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IN THE MATTER OF THE ESTATE OF LOIS A. MAYO, DECEASED.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. P-224-17

OPINION

Argued: November 9, 2018

Decided: November 15, 2018

Appearances: Elton Bozanian, (Rotolo, Bozanian & Yi, LLC, attorneys) for Defendants

Richard Ragsdale, (Davidson Sochor Ragsdale & Cohen, LLC, attorneys) for Plaintiff

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HON. EDWARD A. JEREJIAN, P.J.Ch.

The instant matter comes before the Court by way of Notice of Motion for Summary Judgment pursuant to R. 4:46 by Elton John Bozanian, Esq., attorney for Defendants Cheryl Schnur and Elizabeth Schnur, dismissing the Amended Verified Complaint with prejudice, filed on July 17, 2018. Plaintiff Gregg Mayo, by and through counsel Richard Ragsdale, Esq., filed opposition to the aforementioned motion on October 30, 2018. The Court heard oral argument on the matter on November 9, 2018.

BACKGROUND

Decedent Lois A. Mayo ("Decedent") died on April 21, 2017. Decedent's husband, Gabriel Mayo, predeceased her on February 14, 2017, and Decedent was survived by her four adult children

– Cheryl A. Schnur ("Defendant"), Glenn J. Mayo, Gregg G. Mayo ("Plaintiff"), and Kyle D. Mayo – and also one granddaughter, Elizabeth Joy Schnur.

On November 14, 1996, Decedent Lois A. Mayo, then a resident of Glenn Falls, New York executed her Last Will and Testament and the Lois A. Mayo Revocable Trust at the law offices of Bartlett, Pontiff, Stewart & Rhodes, P.C. See Ragsdale Cert. Ex. A, B, and C.

The 1996 Will was executed as a reciprocal will with her spouse and the parties' father, Gabriel Mayo. In the event that one survived the other, the Decedents bequeathed all tangible personal property to their surviving children, except Defendant Cheryl. Id. at Ex. B. The residue and remainder of the estate was to be used to fund a revocable inter vivos trust. Id. The 1996 Revocable Trust likewise contained multiple references excluding "Cheryl Mayo or her issue" as beneficiaries under the terms. Id.

On November 26, 1996, Decedent executed a Living Will, naming her spouse, Gabriel, as her healthcare proxy with durable power of attorney, with Plaintiff Gregg and Decedent's other son Glenn being named as alternates. Id. at Ex. D. On January 7, 1997, Decedent executed a document naming both Gabriel and Gregg attorneys-in-fact. Id. at Ex. E. Both documents were executed under the laws of New York.

Decedents first went to the office of G. Emerson Dickman, Esq. on June 14, 2006 to discuss special needs planning in order to avoid inadvertently interfering with governmental entitlements and benefits for their three sons. Dickman Cert. at ¶ 1. Decedent in her own words described the three sons as follows:

Glenn (age 42), living at home, on Medicaid, diagnosed as Bipolar and recovering from drug abuse . . . Kyle (age 33) living at home, on Medicaid, diagnosed at an early age, 12 or 13 years old,

as schizophrenic . . . Gregg (age 38) living at home, on Medicaid, back injury "former drug user, clear for six years." [Id. at ¶ 1].

Decedents did not follow up on this initial meeting with Mr. Dickman's offices until May 31, 2012, at which point his notes indicated that they "wished 95% of their estate to go into a Special Needs Trust for their three sons," and that third party co-executors and executrices were preferred to have "decision making responsibility . . . if relationships with beneficiaries became problematic." Id. at ¶ 3a-b.

On January 18, 2017, Decedent called Mr. Dickman's office and spoke to an associate, noting: (1) Cheryl "came back," is "getting a divorce," and is a "blessing;" (2) Gabriel is getting radiation and chemo therapy for cancer; (3) Decedent is "housebound;" (4) Gregg is "addicted to alcohol and prescription drugs;" (5) Now that Cheryl and Elizabeth "are back in the picture" she said she would call back with changes "regarding executors, trustees, and remaindermen." Id. at ¶ 6.

On February 17, 2017, Decedents executed their Wills, the Mayo Family Trust, and Health Care Directives. Mr. Dickman certifies that the contents, purposes, and intent of each were explained in detail to Decedents individually and evaluations of each as to potential capacity and undue influence issues were performed satisfactorily. Id. at ¶ 7. The changes in the estate planning from the initial 1996 documents now name Cheryl and Decedent's granddaughter, Elizabeth, co-executors of the Will, as well as the residuary beneficiaries and co-trustees of the $1.5 million Special Needs Trust.

The estate is estimated to be just under $3 million, the sum of $1.5 million is allocated to funding the Special Needs Trust, established for the benefit of Decedent's three sons – Kyle, Glenn

and Gregg – and the balance of which is gifted to Cheryl and Elizabeth in equal shares. Plt.'s Brief, at p. 5, n. 4.

The crux of the issue before the Court revolves around Defendant's return into Decedent's life after an approximately twenty-four year-long hiatus, and just prior to her parents deaths at a time when they were both ill. See Amended Verified Comp. at ¶10. As a result, the underlying dispute questions Decedent's true testamentary intentions upon the reemergence of Defendant and the ensuing changes Decedent and her husband made subsequently.

LEGAL STANDARD

Summary judgment is designed to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Thus, the court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

In the matter before the Court, Counts 3 and 4 of the Amended Verified Complaint seek relief for lack of capacity and undue influence, respectively.

LACK OF CAPACITY CLAIM

In New Jersey, there is a well-established legal presumption that a testator was of sound mind and competent when he or she executed his or her Will. In re Craft's Estate, 85 N.J.Eq. 125, 130 (Prerog. 1915). The party alleging lack of testamentary capacity bears the burden of proof*, by clear and convincing evidence*, of that lack of capacity. Matter of Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992), certif. denied (emphasis added). Testamentary capacity is to be determined on the date of the execution of the will. Id. at 524.

Plaintiff here concedes that the primary focus of its action is *not* lack of capacity, but in fact undue influence.[1] See Plt.'s Brief, p. 2. Considering the ramifications of a summary judgment motion, however, the Court will still address the merits of Plaintiff's capacity arguments.

Plaintiff's brief in opposition to the instant motion is almost entirely devoid of any arguments furthering its initial position that Decedent lacked capacity when executing the February 2017 estate

[1] Plaintiff concedes in his summary of material facts that "[Decedents] testamentary capacity is arguable, but not the real issue in this case. Undue influence is the heart of this case."

and trust documents. Furthermore, Plaintiffs have not proffered any evidence demonstrating any specific wrongdoing by Elizabeth or Cheryl Schnur whatsoever. Plaintiff's Amended Verified Complaint simply makes bold assertions as to Decedent's "serious illness, being overly medicated, and suffering from dementia at the time of execution," as reasons for the Court to find an inference of lack of capacity. See Amended Verified Comp., Count Three. These blanket allegations, without more, are insufficient to show that any genuine issue of material fact remains regarding Decedent's capacity at the time of execution of the estate and trust documents.

As described in detail *infra*, Mr. Dickman certifies the following regarding Decedent's state of mind during the estate planning and execution process:

> The witnesses and I were satisfied that the Decedents fully understood the purpose of the documents and had the capacity to execute same. The contents of the documents they executed had been discussed in detail for *over a decade*. The Will and Special Needs Trust which I reviewed in detail with Decedents contain language whereby each Decedent declared that, at the time of execution, he/she was 'of sound mind,' and was executing each document of his or her 'free and voluntary act' and '*under no constraint or undue influence.*' . . . I observed no reason to believe that either Decedent lacked capacity to understand the contents of the Estate documents, nor did I observe any reason to believe that either Decedent was under constraint or undue influence. [Id. at ¶¶ 7-10] (emphasis added).

Plaintiff's portrayal of Decedent as incapacitated and of unsound mind during the *execution* of the estate and trust documents specifically is inaccurate and misleading. Although Decedent was undeniably in the advanced stages of cancer treatment when the estate and trust documents of interest were in fact executed, it is also clear to this Court that Decedent had expressed the desire to set up this Special Needs Trust with the *specific intent* of taking her three sons various limitations and disabilities into consideration as far back as 2006. As discussed *infra*, Decedent demonstrated great concern for the mental and psychological capabilities of her three sons in referencing Glenn's

bipolarism and drug abuse, Kyle's schizophrenia, and Gregg's drug use and debilitating back injury. See Dickman Cert. at ¶ 1.

Emerson Dickman's practice was dedicated to representing people with disabilities and their families in two major areas: (1) educational advocacy, for children that have been identified as or should be identified as eligible for special education and related services and seeking appropriate services for them; and (2) special needs planning for families who are dealing with issues relating to children whose disabilities are likely to last for a lifetime. See Dickman Dep. P. 8, lines 1-17.

Furthermore, Mr. Dickman does work related to issues such as Medicaid and disabilities, along with probate work for families who have done special needs trusts, and has been doing so for at least forty (40) years. See Id.

It is clear that based on the extensive planning and consideration for more than a decade of complex planning of the trust based on the son's special needs that the testamentary intent was clear. To argue that Decedent's intent to establish a Special Needs Trust with Mr. Dickman's assistance was the result of diminished capacity is completely inconsistent with the facts before the Court and the history of this case.

As a result, the Court finds that no genuine issue of material fact exists as to Decedent's capacity at the time of execution of the estate and trust documents.

UNDUE INFLUENCE CLAIM

The contestant of a Will has the burden of proving that a testator has been subjected to undue influence, and the undue influence must also be shown to have existed at the time of the execution of the Will. In re Davis' Will, 14 N.J. 166 (1953). Courts attempt to preserve the right of the decedent to dispose of his property as he sees fit. Thus, the law places a heavy burden on the contestant with respect to proving undue influence. In re Gotchel's Estate, 10 N.J. Super. 208 (App. Div. 1950).

The burden of proof in a Will contest will shift to the proponent when two elements are present: (1) the existence of a "confidential relationship" between the defendant and the testatrix; and (2) additional circumstances of a "suspicious character" that require explanation. Haynes v. First National Bank, 87 N.J. 163, 163 (1981). Suspicious circumstances need be no more than "slight." Id. at 176.

Parent child relationships are "among the most natural of confidential relationships." In re Fulper, 99 N.J.Eq. 293, 314 (Prerog. Ct. 1926). However, "the mere existence of family ties does not create . . . a confidential relationship." Vezzetti v. Shields, 22 N.J. Super. 397, 405 (App. Div. 1952).

Plaintiffs rely heavily on the *assumption* that a confidential relationship exists in this case solely because of the parent-child relationship between Decedent and Defendant Cheryl. However, all of the facts pertinent to the timeline of this particular matter, as well as many of the assertions made by Plaintiff himself, completely contradict the presence of a confidential relationship between Defendant and Decedent. Specifically, Decedent's intent to execute a Special Needs Trust dated back eleven years before Defendants even reappeared in Decedent's life. Nevertheless, Plaintiffs rely on the bold assertion that Defendants somehow exerted undue influence on Decedent to execute the trust in a manner entirely consistent with a decade of planning.

Mr. Dickman in his deposition stated that the Decedents expressed clear concern with using Gregg as a trustee for a trust in which he was expected to also be a beneficiary of. See Dickman Dep. P. 41, lines 12-21. Further, Mr. Dickman indicates the clients had not been able to initially indicate any friends, relatives or attorneys that would have been able to fill that position in 2006, prior to Defendants reemergence. Id. at p. 42, lines 1-5.

As noted above, the case law is clear that the mere existence of a familial relationship does not by itself create a confidential relationship. Further, as Plaintiff points out, it is clear that Decedent and Defendant in fact did not have a relationship *at all* for a period of over twenty (20) years until the latter stages of her life. Here, Decedents were married and lived together when they planned their estate dispositions, and there is no evidence before the Court that they were dependent upon any of the parties, let alone Defendants, in any manner. Thus, the blanket claims that questions of material fact remain regarding whether Defendants held any "superior knowledge" as to Decedent's financial circumstances or estate plans is utterly false.

In fact, the only party that appears to have possibly maintained a "confidential relationship" consistent with the theme of the underlying case law is Plaintiff himself. Although Plaintiff's potential exertion of undue influence is not presently before the Court, it is worth noting that Plaintiff has argued that he was the one whom Decedent relied and depended upon through their life. In his own words, he "did everything for them [his] whole life." See 09/21/18 Plt. Dep. At 158:9-13. It was Plaintiff who resided with Decedents at all times, including during Cheryl and Elizabeth's return to the area. Plaintiff cannot now change his position from "[w]e had a close relationship. My entire family for that matter *except for Cheryl* . . . ." simply to satisfy the crucial element of an undue influence claim.

Even in the event that Plaintiff was able to establish genuine questions of material fact regarding Defendant and Decedent's relationship such that summary judgment is inappropriate at this time, it also fails to demonstrate any "suspicious circumstance" remain to survive summary judgment.

Plaintiff's entire argument that suspicious circumstances consistent with a claim of undue influence exist in the matter before the Court is rooted in Cheryl and Elizabeth's long absence from

the family. Plaintiff seems to propose that but for Defendants sudden re-emergence, the 1996 estate documents – or at least their overall substance – would have remained in effect. Defendant, however, makes this argument without accounting for the facts that, subsequently in 1997 their only granddaughter was born (Elizabeth), and the determination that Decedents' three sons were entitled to receive valuable government benefits which include lifetime healthcare coverage. These benefits, however, are subject to termination in the event their income or assets exceed certain nominal amounts.

Plaintiff's bold assertion of undue influence and suspicious circumstances surrounding the execution of the estate and trust documents completely ignores Mr. Dickman's deposition detailing Cheryl and Elizabeth's role as outlined by Decedent. Specifically, Mr. Dickman stated:

> "The discussion that we had regarding the funding of a trust like this is to start off by determining how much we think would be sufficient to meet the needs of the beneficiaries of the trust both in terms of long-term need, emergency funds, and sustainability of the trust. Then we look at the persons that are going to be responsible for the job of implementing their interests, in this case it would be the *trustees* or other people who we say. How much should we put aside to make sure that *they* have been treated fairly . . . In this particular case they felt as far as a trust for the three boys the minimum they would like to see in this trust would be $1.5 million plus the cost-of-living escalator. However, they *also* said the *minimum* that they wanted to be available *for Cheryl and Elizabeth would be 20% of their estate*." See Dickman Dep. P. 112, lines 1-15 (emphasis added).

Here, it is clear that this was a well-thought out and complex trust and estate plan that had been prepared over the course of a decade with the help and advice of a respected attorney who specializes in the field. There is absolutely no evidence before the Court to rebut Mr. Dickman's deposition testimony that Decedent clearly intended to not only implement Elizabeth and Cheryl as Trustees of the Special Needs Trust, but also to make sure they were treated fairly for doing so. It is not even remotely suspicious in the realm of undue influence for Decedent to have compensated Elizabeth and Cheryl out of the estate consistent in the manner discussed with Mr. Dickman.

Lastly, Plaintiff relies on a $65,000 advance of funds that were ostensibly part of Defendants' inheritance as "suspicious circumstances" that warrant further review. However, Plaintiff fails both in its moving papers and at oral argument to provide the Court with justification for its failure to timely object, despite many opportunities and advanced notice from Mr. Dickman's office regarding the proposed advancement. Instead, in response to the advance and Mr. Dickman's lengthy and detailed certification recounting the complete lack of any incapacity or undue influence issues, Plaintiffs merely state that "Dickman was curiously incurious" and plan to cross-examine him at trial for credibility purposes. Plaintiffs maintain this position, despite not providing any sort of basis or factual underpinnings attacking Mr. Dickman's longstanding reputation in the field of special needs trust and estate planning, or his particular professional performance in the instant matter.

Therefore, the Court finds that there is no question of fact surrounding the relationship between Defendants and Decedent, nor is there any indication of suspicious circumstances surrounding the worthy of shifting the burden of proof to Defendants. Thus, the Court finds no undue influence on the part of Defendants.

CONCLUSION

The factual history and timeline before the Court demonstrate several, uncontroverted facts. First, that Decedents maintained visible and legitimate concerns for the well-being of their three adult sons, and intended to plan their estates accordingly. Second, that following the initial execution of their 1996 estate documents, Decedents realized these documents may potentially interfere with their sons' governmental entitlements and benefits. Lastly, that Decedents demonstrated an interest in a non-interested third party having the requisite decision-making responsibility in administering the terms of the Trust. The Decedents executed their final trust and estate plans jointly and with the

assistance and in the presence of an expert in the field of special needs trust and estate planning and administration.

The Court recognizes that when people approach the end of their lives, they often reconcile with individual family members and friends that have been absent for one reason or another. As is the case in the matter before the Court, people also go to great lengths to assure that their individual estates are carried out effectively so as to maximize the care afforded to particular beneficiaries. Although Defendants seems to really take issue with the administration of the residuary of the Estate, as opposed to the terms of the Special Needs Trust, it is farfetched for Defendants to argue that undue influence and incapacity played crucial roles in the execution of both when Decedents' intent on executing a Special Needs Trust was so clearly portrayed over the course of a decade.

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted in its entirety. An Order accompanies this decision.