STATE OF NEW YORK
SURROGATE COURT COUNTY OF HERKIMER

In the Matter of the Probate Proceeding for the Will of R.W. Burrows

File No. 2014-171

In the Matter of the Petition to Set Aside the R.W Burrows Revocable Trust.

DECISION AND ORDER

APPEARANCES:

Howell Bramson, Esq. Robert Rosh, Esq. McCarthy Fingar, LLP	(Attorneys for Respondents Ji Ting Wang-Burrows, Evan Dreyfuss, and Carolyn Zaklukiewicz)
Gerard G. Brew, Esq. Timothy M. Ferges, Esq. McCarter & English, LLP	(Attorneys for Petitioner, Michael L. Lengvarsky, Trustee of the R.W. Burrows Grantor Family Trust)
Leighton Burns, Esq. Kernan and Kernan, P.C.	(Attorney for Petitioner, Michael L. Lengvarsky, Trustee of the R.W. Burrows Grantor Family Trust)
John H. Callahan, Esq. Bond Schoeneck & King	(Attorney for Respondent Burrows Water Works)
Christopher Bray, Esq.	(Guardian ad Litem for Ava and Audrey Burrows)
Carl Graziadei, Esq.	(Guardian ad Litem for Joy Burrows)

CRANDALL, J.:

Ralph W. Burrows, (hereinafter Bill or decedent), died on August 20, 2014 in the County of Herkimer. At the time of his death he held substantial business interests in various corporations, including Burrows Paper Corporation (hereinafter BPC) and Burrows Water Works (hereinafter BWW). Decedent died with five children (three of whom were minors at the time of his death), two former wives and a surviving spouse, Ji Ting Wang-Burrows. (hereinafter Jane).

Attorney Christopher Bray was appointed Guardian ad Litem on behalf of the minor children Ava and Audrey Burrows. (produced from his second marriage to Marcia Burrows) Attorney Carl V. Grazaidei was appointed Guardian ad Litem to represent the minor child Joy Burrows. (decedent's child with his wife Jane).

The Last Will and Testament and R.W. Burrows Revocable Trust were executed on July 23, 2014 at decedent's residence in Little Falls, New York. The instant Probate proceeding was commenced on September 4, 2014. Objections to probate were filed on behalf of Ava and Audrey Burrows by the Guardian ad Litem, Christopher Bray. Marcia Burrows, as Guardian and natural Mother of Ava and Audrey Burrows likewise filed objections. Subsequent to interposing objections to Probate, the Guardian ad litem has Petitioned the Court seeking an Order setting aside the R.W. Burrows Revocable Trust.

POINTS OF COUNSEL

Jane and Evan Dreyfuss, as Preliminary Executors, seek an Order pursuant to CPLR 3212 granting Summary Judgment dismissing the verified objections to probate filed by the Guardian ad Litem as well as the objections filed by Marcia Burrows, as Guardian. The objections to Probate allege that the decedent lacked testamentary capacity; did not know the contents of his last will and testament and that the will offered for probate was procured by undue influence. The Preliminary Executors contend that no material issue of fact exists as to the testamentary capacity of the decedent nor does a triable question fact exist as to the claim of undue influence.

The verified Petition filed by the Guardian ad Litem to set aside the R.W. Burrows Revocable Trust likewise alleges that the decedent was not mentally competent, nor had the legal capacity to enter into such a trust agreement; that the trust agreement was not executed voluntarily, but rather

was the product of undue influence; and that the decedent was under duress at the time the Revocable Trust was executed. The Preliminary Executors seek summary judgment as per CPLR 3212, dismissing the Petition to set aside the R.W. Burrows Revocable Trust, alleging that no material question of fact exists as to the testamentary capacity of the decedent nor does a question of fact exist as to the claim of undue influence.

In an extension of the undue influence claim, (filed under separate cover), the Court appointed Guardian seeks an Order granting partial summary judgment declaring the preliminary executors maintained a confidential relationship with the decedent, such that the burden of proof should shift to them as fiduciaries to prove the July 23, 2014 Last Will and Testament and Revocable Trust instruments were not the product of undue influence. The Preliminary Executors, oppose the motion as being inconsistent, unpled, frivolous and completely contradicted in the record.

STATEMENT OF FACT

In his SCPA 1404 hearing testimony, Attorney draftsman Howell Bramson described a July 7, 2014, estate planning meeting prior to finalizing the Will and Revocable Trust. The decedent's most trusted advisers were present and participated with him in developing a final estate plan. In attendance were: the decedent, Ron Berger (corporate counsel), Carolyn Zaklukiewicz (personal assistant), Richard Maxwell (accountant) and Evan Drefuss (financial advisor). During the two to three hour meeting, Attorney Bramson described the decedent as very "engaged" in all the discussions and was aware of his assets and the significance of the legal instruments which were to be created. Subsequent to the meeting, Attorney Bramson exchanged multiple email communications with decedent, consisting of, among other things, proposed Will

and Trust Documents of which he freely commented and made suggestions and asked questions of Attorney Bramson. (Bramson page 62.) Bramson noted that the Decedent's daughters Ava and Audrey were specifically not included in the residuary clause of the July 23, 2014 Will, because he provided for them in the Burrows Family Grantor Trust wherein they were the beneficiary of a Trust consisting of assets worth approximately Thirty Million Dollars. ($30,000,000). Attorney Bramson noted that the July 23, 2014 Last Will and Testament was not substantially different than prior estate planning documents.

In his September 19, 2018 Affirmation, Evan Dreyfuss (financial adviser and proposed executor), stated that he was present at the July 7, 2014 estate planning meeting at which Bill was " actively involved and engaged, discussed a number of estate related topics, including a grantor trust that he had established for his children... Ava and Audrey.... and that they had been previously taken care of and that consequently they would not be receiving monies from Mr. Burrows estate."

On July 23, 2014, Attorney Bramson personally appeared at the Burrows residence in Little Falls, New York, for the purpose of formalizing Decedent's Last Will and Testament and the R.W. Burrows Revocable Trust. Present at the residence were: the decedent, Jane, Carolyn Zaklukiewicz (personal assistant), Richard Maxwell (accountant) and Steve Roginski (personal chef). Bramson reviewed the terms of the Will and Trust with the Decedent, asked him if it reflected his wishes. The decedent responded affirmatively then Bramson observed him sign the Revocable Trust instrument and then observed him execute his Last Will and Testament. Mr. Bramson and Mr. Maxwell immediately signed as witnesses to the Last Will and Testament and then executed the self proving affidavit. Jane executed the R.W. Burrows Revocable Trust

instrument as Trustee. Carolyn Zakluckiewicz notarized both legal instruments.

Richard Maxwell, a Little Falls, New York native, had known decedent since his summer employment with BPC as a college freshmen. Not only was Maxwell the accountant for BPC and BWW, he was Bill's personal accountant. Maxwell's SCPA 1404 hearing testimony is compelling. Maxwell described his July 23, 2014 conversation with the decedent in detail. Prior to July 23, 2014, Maxwell indicated he had last communicated with Bill sometime in May or June 2014. Yet the decedent independently recalled a conversation during their last meeting (more than one month prior) wherein they discussed the fact that Maxwell and his wife were in the process of building a home. On July 23, 2014, Bill specifically inquired as to the status of the home building project. Maxwell inquired as to the whereabouts of Bill's daughter Joy (approximately 1 year old at that time). The decedent indicated that she was out for a walk with the nanny. (Page 12). The two then talked about the grounds of the residence, detailing different places Joy liked to play. The two men continued to exchange pleasantries for approximately four or five minutes prior to Attorney Bramson's arrival.

Maxwell testified Bramson highlighted the terms of the Revocable Trust and Will with the decedent, "in terms of the specific gifts and bequests" that were included in those documents. Bramson asked decedent as to each item if it "was his intent and if it was his own free will." To which decedent "replied in the affirmative to each question." Maxwell witnessed the decedent execute the Revocable Trust and then the Will. (Page 14). Maxwell testified that Bill appeared to be "sharp as he always had been." When asked, if it seemed that Jane was exerting any pressure on Bill, he stated, "none, whatsoever, that I could tell." (Page 21).

Carolyn Zaklukiewicz testified she was asked to appear at the Burrows residence in Little

Falls on July 23, 2014 to notarize the subject legal instruments. She testified Bill "looked very good" and "completely understood." She observed Bill execute his Last Will and Testament and immediately thereafter watched Howell Bramson and Richard Maxwell sign as respective witnesses. Bramson and Maxwell also executed the attached self-proving affidavit. Likewise, Carolyn observed Bill sign the R.W. Burrows Revocable Trust document and watched as Jane signed as Trustee. Carolyn notarized both the self proving affidavit attached to the Last Will and Testament as well as the signatures on the R.W. Burrows Revocable Trust document.

In her September 28, 2018 Affirmation Carolyn details her observations of the decedent up and through to his death. She specifically references letters he dictated on August 8, 2014, to Ava an Audrey Burrows wherein he acknowledged to them his fate and referenced his last meeting with them. The letters not only indicate that Bill was well oriented, but still articulate and thoughtful.

Hospice Nurse, Elena Scalise provided care for the decedent approximately forty to fifty times commencing on or about July 8, 2014, until his passing on August 20, 2014. She testified that except for the final forty-eight hours of his life, he was alert and oriented. Scalise provided care for him on July 23, 2014 between 3:00 and 4:00 pm and indicated that he was "alert, oriented and able to make his needs known". Scalise acknowledged that on July 23, 2014 the decedent was in control and able to communicate and participate in conversation. (Page 145-146). The July 23, 2014 hospice and palliative care activity record memorialized Bill's physical and mental condition. Scalise noted that she had never witnessed Jane pressuring him to do something against his will. (Page 148).

Steven Roginski, the long time personal chef of the decedent was present at the Burrows

residence every day from May 2014 through to his passing August 20, 2014. Roginski testified that except for the two or three day period immediately prior to his passing, Bill (page 115) was clear minded, engaged in conversations with friends and family and was at all times alert and oriented. Roginski specifically recalled speaking to Bill on July 23, 2014 when he engaged in intelligent conversation with him. Roginski added he observed no instances where Jane pressured or urged him to engage in any particular conduct or take any identifiable action related to his finances or Estate plan. (Page 116).

The deposition testimony of treating oncologist Dr. Scalzo directly refutes the Guardian ad Litem and Guardians assertion that Bill lacked testamentary capacity based upon his own, limited reference as to "chemo brain". Dr. Scalzo explained that "chemo brain" "is a condition that is not measurable, that patients complain of not being able to focus, however it does not have anything to do with their competency or their capacity. Most of those people still have full-time jobs, take care of family, etcetera." He further clarified: (Page 20, 21, 22) "It is more like not being able to multi-task as well as one had before." Dr. Scalzo observed Bill as alert and competent at all times during his interactions with him. Furthermore, Dr. Scalzo referenced a Mini Mental State Examination administered to Bill on which he correctly answered 30 of 30 questions, attaining a perfect score. (Scalzo Dep. 19-24). Scalzo stated he "passed the mini mental status exam with flying colors" and went on to say that there was no evidence of cancer in the decedents brain as of June 17, 2014. (Scalzo pages 26-29)

LAW

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law, and must offer sufficient

evidence to show the absence of material issues of fact. Zarr v. Riccio, 180 A.D.2d 734 (2nd Dept. 1992); Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). If this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial. Romano v. St. Vincent's Medical Center, 178 A.D.2d 467 (2nd Dept. 1991).

The court's burden on a motion for summary judgment is not to resolve issues of fact, but to determine if such issues exist. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Dykman v. Barrett, 187 A.D.2d 553 (2nd Dept. 1992). Summary judgment is available in a probate contest where the objectant fails to offer proof sufficient to raise a triable issue of fact. Matter of Goldberg, 180 A.D.2d 528 (1st Dept. 1992); In re Estate of Cioffi, 117 A.D.2d 860 (3rd Dept. 1986); Matter of Collins, 60 N.Y.2d 466 (1983); Matter of Pollock, 64 N.Y.2d 1156 (1985).

To defeat summary judgment, an objectant must assemble and lay bare affirmative proof to demonstrate the existence of a genuine triable issue of fact. see Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, aff'd 49 NY2d 924. The allegations put forth must be specific and detailed and substantiated by evidence in the record; mere conclusory assertions are not sufficient. Iselin & Co. v Mann Judd Landau, 71 NY2d 420 (1988); Matter of O'Hara, 85 AD2d 669, 671 (2nd Dept. 1981). The papers submitted in support of and in opposition to the motion are to be scrutinized carefully in the light most favorable to the party opposing the motion. Ptasznik v Schultz, 223 AD2d 695, 696 (2nd Dept. 1996); Robinson v Strong Mem. Hosp., 98 AD2d 976 (4th Dept. 1983). If there is a doubt as to the existence of a triable issue of fact, the motion should be denied. Phillips v Kantor & Co., 31 NY2d 307, 311 (1972).

TESTAMENTARY CAPACITY

Turning first to the objection alleging lack of testamentary capacity, Preliminary Executors

have the burden of demonstrating by a preponderance of the evidence that the decedent, at the time of the execution of the offered instrument had testamentary capacity. Matter of Kumstar, 66 NY2d 691 (1985). Capacity is presumed, unless there is evidence to the contrary, and the mental acuity required to execute a will is less than that of other legal documents, requiring only that the decedent generally understood the nature and consequences of executing a will; was aware of the nature and extent of his assets; and knew the natural objects of his bounty and his relations with them. Matter of Anella, 88 AD3d 993 (2nd Dept. 2011); Matter of Coddington, 281 AD 143 (3rd Dept. 1952).

The attestation clause of will, as well as self-proving affidavit, give rise to presumption of compliance with all statutory probate provisions and constituted prima facie evidence of the facts attested to therein by the witnesses. In re Will of Schlaeger, 74 A.D.3d 405 (1st Dept 2001). The record establishes that at all relevant times, including the time when the will was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a Will and Trust instruments. The observations of the multiple witnesses present in the Burrows home on July 23, 2014 are clear , unwavering and unanimous in describing Bill as of sound mind at the time of the execution of the propounded will.

Based upon the foregoing, the proponent has established prima facie that decedent was of sound mind and memory when he executed the will (EPTL 3-1.1). The record is devoid of any proof that at the date of the execution of the propounded instrument, decedent was incapable of handling his own affairs or lacked the requisite capacity to make a Will and/or Trust.

With the burden shifted to objectants to produce evidence demonstrating a triable issue of fact Matter of Scaccia, 66 AD3d 1247, 1251 (3rd Dept. 2009); Matter of Murray, 49 AD3d 1003,

1005 (3rd Dept. 2008), objectants focused on decedent's use of pain management medications during the period of time preceding the will signing. That decedent suffered from terminal cancer and was in a declining physical state as a result thereof does not, without more, create a question of fact on the issue of testamentary capacity, as "the appropriate inquiry is whether the decedent was lucid and rational" at the time the will was signed Matter of Paigo, 53 AD3d 836, 838 (3rd Dept. 2008); Matter of Alibrandi, 104 AD3d 1175, 1176 (4th Dept. 2013); Matter of Murray, 49 AD3d 1003, 1005 (3rd Dept. 2008).

The Guardian and Guardian ad Litem's incapacity claim based on his own limited reference to "chemo brain" is unanimously refuted by multiple witnesses, including the treating physician. The record here demonstrates that the decedent was more than "lucid and rational." The certainty of the witnesses testimony as to his mental acuity, his understanding of his personal and business interests and natural objects of his bounty, stands fast and is entirely confirmed in the record. The multiple witnesses confirm that the decedent was alert, strong minded, financially cognizant and mentally and emotionally independent.

No triable question of fact exists as to decedent's testamentary capacity.

UNDUE INFLUENCE

Unlike due execution and testamentary capacity, objectants have the burden of proving that the propounded instrument is the result of fraud or undue influence. Matter of Spangenberg, 248 A.D.2d 543 (2nd Dept. 1998); citing, Matter of Walther, 6 N.Y.2d 49 (1959).

To establish the undue influence claim, objectants must show (1); the existence and exercise of undue influence; (2) the effective operation of undue influence as to subvert the mind of the testator at the time of the execution of the will (3) the execution of a will that, but for undue

influence, would not have occurred. Matter of Walther, 6 N.Y.2d 49 (1959); Estate of Fellows, 16 AD3d 995 (2005 NY slip. Op.02516). The three elements are motive, opportunity and the exercise of undue influence. Matter of Walther, 6 N.Y.2d 49 (1959). In order for objectants to carry their burden with respect to this issue, they must demonstrate not only the existence of opportunity and motive but the actual exercise of undue influence. Matter of Foranoce, N.Y.L.J., August 7, 2000, at 25, col.6; citing, Matter of Fiumara, 47 N.Y.2d 845; Matter of Walther,6 N.Y.2d 49 (1959); Matter of Holly, 16 A.D. 2d 611 (1st Dept. 1962).

The Guardian and Guardian ad Litem claim the July 23, 2014 Will and Revocable Trust were the products of and were executed while under duress and procured by undue influence of the surviving spouse. Among the allegations; Respondent's claim that Jane participated in the preparation of the legal instruments herein; Jane participated in Bill's affairs; Jane was present when the instruments were executed; Bill signed the instruments when he was terminally ill and confined to his home; Jane served as Bill's primary care giver and administered prescribed medications in July of 2014.

To the contrary, the record is devoid of the necessary proof of undue influence such as to subvert the mind of the testator at the time of the execution of the will, such that execution of the will, but for undue influence, would not have occurred. Matter of Walther, 6 N.Y.2d 49 (1959). Here, the Guardian claims undue influence, yet while testifying under oath she could not identify an instance of such undue influence. The deposition of financial advisor Amy Saban is unequivocal, in that the decedent was competent and lucid and was not "being pressured to do something against his will" and that Jane was a passive participant, (Page 113) as it related the preparation of his estate plan. The Court finds the deposition testimony of Steven Roginski,

Richard Maxwell and Hospice nurse Elena Scalise compelling. There is no question that the decedents state of mind and health as it related to independence of thought and free will. The facts that the decedent's wife participated in his affairs and was involved in his care toward the end of his life is not remarkable. In fact, it would be noteworthy, if to the contrary, she had not participated in his care and tended to his wishes in his waning days. The Objectants have failed to show an instance of the "actual exercise of undue influence" which is required. See Matter of Fiumara, 47 N.Y.2d 845 (1979); Matter of Walther, 6 N.Y.2d 49 (1959); Matter of Holly, 16 A.D.2d 611 (1st Dept. 1962).

Further, the Court is unmoved by the Guardian and Guardian ad Litem's position that Jane seized control over and took measures to liquidate BWW and BPC. In fact, the record indicates, it was the decedent who initiated the corporate actions called into question by the objectants. Here, the Guardian and Guardian ad Litem present mere conclusory allegations and speculation as to undue influence. Matter of Curtis, 130 AD3d 722 (2nd Dept. 2015).

No material triable issue of fact exists as to whether The Last Will and Testament and Revocable Trust instruments executed on July 23, 2014 were the product of undue influence or duress. The Preliminary Executors Motion for Summary Judgment is granted and the objections as to lack of testamentary capacity, undue influence and duress are dismissed. The Petition to set aside the R.W Burrows Grantor Trust on the grounds of testamentary capacity, undue influence and duress is likewise dismissed.

MOTION FOR PARTIAL SUMMARY JUDGMENT SHIFTING THE BURDEN OF PROOF TO PRELIMINARY EXECUTORS AT TRIAL

The Court appointed Guardian, seeks an Order granting partial summary judgment declaring that the preliminary executors maintained a confidential relationship with the decedent,

such that the burden of proof should shift to them as fiduciaries to prove the July 23, 2014 Last Will and Testament and Revocable Trust Instruments are not the product of undue influence. The Preliminary Executors oppose the motion as being inconsistent, unpled, frivolous and completely contradicted in the record.

Generally, the relationship between a decedent and a close family member is not considered "confidential" for purposes of raising the inference of undue influence. Matter of Walther, 6 NY2d 49, 56(1959).The close nature of the relationship offsets the inference. Id. at 56.

The record as a whole establishes that the decedent, although suffering with cancer, was alert, strong-minded, financially, mentally, and emotionally independent, had thoughtfully planned his complex estate with the assistance of Jane and several other financial and legal experts . No inference of undue influence arises in these circumstances. Matter of Fiumara, 47 NY2d 845, 847 (1979); Matter of Walther, 6 N.Y.2d 49, (1959); Matter of Ryan, 34 AD3d 212 (1st Dept. 2006); Matter of Seelig, 13 AD3d 776 (3rd Dept.2004). The fact that his wife was knowledgeable as to his legal and business affairs is not surprising and does not prove undue influence. Unlike Matter of Neenan, 35 AD3d 475 (2nd Dept. 2006), Jane had no direct role in drafting the Last Will and Testament nor is there competent evidence of record that she had any input as to the R.W. Burrows Revocable Trust.

Where a familial relationship exists, it may only be viewed as a confidential or fiduciary relationship sufficient to shift the burden of establishing that the transaction was not the product of undue influence if coupled with other factors, such as where the donor is in a physical or mental condition such that he or she is completely dependent upon the defendant-donee for the

management of his or her affairs and/or is unaware of the legal consequences of the transaction Peters v. Nicotera, 248 A.D.2d 969, 970 (4th Dept. 1998); Matter of Collins, 124 A.D.2d 48 (4th Dept 1987) The existence of a confidential relationship does not create a presumption of undue influence as a matter of law and the burden of proving undue influence never shifts from the objectant. Matter of Collins, 124 A.D.2d 48 (4th Dept 1987). In the case at bar, no competent evidence establishes such a controlling or unequal relationship between Jane and Bill such that he was entirely dependent on her. In fact, the record indicates that up until the last 48 hours of his life he was oriented and able to make his needs known.

The proof must show that the testator was dependent on the beneficiary and that the beneficiary intruded on the testator's freedom of action. Matter of Arnold, 125 Misc.2d 265(1983). Generally, the relationship between a decedent and a close family member is not considered "confidential" for the purposes of raising the inference of undue influence. Matter of Revit, NYLJ, May 10, 1999, at 31, col. 2, because the close nature of the relationship offsets the inference. Matter of Walther, 6 N.Y.2d 49 (1959). Here, several individuals presented themselves to the decedent during the month of July 2014 and thereafter, including several close family, personal friends and business associates as well as health care provider and chef. The decedent was not isolated and unable to make his wishes known to those around him.

Additionally, an inference of undue influence cannot be drawn from circumstances which are consistent with a contrary inference. Matter of Branovacki, 278 A.D.2d 791 (4th Dept 2000); Matter of Swain, 125 A.D.2d 574 (2d Dept 1986), appeal denied, 69 N.Y.2d 611 (1987), and the mere fact that a will favors one child over another does not supply the inference. Matter of Fiumara, 47 NY2d 845 (1979). Here, there is no proof that the decedent's "freedom of action"

was impaired, nor was his ability to communicate with friends and professionals with whom he had long standing business and personal relationships. The fact that he changed his Last Will and Testament is not proof of undue influence. In fact, the modifications here, appear to be well thought out and reasonable under the circumstances. In view of the entirety of the estate plan, the Guardian ad Litem and Guardian's claim that their wards were disinherited is an unsupported accusation.

The objectants erroneously rely on Rollwagen v. Rollwagen, 63 NY 504 (1876), where, unlike here, the decedent "could not utter a word or make an intelligible sound". The record is clear that the decedent here was anything but unintelligible. The SCPA 1404 hearing testimony, the records notes and testimony of the health care providers together with the testimony of the chef and Ms. Zaklukiewicz, and the affirmation of Mr. Laubenstein prove the decedent was fully engaged, communicative and fully aware of the circumstances. Objectants reliance on Janke v. Janke, 47 AD 2d 445 (4th Dept. 1975) is misplaced in that Janke was a matrimonial matter where the parties were in dispute as to the equitable distribution of a tavern. Likewise the Court is unmoved by the objectants reliance on Oakes v. Muka, 69 AD 3d 1139 (3rd Dept. 2010), where the decedent had parkinsons disease and "his care providers opined that he was suffering from Alzheimer's disease", and was not....oriented to time or place, suffering from hallucinations and delusional". No such evidence as to such a debilitated mental state existed in the instant case.

To establish a confidential relationship, there must be evidence of inequality or controlling influence. Matter of Albert, 137 Ad 3d 1268, 1269 (2nd Dept. 2016). The record is absent of evidence establishing a inequality or control on the part of Jane. A familial relationship alone is insufficient to establish a confidential relationship. Matter of Graeve, 113 Ad 3d 983, 984

(3rd Dept. 2014). The case at bar is distinct from that of Blase v. Blase, 148 Ad 3d 1777 (4th Dept. 2017) relied upon by the Guardian. In Blase, the son of decedent was found to have a confidential relationship such as to shift the burden to himself after he had used a power of attorney to remove his brother as beneficiary on a bank account while the decedent was incapacitated in a nursing home. Id. at 1778.

There is no question that Mr. Dreyfuss, a preliminary executor and financial advisor to the decedent, received no gift, distribution or bequest from the decedent under the subject Will or Trust. As in In re Coopersmith, 48 A.D. 3d 563, 567 (2d Dept. 2008), the petitioner, the attorney-draftsman, was named as one of three executors and as one of three trustees of a charitable trust, was not a beneficiary under the will, and thus, the inference or presumption of undue influence does not apply. Matter of Weinstock, 40 N.Y.2d 1 (1979); Matter of Henderson, 80 N.Y.2d 388 (1992). Thus, no inference of undue influence arises here where no such gift or bequest advances to Mr. Dreyfuss.

The Motion for Partial Summary Judgment shifting the burden requiring the proponents to show that the July 23, 2014 legal instruments are not the products of undue influence is denied. The Motion for Partial Summary Judgment is denied in all respects.

CONCLUSION

The Court is satisfied that the propounded instruments were duly executed in accordance with the requirements of EPTL 3-2.1. The decedent's competence to make the Will and Trust and his freedom from restraint and duress have been established to the Court's satisfaction. SCPA 1408(2). The objections to probate are hereby dismissed and the Guardian's motion for partial summary judgment is denied. The Petition to set aside the R.W. Burrows Revocable Trust is

likewise dismissed.

The propounded instruments will be admitted to Probate as decedent's Last Will and Testament. Letters of Trusteeship shall issue with respect to the R.W. Burrows Revocable Trust.

The above constitutes the Decision and Order of this Court.

DATED: May 28, 2020

ENTER,

HON. JOHN H. CRANDALL
HERKIMER COUNTY JUDGE AND SURROGATE