Trustees shall not be required to render to any court annual or other periodic accounts, or any inventory, appraisal, or other returns or reports, whether required by statute or otherwise. The Trustees shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as the Trustees shall determine. The Trustees shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians, out of the property of the trust. The Trustees shall not be required to register any trust hereunder.

2. The Grantor directs that in any proceeding relating to a trust hereunder, service upon any person under a legal disability need not be made when another person not under

a disability is a party to the proceeding and has the same interest as the person under the disability. The person under the disability shall nevertheless be bound by the results of the proceeding. The same rule shall apply to non-judicial settlements, releases, exonerations and indemnities.

C. Continuation of Trustees' Powers. Powers granted to the Trustees hereunder or by applicable law shall continue with respect to all property held hereunder to be exercisable by the Trustees until property is actually distributed to a beneficiary. By way of illustration and not by way of limitation, the Trustees may invest and reinvest and take all investment action with respect to property that has been directed to be distributed and notwithstanding any direction that the property be distributed "as it is then constituted" until such property is actually distributed.

D. Additional General Provisions Regarding Fiduciaries.

1. "Interested Trustee" means, for any trust, a Trustee who is (i) a transferor of property to the trust, including a person whose qualified disclaimer resulted in property passing to the trust; or (ii) a person who is, or in the future may be, eligible to receive income or principal pursuant to the terms of the trust. A Trustee described in (i) is an Interested Trustee only with respect to the transferred property (including income and gain on, and reinvestment of, such property). A person is described in (ii) even if he or she has a remote contingent remainder interest. A Trustee who is not an Interested Trustee is a "Disinterested Trustee."

2. Except to the extent, if any, specifically provided otherwise in this Trust Agreement, references to the Trustees shall, in their application to a trust hereunder, refer to all those from time to time acting as Trustees and, if two Trustees are eligible to act on any given matter, they shall act unanimously, and if more than two Trustees are eligible to act on a given matter, they shall act by majority.

3. The Trustees shall be entitled to reimbursement for any out-of-pocket expenditures made or incurred in the proper administration of the trusts under this Trust Agreement or in furtherance of his or her fiduciary duties and obligations.

4. The fact that a Trustee is active in the investment business shall not be deemed a conflict of interest, and purchases and sales of investments may be made through a corporate Trustee or through any firm of which a corporate or individual Trustee is a partner, member, shareholder, proprietor, associate, employee, owner, subsidiary, affiliate or the like.

Property of a trust hereunder may be invested in individual securities, mutual funds, partnerships, private placements or other forms of investment promoted, underwritten, managed or advised by a Trustee or such a firm.

5. A Trustee may irrevocably release one or more powers held by the Trustee while retaining other powers.

6. Any Trustee may delegate to a Co-Trustee any power held by the delegating Trustee, but only if the Co-Trustee is authorized to exercise the power delegated. A delegation may be revocable, but while it is in effect the delegating Trustee shall have no responsibility concerning the exercise of the delegated power.

E. **Waiver of Bond.** No Trustee shall be required to give bond or other security in any jurisdiction and, if despite this exoneration, a bond is nevertheless required, no sureties shall be required.

ARTICLE X

Governing Law and Trustee Powers

The interpretation and operation of the trust shall be governed by the laws of the State of New York. The Trustees may, without prior authority from any court, exercise all powers conferred by this Trust Agreement or by common law or by any fiduciary powers act or other statute of the State of New York or any other jurisdiction whose law applies to the trust. The Trustees shall have sole and absolute discretion in exercising these powers. Except as specifically limited by this Trust Agreement, these powers shall extend to all property held by the Trustees until actual distribution of the property. The powers of the Trustees shall include the following:

A. **Special Trustee Liability Provision.** Some persons may be hesitant to serve as Trustee hereunder because of a concern about potential liability. Therefore, with respect to any trust created hereunder (i) no individual Trustee shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken in connection with the administration of any trust created hereunder if in good faith reasonably believed by such Trustee to be in accordance with the provisions and intent hereof, (ii) no individual Trustee shall have any fiduciary responsibility to observe, monitor or evaluate the actions of the other

Trustees, and (iii) each individual Trustee shall be fully indemnified by the trust estate against any claim or demand by any trust beneficiary or trust creditor, except for any claim or demand based on such Trustee's willful misconduct or gross negligence. Expenses incurred by a Trustee in defending any such claim or demand shall be paid by the trust estate in advance of the final disposition of such claim or demand, upon receipt of an undertaking by or on behalf of such Trustee to repay such amount if it shall ultimately be determined that such Trustee is not entitled to be indemnified as authorized by this paragraph. In no event shall any Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

B. Security Interests. The Trustees may grant security interests and execute all instruments creating such interests upon such terms as the Trustees may deem advisable.

C. Tax Elections and Allocations. The Trustees may make all tax elections and allocations the Trustees may consider appropriate, including any election to treat this revocable trust as part of the Grantor's estate for income tax purposes, even though a Trustee may have an interest affected by the election, except where a Trustee is prohibited from participating in the election by another provision of this Trust Agreement, provided, however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. Tax elections and allocations made in good faith shall not require equitable adjustments.

D. Division and Distribution of The Trust Fund. The Trustees may divide and distribute the assets of the Trust Fund in kind, in money, or partly in each, without regard to the income tax basis of any asset and without the consent of any beneficiary. The decision of the Trustees in dividing any portion of the Trust Fund between or among multiple beneficiaries shall be binding on all persons.

E. Determinations About Property. The Trustees may determine what property is covered by general descriptions contained in this Trust Agreement.

F. Reliance Upon Advice. The Trustees may employ and rely upon advice given by accountants, attorneys, investment bankers, and other expert advisors and employ agents, clerks and other employees and pay reasonable compensation to such advisors or employees in addition

to fees otherwise payable to the Trustees, notwithstanding any rule of law otherwise prohibiting such dual compensation.

G. **Trustee as Agent.** Trustees serving in any jurisdiction in which a corporate trustee is unable to serve as Trustee may use such corporate trustee as an agent to perform any task that may lawfully be performed by such an agent in that jurisdiction, and may pay to such corporate trustee such compensation for its services as an agent as shall be agreed upon by all Trustees.

H. **Custodian Employed.** The Trustees may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any bank, trust company, brokerage house or other institution employed as custodian), and pay reasonable compensation to a custodian in addition to any fees otherwise payable to the Trustees, notwithstanding any rule of law otherwise prohibiting such dual compensation.

ARTICLE XI

Definitions and Miscellaneous Provisions

The following definitions and miscellaneous provisions shall apply under this Trust Agreement:

A. **Surviving Spouse.** The "surviving spouse" of an individual means the person (if any) who survives that individual and who is married to and living as husband and wife with that individual at the time of his or her death.

B. **Minor and Adult.** Whether an individual is a minor or an adult shall be determined under the laws of the individual's domicile at the time in question.

C. **Code and Regulations.** References to the "Internal Revenue Code" or "Code" or to provisions thereof are to the Internal Revenue Code of 1986, as amended at the time in question. References to the "Regulations" and "Regs." are to the Regulations under the Code. If, by the time in question, a particular provision of the Code has been renumbered, or the Code has been superseded by a subsequent Federal tax law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to the Grantor's intent as expressed in this Trust Agreement. A similar rule shall apply to references to the Regulations.

D. **Per Stirpes.** Property that is to be divided among an individual's surviving or then-living descendants "per stirpes" or in "per stirpital shares" shall be divided into as many equal shares as there are children of the individual who are then living or who have died leaving surviving or then-living descendants. A share allocated to a deceased child of the individual shall be divided further among such deceased child's surviving or then-living descendants in the same manner.

E. **Executors.** Whenever herein a reference is made to the Grantor's or another person's Executors, such reference shall be to those serving as the fiduciary of that person's estate, whether or not their title is Executors under applicable state law.

F. **Incapacitated Grantor or Trustee.** The Grantor or a Trustee shall be deemed to be "incapacitated" (and while incapacitated shall not serve as a Trustee) if another then-serving Trustee or, if there is none, the next successor Trustee receives written certification that the examined individual is physically or mentally incapable of managing the affairs of the trust (or, in the case of the Grantor, the Grantor's personal financial affairs), whether or not there is an adjudication of incapacity.

1. This certification shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Grantor or the Trustee, as the case may be.

2. This certification need not indicate any cause for the incapacity of the Grantor or the Trustee.

3. A certification of incapacity shall be rescinded when a serving Trustee receives a certification that the Grantor shall then be capable of managing the Grantor's personal financial affairs or that the former Trustee is capable of managing the trust's affairs, as the case may be. This certification, too, shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Grantor or the Trustee, as the case may be, and at least one (1) of whom is board certified in the specialty most closely associated with the former incapacity.

4. No person is liable to anyone for actions taken in reliance on the certifications under this paragraph or for dealing with a Trustee other than the one removed for incapacity based on these certifications.

ARTICLE XII
Revocability of Trust and Rights Reserved

The Grantor reserves the following rights, each of which may be exercised whenever and as often as the Grantor may wish:

A. **Amend or Revoke.** The right by an acknowledged instrument in writing to revoke or amend this Trust Agreement or any trust hereunder. After the Grantor's death, neither this Trust Agreement nor any trust hereunder may be revoked or amended except as expressly provided elsewhere herein.

B. **Remove and Appoint Trustees.** The right to remove any Trustee and appoint substitute, additional or successor Trustees.

C. **Approve Investment Decisions.** The right to approve the Trustees' investment decisions and the Grantor's approval shall bind all other beneficiaries.

D. **Approve Trustees' Conduct.** The right from time to time to approve of the Trustees' conduct (whether in connection with an accounting by the Trustees or without an accounting), and the Grantor's approval shall bind all other beneficiaries.

E. **Insurance Policies.** All rights the Grantor may have as the owner of any insurance policies payable to the Trustees.

ARTICLE XIII
Savings Clause

Should any of the provisions or directions of this Trust Agreement fail or be held ineffectual or invalid for any reason, it is the Grantor's desire that no other portion or provision of this Trust Agreement be invalidated, impaired or affected thereby, but that this Trust Agreement be construed as if such invalid provision or direction had not been contained therein.

ARTICLE XIV
Captions

The captions used in this Trust Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Trust Agreement or the intent of any provision therein.

IN WITNESS WHEREOF, the Trustees and the Grantor have signed this Trust Agreement, effective the day and year first above written and executed by each of them on the dates set forth below.

Dated: _____

GABRIELLA BROWN SCOTT, as Grantor

Dated: _____

MARIE BROWN SMITH, as Grantor

Sample

STATE OF NEW YORK

)

) :ss

WESTCHESTER COUNTY

)

On _____, before me, the undersigned, a Notary Public in and for said state, personally appeared GABRIELLA BROWN SCOTT, as Grantor, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that GABRIELLA BROWN SCOTT executed the same in her capacity, and that by her signature on the instrument, the individual, or the person on behalf of whom the individual acted, executed the instrument.

WITNESS my hand and notarial seal.

Notary Public

STATE OF NEW YORK

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WESTCHESTER COUNTY

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On _____, before me, the undersigned, a Notary Public in and for said state, personally appeared MARIE BROWN SMITH, as Grantor, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that MARIE BROWN SMITH executed the same in his capacity, and that by his signature on the instrument, the individual, or the person on behalf of whom the individual acted, executed the instrument.

WITNESS my hand and notarial seal.

Notary Public

GABRIELLA BROWN SCOTT REVOCABLE TRUST

SCHEDULE A

CASH\$10.00

Sample

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

[REDACTED]

Plaintiff,

Index No.: [REDACTED]

VERIFIED AMENDED
COMPLAINT

-against-

[REDACTED] AS TRUSTEE OF THE
[REDACTED] TRUST, [REDACTED]
[REDACTED], individually [REDACTED]
Individually as an interested party, being unknown,
AND JOHN DOE(S), said individuals

Defendants.

RECEIVED

DEC 22 2011

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-----X

PLAINTIFF, [REDACTED], by his attorney [REDACTED]

[REDACTED] complaining of the above named Defendants, respectfully alleges as follows:

1. That at all times herein mentioned, Plaintiff [REDACTED] (hereinafter referred to as "[REDACTED]") was and is a resident of the County of Westchester, State of New York.
2. Defendant [REDACTED] (hereinafter referred to as "[REDACTED]") is a resident of the [REDACTED], State of New Jersey.
3. On or about December 1, 1999, [REDACTED] (hereinafter referred to as "[REDACTED]"), while a resident of the State of New York, executed an *inter vivos* trust (hereinafter referred to as the "Trust"), a copy of which is annexed hereto as Exhibit "A".
4. On or about December 31, 2004, [REDACTED], while a resident of the State of New York, executed an *Inter vivos* Trust instrument captioned "Amended and Restated Declaration of Trust" (hereinafter referred to as the "Alleged Amended Trust"), a copy of

which is annexed hereto as Exhibit "B," purporting to "amend and restate the terms of the trust of the property."

5. Upon information and belief the assets and property used to fund the Trust and Alleged Amended Trust were located in the State of New York.

6. [REDACTED] died on July 5, 2010.

7. In August 2010, Plaintiff, for the first time, received notice of the creation and a copy of the Alleged Amended Trust from Defendant [REDACTED]

8. On or about August 19, 2010, Plaintiff demanded an accounting by Defendant [REDACTED] of the trust assets, but [REDACTED] to date has wholly failed and refused to render any such account.

9. Plaintiff is the son of [REDACTED] and is a person interested as a beneficiary of the Trust.

10. [REDACTED] is the son of [REDACTED] and is a person interested as a beneficiary of the Trust and the Alleged Amended Trust.

**FIRST CAUSE OF ACTION TO INVALIDATE
THE ALLEGED AMENDED TRUST FOR OVERREACHING
AND UNDUE INFLUENCE**

11. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 1 through 10, as though set forth at length herein.

12. Upon information and belief, [REDACTED]'s execution of the Alleged Amended *inter vivos* Trust was not done of her own free will and volition, but was procured by overreaching and undue influence practiced upon her by Defendant [REDACTED] and others under [REDACTED] control, or acting at her behest or in concert and privity with her,

whose identities are presently unknown to Plaintiff.

13. Upon information and belief, the Alleged Amended *inter vivos* Trust was not executed by [REDACTED] in the manner and form required by law.

14. Upon information and belief, at the time of execution of the Alleged Amended Trust and continuing until [REDACTED]'s death, Defendant [REDACTED] and others manipulated [REDACTED] made continuing fraudulent misrepresentations to her, and insinuated themselves into [REDACTED]'s life, using their family or other close personal relationships, as well as [REDACTED]'s deteriorated condition, to create for themselves a position of trust and confidence with [REDACTED], so dominating her life and overcoming her own free will as to cause her to be unable to resist the influence of defendants to dispose of her property and possessions in a manner contrary to her true wishes.

**SECOND CAUSE OF ACTION TO INVALIDATE
THE ALLEGED AMENDED TRUST FOR LACK OF CAPACITY**

15. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 11 through 14, as though set forth at length herein.

16. Upon information and belief [REDACTED]'s execution of the Alleged Amended *inter vivos* Trust was not done of her own free will and volition, but was procured improperly as a result of [REDACTED]'s lack of capacity, known by Defendant [REDACTED] and others acting at her behest or in concert and privity with her, whose identities are presently unknown to Plaintiff.

17. Upon information and belief, the Alleged Amended *inter vivos* Trust was not executed by [REDACTED] in the manner and form required by law.

18. Upon information and belief, at the time of execution of the Alleged Amended Trust, [REDACTED] was incapacitated, frail and debilitated, suffering the effects of old age and dementia, as well as the recent death of her husband, unable to function independently, and incapable of formulating the intent necessary to create or amend a trust, to comprehend the legal effect of the documents signed by her, or to resist the influence of defendants to dispose of her property and possessions in a manner contrary to her true wishes.

19. Upon information and belief, at the time of execution of the Alleged Amended Trust, Defendant [REDACTED] and others manipulated [REDACTED], made fraudulent misrepresentations to her, and insinuated themselves into [REDACTED]'s life, using their family or other close personal relationships, as well as [REDACTED]'s deteriorated condition, to create for themselves a position of trust and confidence with [REDACTED], so dominating her life and overcoming her own free will as to cause her to be unable to resist the influence of defendants to dispose of her property and possessions in a manner contrary to her true wishes and the natural objects of her bounty.

THIRD CAUSE OF ACTION TO INVALIDATE THE ALLEGED AMENDED TRUST FOR FRAUD

20. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 15 through 19, as though set forth at length herein.

21. The original 1999 *inter vivos* Trust executed by [REDACTED] provided for the equal disposition of her property among her three children, [REDACTED]
[REDACTED]

22. The Amended 2004 *inter vivos* Trust significantly deviated from this

leaving Defendant [REDACTED] with a substantial portion of the property distribution.

23. [REDACTED] consistently maintained a close relationship with the Plaintiff, both before and after December 2004, and on many occasions had stated to the Plaintiff and to other family members that she made sure all her children were treated equally in the event of her death.

24. Upon information and belief, Defendant [REDACTED] and other unknown individuals, utilizing inordinate control and influence over [REDACTED], induced [REDACTED] to execute the Alleged *intervivos* Amended Trust, by fraudulently misrepresenting to her that her stated wishes and intentions would be preserved and fulfilled by said Alleged Amended Trust, although they knew said statements to be false.

25. Since [REDACTED] required a 24 hour 7 day a week home health care worker and became very reliant on Defendant [REDACTED].

26. Defendant [REDACTED] took over control of all decisions and personal affairs of [REDACTED] and arranged various appointments with financial institutions and attorneys so that she could maintain control over the trust and improperly deceived Martha into transferring a majority of the assets to her.

27. It is upon information and belief that Defendant [REDACTED] orchestrated the execution of the alleged Amended Trust and that the execution was not in front of nor under the direct supervision of a disinterested attorney.

28. Since execution of the alleged Amended Trust, Defendant [REDACTED] continued to control [REDACTED] personal affairs and orchestrated a series of events to directly benefit her and in doing so she insured that her improper conduct would not be discovered.

29. It is upon information and belief that Since 2004 at the time of the alleged amendment to the *inter vivos* trust Defendant [REDACTED] purposely hid the fact from Plaintiff and others that [REDACTED] allegedly amended the *inter vivos* Trust from Plaintiff and others.

30. It is upon information and belief that since 2004 until [REDACTED] death Defendant [REDACTED] had used her position of trust to improperly dispose of Trust assets to her own benefit or for the benefit of others not entitled to receive said assets.

FOURTH CAUSE OF ACTION FOR AN ACCOUNTING

31. Plaintiff repeats and realleges the allegations contained in paragraphs 20 through 30, as though set forth at length herein.

32. Pursuant to the express trust terms, Defendant [REDACTED] as trustee has had the custody, management and control of the trust property from December 1, 1999 to the present.

33. Defendant [REDACTED] has never rendered, either to Plaintiff or to any Court of competent jurisdiction, any account of her actions as trustee, although duly demanded by Plaintiff.

34. Defendant [REDACTED] has been acting as trustee for a period in excess of seven years, and it is necessary, proper and appropriate for her to be required to judicially account for her acts as such trustee at this time.

35. Plaintiff has no adequate remedy at law.

FIFTH CAUSE OF ACTION TO REMOVE TRUSTEE

36. Plaintiff repeats and realleges the allegations contained in paragraphs 31

through 35 as though set forth at length herein.

37. Defendant [REDACTED] was appointed as a trustee under the Alleged Amended Trust, and pursuant to said instrument has served and continues to serve as such trustee. Upon information and belief, [REDACTED] served as *de facto* trustee for some time prior and after execution of the Alleged Amended Trust.

38. Defendant [REDACTED] should be removed as trustee forthwith because, upon information and belief, she has committed the following acts of misconduct:

- a. She has wasted, misappropriated, or improperly applied trust assets;
- b. She has consistently failed and refused to respond to reasonable inquires from Plaintiff regarding the administration of the trust;
- c. She has encumbered the trust with exorbitant administration and other fees and expenses;
- d. She has unjustifiably converted trust assets to her own use or the use of others;
- e. She has commingled, secreted and wasted the assets of the trust and made improper and illegal payments and gifts to herself and others; and
- f. She is unqualified to act as a fiduciary for want of understanding, and is otherwise unfit to serve in such capacity.

39. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment against Defendants:

1. For a First, Second and Third Cause of Action, invalidating and declaring void *ab initio* the Alleged Amended Trust;
2. For a Fourth Cause of Action, ordering and directing Defendant [REDACTED] to render a full and complete judicial accounting of all her actions as trustee, from December 1, 1999 down to date;
3. For a Fifth Cause of Action, removing Defendant [REDACTED] as trustee forthwith, and appointing Plaintiff or such other person as the Court may deem appropriate as successor trustee; and
4. Granting such other, further, and different relief as to the Court may seem just and proper; together with the costs and disbursements of this action.

Dated: New York, New York
December 20, 2011

By: [REDACTED]

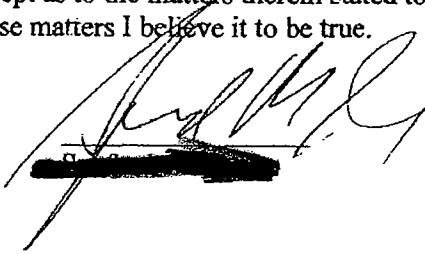
Attorney for Plaintiff

[REDACTED]
New York, New York [REDACTED]

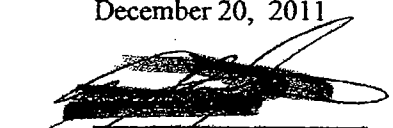
VERIFICATION

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

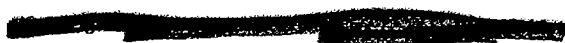
I, the undersigned, being duly sworn, deposes and say: I am the Plaintiff in the within action, I have read the foregoing Complaint and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.



Sworn to before me on this
December 20, 2011


Notary Public

Notary Public, State of New York
Qualified in Queens County
Commission Expires January 4, 2015



Nancy J. Rudolph

Partner

Ms. Rudolph is a member of our Trusts and Estates and Real Estate Practice Groups. Prior to joining Bleakley Platt in 2001, Ms. Rudolph was in private practice with a White Plains law firm, concentrating in litigation. She has also served in the public sector as an Assistant Attorney General in the New York State Office of the Special Prosecutor, handling white collar civil litigation related to Medicaid Fraud. In addition, she was an Administrative Hearing Officer with the New York State Racing and Wagering Board from 1980 to 1984. In her private practice from 1984 to 1987, Ms. Rudolph concentrated in estates, guardianship, real estate and litigation. From 1997 to 2001, Ms. Rudolph was a frequent lecturer to physicians and other professionals on methods to avoid lawsuits.

Today, Ms. Rudolph concentrates in the area of trusts and estates, estate administration, estate tax, and guardianship in the Surrogate's Court, the Supreme Court, and before the United States Tax Court. Ms. Rudolph represents beneficiaries and fiduciaries, both individual and corporate, in judicial proceedings involving probate, administration, lost wills, construction, kinship, removal of fiduciaries, contested accountings, uncontested accountings, and in real estate transactions. Ms. Rudolph also represents individuals and corporate fiduciaries as trustees of supplemental or special needs trusts.

Representative Matters

- Successfully represented a corporate fiduciary in two contested accounting trials before the Surrogate in Westchester County.
- Successfully represented a surviving spouse as the income beneficiary of a testamentary qualified terminal interest trust holding a substantial and very valuable art collection who sought to suspend the independent trustee for violations of the statute.
- Represented beneficiaries in a will construction proceeding, resulting in a favorable interpretation in a Surrogate's Court decision and the ultimate restoration of their annual distributions.
- Negotiated a settlement of a contested accounting for a corporate fiduciary that faced allegations for failure to diversify estate assets under the Prudent Investor Act.
- Successfully represented legal guardians in negotiating the resignation of a testamentary trustee of a supplemental needs trusts.
- Negotiated a settlement for a corporate fiduciary in a construction proceeding on the validity of an amendment to a revocable trust.

Education

- New York Law School, J.D., 1977
- Manhattanville College, B.A., 1972

Bar Admissions

- New York
- U.S. District Courts for the Eastern and Southern Districts of New York
- U.S. Court of Appeals for the Second Circuit
- U.S. Supreme Court

Memberships

- New York State Bar Association
- New York State Bar Association Foundation, Fellow
- Westchester County Bar Association, Executive Committee
- Westchester Women's Bar Association, Co-Chair of the Trusts & Estates Section

Community Involvement

- Westchester Care at Home, former Board Member, 2010-2012
- Visiting Nurse Services Westchester (VNSW) Board Member, 2013 - present
- VNSW - Chair of the Finance Committee and Member of the Governance Committee, 2013 - present

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----- X
Proceeding to Avoid and Cancel an Alleged Amendment
Dated April 2, 2007 to the [REDACTED] Revocable
Trust Under Agreement Dated May 31, 2006 as
Beneficiary of the Last Will & Testament of [REDACTED]

PETITION

File #: [REDACTED]

Deceased

And/or

To Impose a Constructive Trust.
----- X

TO THE SURROGATE'S COURT, COUNTY OF WESTCHESTER

It is respectfully alleged:

1. Petitioners are David [REDACTED], residing at [REDACTED], NY 10923, Thomas [REDACTED], residing at [REDACTED], Chester, NY 10918, and Chris [REDACTED], residing at [REDACTED], NJ 07067. Petitioners are remainderman beneficiaries of the Norma [REDACTED] Trust Under Agreement dated May 31, 2006, created by Norma [REDACTED], deceased, which trust in turn is the pourover residuary beneficiary of the Last Will & Testament of said Norma [REDACTED], deceased.
2. Respondent David C. [REDACTED] was a beneficiary of a 1/15th fraction of The Norma [REDACTED] Revocable Trust dated May 31, 2006, allegedly increased to a 1/2 remainder share of said trust as purportedly amended on April 2, 2007, to the exclusion of petitioners and others.
3. Respondent Bank [REDACTED] - [REDACTED] ("Respondent Bank [REDACTED]") is the executor of decedent's Last Will & Testament admitted to probate by this Court on July 25, 2007 and which obtained Letters

Testamentary from this Court on July 25, 2007. Respondent Bank [REDACTED] is also trustee of The Norma [REDACTED] Revocable Trust ("subject trust").

4. Petitioners seek an order determining that the purported amendment to the subject trust, dated April 2, 2007, is void due to the lack of required mental capacity of Norma [REDACTED] at the time of the execution of the purported amendment, and due to the undue influence and misrepresentations of Respondent David C. [REDACTED].

5. In the alternative, petitioners seek an order imposing a constructive trust on that portion of the decedent's estate or remainder interest in the subject trust which would otherwise have passed to petitioners and others under the subject trust without the purported amendment, due to the confidential relationship of Respondent David C. [REDACTED] with the decedent Norma [REDACTED], misrepresentations to the decedent made by Respondent David C. [REDACTED], decedent's reliance on the misrepresentations in executing an amendment to her trust and resulting unjust enrichment to Respondent David C. [REDACTED].

6. Petitioners also seek an order allowing them or any other interested persons to petition for probate of the decedent's prior will dated May 31, 2006, should the Court revoke probate of the will dated April 2, 2007.

FACTUAL HISTORY

7. Upon information and belief, Decedent Norma [REDACTED] executed the subject trust on May 31, 2006 and on same date a pourover will, naming the subject trust as residuary beneficiary. A copy of the subject trust is annexed hereto as Exhibit "A".

8. Decedent Norma [REDACTED] maintained a close and loving relationship with all of her nieces and nephews, including the petitioners herein and others excluded by the questioned amendment of April 2, 2007. The decedent frequently and consistently during

the last few years of her life, through her statements and actions, indicated her intention to benefit in an equal manner all of her nieces and nephews and not just her brother, Respondent David C. [REDACTED]. Upon information and belief, she executed a pourover will dated May 31, 2006 reflecting her intentions.

9. As is set forth in Article FOURTH of the subject trust, upon the death of Grantor Norma [REDACTED], the net trust estate, after payment of all applicable taxes and administration expenses, is to be distributed in equal shares to the Respondent David C. [REDACTED], and Grantor's nieces and nephews, to wit: Patricia [REDACTED], Kristina [REDACTED], Nicole [REDACTED], Michelle [REDACTED], Amanda [REDACTED], Robert [REDACTED], Stephen [REDACTED], Michael [REDACTED], Eugene [REDACTED], John [REDACTED], Donald [REDACTED], and petitioners herein (David [REDACTED], Thomas [REDACTED] and Chris [REDACTED]). Accordingly, each remainderman was to receive a 1/15th share, including Respondent David C. [REDACTED] and each of the petitioners herein.

10. As a result of the purported amendment to the subject trust dated April 2, 2007, at the express instigation and influence of Respondent David C. [REDACTED], and during a period of time when grantor Norma Kaufman was confused, and in a state of generally poor mental and physical health, the purported amendment changed Respondent David C. [REDACTED]'s share from 1/15th to one-half (1/2) of the remainder after payment of \$5,000.00 to each of three added beneficiaries. Under the purported amendment, the other 50% of the remainder would be distributed in equal shares to Patricia [REDACTED], Michael [REDACTED], John [REDACTED], Donald [REDACTED], Janice [REDACTED], Eugene [REDACTED] and Robert [REDACTED]. The purported amendment excluded all of Respondent David C. [REDACTED]'s five (5) surviving children, including your petitioners, as well as Stephen [REDACTED] and Michelle [REDACTED]. In addition, the purported amendment excluded Kristina [REDACTED] and Nicole [REDACTED].

██████, who are the surviving issue of Respondent David C. ██████'s deceased daughter. Also excluded was Decedent's grand niece, Amanda ██████, the daughter of Decedent's deceased nephew, Thomas ██████. One of the excluded beneficiaries, Nicole ██████, is an infant. Nicole ██████ resides with her father Anthony ██████, at ██████ ██████ ██████, New York. Nicole's date of birth is August 16, 1992 and she does not have a legal guardian. As such, it is respectfully requested that the Court appoint a guardian ad litem for said minor's interests in this proceeding. A copy of the questioned trust amendment dated April 2, 2007 is annexed hereto as Exhibit "B".

11. Respondent David C. ██████ was in a de facto confidential relationship and position of trust to the Decedent Norma ██████. Upon information or belief, said Respondent had been given Power of Attorney and thus also had a fiduciary relationship to decedent. During the last few months of Decedent's life, Respondent David C. ██████ became more involved in her affairs, including handling her finances, paying or transferring her assets to himself, controlling her schedule, restricting and obstructing others from visiting her. Decedent became increasingly dependent on Respondent David C. ██████ while her mental and physical health declined.

12. Upon information and belief, Respondent David C. ██████ introduced Decedent directly to the law firm, or to the bank trust officer who in turn led Decedent to the law firm which drafted the questioned trust amendment.

13. As of April 2, 2007, Norma ██████ was in a confused mental state and poor physical condition, could not understand the scope and meaning of the amendment to her trust dated April 2, 2007, or the nature and condition of her assets or her relation to her nieces and nephews.

14. Respondent David C. [REDACTED] compelled Decedent Norma [REDACTED] to give one-half of the residuary trust estate to himself and exclude Respondent's children and grandchildren, by misrepresenting to her that he would take care of them with his added inheritance.

15. After Decedent had signed the questioned trust amendment and new will, she was advised that she had excluded several of her nieces and nephews by giving one half of her estate to Respondent David C. [REDACTED], and that he had made statements that he was going to enjoy his inheritance with no promise of taking care of the excluded persons. Decedent was upset by this and made statements to others that this was not her intent and that she intended to change her documents.

16. Decedent's health deteriorated further and she was not able to change her Will and Trust prior to her death on June 19, 2007.

17. That despite respondent David C. [REDACTED]'s promises to the decedent, he has failed and refused to acknowledge that he holds the increase in his share in trust for the benefit of petitioners or Decedent's other excluded nieces and nephew or that he will distribute same to them.

18. But for the Decedent's lack of mental capacity to execute and Respondent David C. [REDACTED]'s misrepresentations encouraging the amendment, petitioners would share in the remainder of the trust estate which trust in turn is the residuary beneficiary of Decedent's probate estate.

19. That but for the misrepresentation and fraud perpetrated by Respondent David C. [REDACTED] on Decedent Norma [REDACTED], the purported amendment to the trust would not have been executed and petitioners would share in the remainder of the trust.

20. That Decedent Norma [REDACTED] died on or about June 19, 2007 and thereafter Respondent Bank [REDACTED] petitioned this Court for probate of the decedent's Last Will and Testament dated April 2, 2007. The probate petition was submitted to this Court identifying as interested persons only those persons named as remaindermen of the revocable trust as purportedly amended. The petition omitted petitioners and others excluded by the amended trust. Petitioners were not served with a Notice of Probate, or Citation or any other formal notification of the probate proceeding.

21. Only by conversations with family members did petitioners learn of the probate proceeding and upon inquiring with the Court in August of 2007, were advised that a probate decree had already been issued and Letters Testamentary issued to the Bank of New York in July, 2007.

22. The petitioners respectfully submit that it was misleading and improper to petition this Court without submitting copies of the trust and the purported amendment, or at least providing a summary so that the Court would be made aware of persons adversely affected by the alleged amendment to the revocable trust.

AS AND FOR A FIRST CLAIM/CAUSE OF ACTION TO REVOKE & SET ASIDE
THE PURPORTED TRUST AMENDMENT OF APRIL 2, 2007

23. Petitioners repeat and reallege each and every allegation of the preceding paragraphs as if more fully set forth at length herein.

24. At the time of the alleged execution of the purported amended trust on April 2, 2007, the grantor Norma [REDACTED], deceased, was suffering from Ovarian Cancer, which had spread to her brain shortly after Christmas of 2006, with collateral effects of extreme fatigue, pain, and confusion, where she lacked the requisite mental capacity, including awareness of the nature and extent of her property and the natural objects of her bounty. More specifically, as of April, 2007 Norma [REDACTED] did not remember or understand

that she had several nieces and nephews as children and grandchildren of living siblings and predeceased siblings.

25. Decedent did not understand the nature and consequences of the purported trust amendment of April 2, 2007.

26. That Petitioners have no adequate remedy at law.

AS AND FOR A SECOND CLAIM/CAUSE OF ACTION TO REVOKE & SET ASIDE
THE PURPORTED TRUST AMENDMENT OF APRIL 2, 2007

27. Petitioners repeat and reallege each and every allegation of the preceding paragraphs as if more fully set forth at length herein.

28. The document alleged trust amendment dated April 2, 2007 was not freely and voluntarily executed by Norma [REDACTED], but was obtained and the subscription procured, if in fact it was subscribed by Norma [REDACTED], by the fraud and/or undue influence of Respondent David C. [REDACTED].

29. The purported amendment is not a true amendment to the trust and does not express or embody the donative or testamentary intent of Norma [REDACTED].

30. That Petitioners have no adequate remedy at law.

AS AND FOR A THIRD CLAIM/CAUSE OF ACTION TO IMPOSE A
CONSTRUCTIVE TRUST

31. Petitioners repeat and reallege each and every allegation of the preceding paragraphs as if more fully set forth at length herein.

32. Respondent David C. [REDACTED] had a confidential relationship with Decedent Norma [REDACTED] by virtue of his actions in controlling her financial affairs, her other personal affairs and having obtained Power of Attorney from her to act as her attorney-in-fact.

33. Decedent Norma [REDACTED] and Respondent David C. [REDACTED] were siblings. Norma [REDACTED]'s husband had predeceased her and during the last few months of her life, she relied almost exclusively on Respondent David C. [REDACTED] for her financial affairs.
34. As Norma [REDACTED]'s health deteriorated, the fiduciary responsibility of Respondent David C. [REDACTED] to Norma [REDACTED] became heightened.
35. That Respondent David C. [REDACTED] misrepresented to Norma [REDACTED] that she should change her estate plan, by changing her will and amending her revocable trust to increase his share of the remainder portion from one-fifteenth to one-half, to the exclusion of eight of her nieces and nephew, two (2) of whom are infants.
36. That upon information and belief, said Respondent falsely stated to Norma [REDACTED] that she did not need to leave any portion of her residuary or remainder trust estate to certain nieces and nephews (including petitioners herein) as he, Respondent, would provide for them.
37. That respondent has failed or refused to acknowledge that he will provide for such nieces and nephews excluded by the April 2, 2007 amendment, or that he holds interests for the benefit of or will distribute his increased portion of the trust remainder estate to those eight nieces and nephews, including petitioners herein.
38. That respondent David C. [REDACTED] has been unjustly enriched thereby.
39. That petitioners have no adequate remedy at law.

JURISDICTIONAL BASES

40. It is respectfully submitted that this Court has jurisdiction over the subject trust pursuant to SCPA Sections 104, 1501 and 1509. Additionally, this Court may exercise jurisdiction "in law and in equity to administer justice in all matters relating to the estate and the affairs of decedents.... and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party or any other person having any claim or interest therein... as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition... as justice requires." SCPA 201.

41. Petitioners and counsel have undertaken to properly denominate their claims as set forth herein. To the extent that the claims have been improperly labeled or identified, Petitioners respectfully request that this Court entertain the claims pursuant to SCPA Section 202 in view of the serious factual and legal questions raised herein.

42. The names, addresses and interest of persons interested in this proceeding to the best of Petitioners' knowledge are as follows:

Name & Address

Nature of Interest

Respondent Bank [REDACTED]

Executor of the Estate of Norma [REDACTED]
& Trustee of Norma [REDACTED] Revocable
Trust U/A 5/31/06

[REDACTED]
[REDACTED]

Respondent David C. [REDACTED]

1/15 interest in remainder of subject trust,
50% interest of remainder under trust as
purportedly amended

2421 [REDACTED] Dr.
[REDACTED] NY 07405

Patricia [REDACTED]

Remainderman of subject trust as
purportedly amended (share increased
from 1/15 to 1/14 after 3 \$5,000 gifts)

407 [REDACTED] Rd.
[REDACTED] NY 10541

Michael [REDACTED]

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

258 [REDACTED] Ave.
[REDACTED] NY 07512

Eugene [REDACTED]
10 Wood [REDACTED] Lane
Roading, Essex CM79BA (England)

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

John [REDACTED]
9625 [REDACTED] Lane
Hagerstown, MD 21740

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

Donald [REDACTED]
85 Maple Road
Little Ferry, NJ 07643

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

Robert [REDACTED]
424 [REDACTED] Drive
Saddle Brook, NJ 07662

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

Janice [REDACTED]
205 [REDACTED] Drive
Point Pleasant, NJ 08742

Remainderman of subject trust as amended
(share increased from 1/15 to 1/14 after 3
\$5,000 gifts)

Amanda [REDACTED]
[REDACTED]
Point Pleasant, NJ 08742

Remainderman in original trust,
excluded by purported amendment

Stephen [REDACTED]
610 Salmon Avenue
Raritan, NJ 07652

Remainderman in original trust,
excluded by purported amendment

Kristina [REDACTED]
30 Cardinal Drive
Washingtonville, NY 10992

Remainderman in original trust,
excluded by purported amendment

Nicole [REDACTED]
30 Cardinal Drive
Washingtonville, NY 10992

Remainderman in original trust,
excluded by purported amendment

Michelle [REDACTED]
5160 North Ridge Road, Apt. 308
Sarasota, FL 34238

Remainderman in original trust,
excluded by purported amendment

David [REDACTED]
9 [REDACTED] Ct.
Cantonville, NY 10923

Remainderman in original trust,
excluded by purported amendment,
petitioner herein

Chris [REDACTED]
27 [REDACTED] Ave.
Colonie, NY 12067

Remainderman in original trust,
excluded by purported amendment,
petitioner herein

Thomas [REDACTED]
20 Chester Aene Blvd.
Chester, NY 10918

Remainderman in original trust,
excluded by purported amendment,
petitioner herein

Patricia [REDACTED]
241 [REDACTED]
Irvington, NY 10955

Beneficiary of \$5,000.00 by purported
amendment

Sisters of [REDACTED]
888 [REDACTED] Ave
New Windsor, NY

Beneficiary of \$5,000.00 by purported
amendment

Immaculate Conception Church
46 North Broadway
Irvington, NY

Beneficiary of \$5,000.00 by purported
amendment

43. Upon information and belief, all persons interested are adults and no one is under a disability except infant, Nicole [REDACTED], who resides with her father Anthony [REDACTED], at 30 Cardinal Drive, Washingtonville, New York.

44. Petitioners further request the opportunity to petition for probate of the decedent's Last Will & Testament, dated May 31, 2006, should this Court revoke the probate of the decedent's will dated April 2, 2007.

45. Petitioners further request injunctive relief in the form of an order restraining Respondent Bank of [REDACTED] from making any trust distributions to beneficiaries or to any will beneficiaries until the Court has determined the matters set forth in this petition.

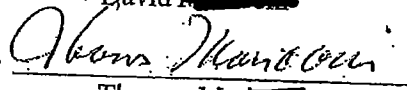
46. No previous application to this or any other court has been made for the relief requested herein.


WHEREFORE, it is respectfully requested that the Court issue an Order or Decree granting the following forms of relief:

- a) Revoking, canceling or setting aside the purported amendment dated April 2, 2007 to the Norma [REDACTED] Revocable Trust dated May 31, 2006, and/or
- b) Imposing a constructive trust on that portion of the remainder to Respondent David C. [REDACTED] increased by the purported amendment to the extent of 3/15 of the entire remainder of the trust and that he be directed, or prior to his receipt that Respondent Bank [REDACTED] be directed to distribute and pay over same directly to petitioners herein (and to others) whose remainder shares were adversely affected by the subject amendment; and/or
- c) Permitting petitioners, in the absence of any other appropriate person, to petition this Court for probate of decedent's Last Will & Testament dated May 31, 2006 should this Court void or set aside probate of the decedent's Will dated April 2, 2007; and
- d) Prohibiting and restraining Respondent Bank [REDACTED] from distributing any part of the probate estate or the trust estate to any beneficiary pending a determination of this petition; and
- e) Granting costs and disbursements, including reasonable attorney's fees from estate or trust assets, as the case may be, to petitioners herein; and
- f) For such other, further and different relief as to this Court seems just and equitable.

Dated: February 15, 2008


David [REDACTED]


Thomas [REDACTED]


Chris [REDACTED]

Yours, etc.



Attorney for Petitioners

[REDACTED]

[REDACTED]

[REDACTED]

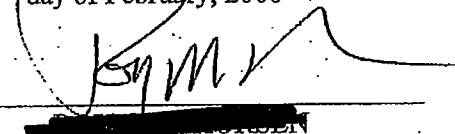
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF [REDACTED])

DAVID [REDACTED], being duly sworn, deposes and says that he is a petitioner, in the above named proceeding, he has read the annexed petition; knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.


DAVID [REDACTED]

Sworn to before me this
15th day of February, 2008


[REDACTED]

Notary Public, State of New York

No. [REDACTED]

Qualified in [REDACTED] County
Commission Expires October 19, 2009

VERIFICATION

STATE OF [REDACTED])
) ss.:
COUNTY OF [REDACTED])

THOMAS [REDACTED], being duly sworn, deposes and says that he is a petitioner, in the above named proceeding, he has read the annexed petition; knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

[Signature]
[REDACTED]

Sworn to before me this
15th day of February, 2008

[Signature]
[REDACTED]

Notary Public, State of New York


Qualified in [REDACTED] County

Commission Expires October 19, 2009

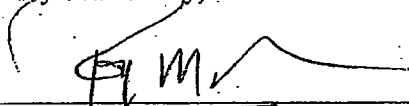
VERIFICATION

STATE OF [REDACTED])
) ss.:
COUNTY OF [REDACTED])

CHRIS [REDACTED], being duly sworn, deposes and says that he is a petitioner, in the above named proceeding, he has read the annexed petition; knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.


CHRIS [REDACTED]

Sworn to before me this
15th day of February, 2008


[REDACTED]

Notary Public, State of New York

Qualified in [REDACTED] County
Commission Expires October 19, 2009

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

Proceeding to Avoid and Cancel an Alleged Amendment
Dated April 2, 2007 to the Norma [REDACTED] Revocable
Trust Under Agreement Dated May 31, 2006 as
Beneficiary of the Last Will & Testament of [REDACTED],

AFFIDAVIT

File #: **[REDACTED]**

Deceased

And/or

To Impose a Constructive Trust.

STATE OF NEW YORK)
) ss.
COUNTY OF WESTCHESTER

PATRICIA [REDACTED], being duly sworn, deposes and says:

1. I am the niece of the decedent in the above captioned proceeding and am a residuary beneficiary of both the Last Will and Testament of the decedent, dated April 2, 2007 and The Norma [REDACTED] Revocable Trust dated May 31, 2006 as amended and restated April 2, 2007.
2. I submit this affidavit in support of the proceeding commenced by my cousins David [REDACTED], Thomas [REDACTED] and Christopher [REDACTED], to avoid and cancel the alleged amendment dated April 2, 2007 to The Norma [REDACTED] Revocable Trust dated May 31, 2006, and/or to impose a constructive trust.
3. Upon information and belief, prior to April 2, 2007, the decedent (hereinafter, "Aunt Norma"), had a Last Will and Testament dated May 31, 2006 which poured over the vast majority of her estate to The Norma [REDACTED] Revocable Trust (hereinafter, "the Trust"). Pursuant to the provisions of the original trust agreement dated

May 31, 2006, upon Aunt Norma's death, all of the Trust's disposable property was to be divided equally among the following individuals:

- David [REDACTED] (brother of Aunt Norma)
- David [REDACTED] (son of David C. Mariconi)
- Thomas [REDACTED] (son of David C. Mariconi)
- Chris [REDACTED] (son of David C. Mariconi)
- Stephen [REDACTED] (son of David C. Mariconi)
- Michelle [REDACTED] (daughter of David C. Mariconi)
- Kristina [REDACTED] (grand-daughter of David C. Mariconi)
- Nicole [REDACTED] (grand-daughter of David C. Mariconi)
- Patricia [REDACTED] (niece of decedent)
- Michael [REDACTED] (nephew of decedent)
- Eugene [REDACTED] (nephew of decedent)
- John [REDACTED] (nephew of decedent)
- Donald [REDACTED] (nephew of decedent)
- Amanda [REDACTED] (great-niece of decedent)
- Robert [REDACTED] (nephew of decedent).

4. Upon information and belief, Aunt Norma's last will and testament dated May 31, 2006 contained a contingency that in the event the Trust was not in existence at the time of her death, then her residuary estate was to be distributed in equal shares to the fifteen (15) individuals named in paragraph "3" above.

5. On or about April 2, 2007, Aunt Norma executed a new Last Will and Testament which was admitted to probate by this Court on July 25, 2007. Said Last Will and Testament also poured over the vast majority of Aunt Norma's estate to the Trust, as purportedly amended on April 2, 2007. The amended Trust provides that, with the exception of \$15,000.00 in distributions to others, the principal of the trust is to be distributed as follows:

- 50% to David C. [REDACTED] (brother of Aunt Norma);

50 % in equal shares to Patricia [REDACTED] (niece), Michael [REDACTED] (nephew), John [REDACTED] (nephew), Donald [REDACTED] (nephew), Janice [REDACTED] (niece), Eugene [REDACTED] (nephew) and Robert [REDACTED] (nephew).

6. The Last Will and Testament, dated April 2, 2007, goes on to provide that if the Trust is not in existence at the time of Aunt Norma's death, her residuary estate is to be distributed to the same beneficiaries named in paragraph "5" above.

7. The Last Will and Testament, dated April 2, 2007, had the simple effect of removing as one-fifteenth (1/15th) beneficiaries, the seven (7) children and grandchildren of David C. [REDACTED], and instead distributing those shares to David C. [REDACTED].

8. I first learned of the amendments to Aunt Norma's will and the Trust on or about May 12, 2007. I remember that day because I, along with David C. [REDACTED] (hereinafter "Uncle David"), was planning the funeral arrangements for my Aunt Mary (sister of Uncle David and Aunt Norma). I don't recall why, but Uncle David told me that Aunt Norma changed her will to provide that he would get half of Aunt Norma's estate and that his children and grandchildren were getting nothing. Uncle David made it clear to me that he would see to it that his children and grandchildren received nothing from Aunt Norma. He stated that he was going to travel and enjoy the rest of his life and if there was anything remaining when he died, it would go to his descendents.

9. After Aunt Mary's funeral on May 20, 2007, I told Aunt Norma about what Uncle David said. Aunt Norma became very upset and told me that her intentions were never to take inheritance monies away from Uncle David's children and grandchildren, but rather to leave all of her possessions to all her nephews, nieces and her brother David, in equal shares.

10. The very next day, Monday, May 21, 2007, Aunt Norma called me at work and told me that she had called her lawyer and that everything was going to be straightened out. The lawyer was scheduled to come to Aunt Norma's home the following week, however due to Aunt Norma's declining health, the meeting was cancelled.

11. I spent much time with Aunt Norma during her final days until her death on June 19, 2007. On several occasions we discussed her will and the Trust. She repeatedly told me the same thing, "This is not the way I wanted it to be". She repeatedly said she had spoken with her lawyer and that everything was going to be okay.

12. During the last week of Aunt Norma's life, she was visited by two of her good friends, Anne [REDACTED] and Kay [REDACTED], while I was also at Aunt Norma's home. Both Anne and Kay told me that Aunt Norma was upset about the way the will and Trust were written and that she wanted them to be changed as soon as possible.

13. In addition, a few days before Aunt Norma's passing, she told me that I need not worry, as Uncle David had assured her that he was going to take care of his children and grandchildren with the monies he would be inheriting.

14. Unfortunately, Aunt Norma died on June 19, 2007 before executing any further amendments to her will or the Trust.

15. Aunt Norma suffered from cancer for the three years immediately preceding her death. For the last seven (7) months of her life, the cancer attacked her brain. I considered myself to be closer to Aunt Norma than any of her other nephews or nieces for many, many years. This was no small task as she maintained a close and loving relationship with all her nephews and nieces. I personally witnessed the effects her illness


had on her, both physically and mentally. In my opinion, at the time that she executed her will and amended trust agreement on April 2, 2007, she was not of sound mind nor body.

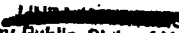
16. I further believe that in the last months of Aunt Norma's life, Uncle David, for reasons of personal gain, became more involved in her life than he had ever before. He handled her finances (often to his own benefit), introduced her to the law firm that drafted the will and trust, restricted her access to her beloved family, developed a confidential relationship with her, and upon information and belief, had been given power of attorney by Aunt Norma.

WHEREFORE, it is respectfully requested that the Court grant petitioners the relief requested.

Sworn to before me
this 16 day of February, 2008


(Notary Public)


PATRICIA E. [redacted]


Notary Public, State of New York
No. 4 [redacted]
Qualified in Westchester County
Term Expires, April 30, 2011

Nancy J. Rudolph

Partner

Ms. Rudolph is a member of our Trusts and Estates and Real Estate Practice Groups. Prior to joining Bleakley Platt in 2001, Ms. Rudolph was in private practice with a White Plains law firm, concentrating in litigation. She has also served in the public sector as an Assistant Attorney General in the New York State Office of the Special Prosecutor, handling white collar civil litigation related to Medicaid Fraud. In addition, she was an Administrative Hearing Officer with the New York State Racing and Wagering Board from 1980 to 1984. In her private practice from 1984 to 1987, Ms. Rudolph concentrated in estates, guardianship, real estate and litigation. From 1997 to 2001, Ms. Rudolph was a frequent lecturer to physicians and other professionals on methods to avoid lawsuits.

Today, Ms. Rudolph concentrates in the area of trusts and estates, estate administration, estate tax, and guardianship in the Surrogate's Court, the Supreme Court, and before the United States Tax Court. Ms. Rudolph represents beneficiaries and fiduciaries, both individual and corporate, in judicial proceedings involving probate, administration, lost wills, construction, kinship, removal of fiduciaries, contested accountings, uncontested accountings, and in real estate transactions. Ms. Rudolph also represents individuals and corporate fiduciaries as trustees of supplemental or special needs trusts.

Representative Matters

- Successfully represented a corporate fiduciary in two contested accounting trials before the Surrogate in Westchester County.
- Successfully represented a surviving spouse as the income beneficiary of a testamentary qualified terminal interest trust holding a substantial and very valuable art collection who sought to suspend the independent trustee for violations of the statute.
- Represented beneficiaries in a will construction proceeding, resulting in a favorable interpretation in a Surrogate's Court decision and the ultimate restoration of their annual distributions.
- Negotiated a settlement of a contested accounting for a corporate fiduciary that faced allegations for failure to diversify estate assets under the Prudent Investor Act.
- Successfully represented legal guardians in negotiating the resignation of a testamentary trustee of a supplemental needs trusts.
- Negotiated a settlement for a corporate fiduciary in a construction proceeding on the validity of an amendment to a revocable trust.

Education

- New York Law School, J.D., 1977
- Manhattanville College, B.A., 1972

Bar Admissions

- New York
- U.S. District Courts for the Eastern and Southern Districts of New York
- U.S. Court of Appeals for the Second Circuit
- U.S. Supreme Court

Memberships

- New York State Bar Association
- New York State Bar Association Foundation, Fellow
- Westchester County Bar Association, Executive Committee
- Westchester Women's Bar Association, Co-Chair of the Trusts & Estates Section

Community Involvement

- Westchester Care at Home, former Board Member, 2010-2012
- Visiting Nurse Services Westchester (VNSW) Board Member, 2013 - present
- VNSW - Chair of the Finance Committee and Member of the Governance Committee, 2013 - present

GAIL M. BOGGIO

Gail M. Boggio is a partner in the law firm of McCarthy Fingar LLP, located in White Plains, New York and co-chairs the firm's Trusts and Estates Department. Since 1998, she has practiced in the area of trusts and estates law, including estate planning and litigation; Medicaid planning; not-for-profit and charitable giving; forensic accounting; and is a Court Examiner for the Ninth Judicial District. She is a frequent lecturer on matters relating to trusts and estates law. Prior to entering the law profession, Ms. Boggio practiced as a certified public accountant for over fifteen years.

Ms. Boggio is a former President of the Women's Bar Association of the State of New York, is a current member of WBASNY's Board of Directors and is co-chair of the 2013 WBASNY Convention. She is an active member of the Westchester Women's Bar Association; New York Estate Planning Council; Director of the Westchester County Bar Association's Trust and Estates Section; President of the Eastchester Bar Association; and a member of the American Institute of Certified Public Accountants and the Massachusetts Institute of Certified Public Accountants.

A graduate of Pace University School of Law, Ms. Boggio received her undergraduate degree in accounting and economics from The Catholic University of America in Washington, D.C. Ms. Boggio is admitted to the bar in the State of New York and the U.S. District Courts for the Southern and Eastern Districts of New York, the United States Supreme Court and the United States Tax Court.

Biography

Ms. Orlowski is a member of the Trusts & Estates and Tax Practice Groups and concentrates her practice in the areas of trusts, estates, estate planning and taxation.

Her practice includes the preparation of Wills, Trusts and related estate planning documents and the representation of Executors, Trustees and beneficiaries in Surrogate's Court proceedings and with respect to the administration of estates and trusts. She also provides analysis and advice regarding estate tax, gift tax and fiduciary income tax matters.

Ms. Orlowski assists in structuring financial and business transactions, including the tax aspects of mergers and acquisitions, and partnership, shareholder, limited liability company and other business arrangements. She counsels closely-held business owners on business succession planning and gives tax advice with respect to income and estate planning to minimize tax consequences for present and future generations of owners.

Education

- New York University (L.L.M., Taxation, 2002)
- Fordham University School of Law (J.D., 1994)
- Fordham University (M.A., American History, 1991)
- Fordham University (B.A., History and Economics, 1990)

Memberships

Ms. Orlowski is a member of the Trusts and Estates Section of the New York State Bar Association.

Admissions

- New York
- U.S. District Court for the Southern District of New York
- U.S. Tax Court
- U.S. Court of Claims

JAMES P. REDUTO graduated from Colby College in Waterville, Maine in 1990. He received his law degree from Albany Law School of Union University in 1993.

Mr. Reduto joined Bertine Hufnagel Headley Zeltner Drummond & Dohn, LLP in Scarsdale, New York in 2000 and concentrates his practice in trusts and estates, elder law and real estate. He has extensive experience in all facets of trusts and estates and represents clients, including high net worth individuals, in estate planning, gift and estate tax planning, special needs planning, and administration of complex trusts and estates. Mr. Reduto also represents beneficiaries, executors and trustees in trusts and estates litigation in Surrogate's Courts throughout the metropolitan area.

Mr. Reduto is certified as an Elder Law Attorney by the National Elder Law Foundation. He represents clients in connection with Medicaid eligibility and planning for long term care, and advises them on the preservation and protection of their assets.

Mr. Reduto has been invited to lecture on the topic of trusts and estates in continuing legal education programs given by the New York State Bar Association, Westchester County Bar Association and National Business Institute. He has also lectured at Pace University Law School on elder law.

Mr. Reduto was admitted to the New Jersey Bar in 1993 and the New York Bar in 1994, and is a member of the New York State Bar Association and Westchester County Bar Association.

*National Elder Law Foundation is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in New York and does not necessarily indicate greater competence than other attorneys experienced in this field.

MICHAEL H. FRIEDMAN is a partner in Kurzman Eisenberg Corbin & Lever, LLP. Mr. Friedman received his Juris Doctor degree from the Benjamin N. Cardozo School of Law in 1990, and a Master of Laws in Taxation (LL.M), with an emphasis in estate planning, from the New York University School of Law in 1999.

Mr. Friedman served as a Court Attorney-Referee to the Honorable Lee L. Holzman, Judge of the Surrogate's Court in Bronx County, New York, and has since concentrated his practice in the areas of estate and tax planning, estate and trust administration, and estate and trust litigation. While Mr. Friedman specializes in all aspects of estate and trust litigation, including contested probate and accounting proceedings and the myriad of contested estate proceedings, his experience and practice include the preparation of wills, trusts, and other estate planning documents, including medical and financial directives, all phases of estate and trust administration, including the probate of wills, the marshaling of assets and resolving claims, the preparation of Federal and State Estate Tax returns, the handling of estate tax audits with federal and state taxing authorities, and the preparation and prosecution of accountings for fiduciaries, including executors, administrators, trustees, and guardians.

Mr. Friedman is a former Chair of the Trusts and Estates Section of the Westchester County Bar Association and is an active participant in the Trusts and Estates sections of the New York State Bar Association, the Westchester County Bar Association and the Bronx County Bar Association. Mr. Friedman also writes and lectures on various topics relating to Surrogate's Court practice and estate litigation.

Michael H. Friedman, Esq.
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mfriedman@kelaw.com



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White Plains, NY 10601
914/761-3707 phone
914/761-9402 fax
wcbany.org

WESTCHESTER COUNTY BAR ASSOCIATION

Membership Application 2013

Last _____ First _____ MI _____

Date of Birth ____/____/____ Month/Year Admitted to NY BAR _____

Judge ☐ (must be Sitting or Acting)

Membership Type: ☐ Lawyer ☐ Student ☐ Affiliate/Non-Lawyer

Type of practice: ☐ Solo Practitioner ☐ Public Sector Law Firm Size ☐ 2-5 ☐ 6-12 ☐ Over 12

☐ Judiciary ☐ Academic ☐ Corporate ☐ Other

Check one: ☐ Female ☐ Male

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Attention members: Your office address will be published in the WCBA Directory and on the website.

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Please check the Section you would like to join and record the fee on the next page.

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<input type="checkbox"/> Real Property	\$10		

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<input type="checkbox"/> Adult Guardianship	<input type="checkbox"/> Environmental Law	<input type="checkbox"/> Newsletter
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<input type="checkbox"/> Continuing Legal Education	<input type="checkbox"/> Lawyer Assistance	<input type="checkbox"/> Trial Lawyers & Tort
<input type="checkbox"/> Corporate & Commercial Law	<input type="checkbox"/> Lawyer Referral Service	<input type="checkbox"/> Website Committee
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<input type="checkbox"/> Elder Law	<input type="checkbox"/> Mock Trial	

☐ Lawyer Referral Service (LRS) Membership (Please send me an application. If accepted fee is \$125/year.)

☐ Assigned Counsel (18b Panel) (Please send me an application. If accepted fee is \$50/year.)

(over)

OPTIONAL: Racial/Ethnic Information Policy

The use of this information is restricted to the WCBA. The information is requested to enhance the Bar's continuing efforts to reflect diversity within its programs, activities and leadership. It will not be provided to any external individual or organization except in summary form.

Ethnicity (Optional): ☐ African American ☐ Asian American ☐ Caucasian
☐ Hispanic/Latino ☐ Native American ☐ Other

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____ I was a member and am renewing my membership
____ WCBA CLE: Title _____
____ WCBA Event: Title _____
____ Work Colleague: Name _____
____ Other: Please supply _____

Are you a member of any other Bar Associations? ____ Yes ____ No

Please list the Bar Associations of which you are currently a member

SCHEDULE OF BAR DUES

Sustaining Member*	\$225.00	_____
Admitted to the Bar 10 Years or More	\$175.00	_____
Admitted to the Bar 5 to 9 Years	\$125.00	_____
Admitted to the Bar Less than 5 Years	\$ 85.00	_____
Affiliate Non-Lawyer	\$100.00	_____
Admitted to the Bar Less than 1 Year	FREE	_____
Student	FREE	_____
Section Dues Total (from page 1)	_____	_____
WCBF contribution	\$ 35.00	_____

Payment Enclosed \$ _____

**The sustaining member category applies to those members who demonstrate a high level of commitment to both the association and the profession.*

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Card Number _____ Expiration Date _____ Sec. Code _____
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There are four options for submitting the application and payment:

WEBSITE: Go to the home page at www.wcbany.org, choose the "Membership" drop down menu and follow the directions.

EMAIL: Fill out this form and email to: membership@wcbany.org. (You may omit credit card information for security purposes and we will contact you.)

FAX: Fill out this form and Fax to: (914) 761-9402.

MAIL: Mail this form with check made out to "WCBA" to: WCBA, One North Broadway, Ste. 512, White Plains, NY 10601.

WESTCHESTER COUNTY BAR ASSOCIATION
CONTINUING LEGAL EDUCATION
PROGRAM EVALUATION FORM

The Trusts & Estates Section presents...
Revocable Trusts: The Will Substitute, Part II-Litigation
June 20, 2013
White Plains, NY

Please complete this form and return it to the registration desk at the conclusion of the program.

1. Please rate your satisfaction with the content of this CLE
Very _____ Somewhat _____ Not At All _____
2. How many years ago were you admitted to the bar? _____
3. How many attorneys are in your firm or office? _____
4. What is your primary area(s) of practice? _____

5. What is your overall evaluation of today's program?
Excellent _____ Good _____ Fair _____ Poor _____

Please rate the speaker(s) regarding CONTENT of presentation and ABILITY to present subject:
Excellent (E), Good (G), Fair (F), Poor (P).

<u>PRESENTER</u>	<u>CONTENT</u>	<u>ABILITY</u>
Nancy Rudolph, Esq.	E G F P	E G F P
Gail Boggio, Esq.	E G F P	E G F P
Michael Friedman, Esq.	E G F P	E G F P
James Reduto, Esq.	E G F P	E G F P
Michelle Orlowsky, Esq.	E G F P	E G F P

6. What changes, if any, would you recommend if this program were presented again?

(OVER)

7. How did you learn of this program?

WCBA monthly Calendar of Events/Newsletter _____ Word of mouth _____

Ad in newspaper/legal periodical _____ E-Mail _____ Website _____

8. The printed materials were:

Excellent _____ Good _____ Fair _____ Poor _____

9. The registration, organization and administration of the program was:

Excellent _____ Good _____ Fair _____ Poor _____

Comments: _____

10. What schedule do you prefer for these courses?

Evenings _____ Afternoons _____ Mornings _____

Full Day _____ Saturday _____ Does not Matter _____

Other (describe): _____

11. Was the meeting place acceptable? Yes _____ No _____

Comments: _____

Please give us your suggestions for new programs or topics you would like to see offered.