Steuben County Surrogate's Court File No. 45107/15
Appellate Division, Fourth Department Docket No. CA 19-01048

Court of Appeals

STATE OF NEW YORK

In the Matter of the Probate Proceeding of the Estate of
SOPHIE PETER KOTSONES,

Deceased.

JAMES KOTSONES,

Petitioner-Respondent-Movant,

—against—

ELLEN KREOPOLIDES (a/k/a ELLEN MARIA KREOPOLIDES), Individually and as Trustee of the SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES (a/k/a ALEX KREOPOLIDES), and 42-52 WEST MARKET STREET LLC,

Respondents-Appellants-Respondents.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
OF THE STATE OF NEW YORK

In the Matter of the Probate Proceeding of the
Estate of

SOPHIE PETER KOTSONES,
Deceased.

Fourth Department Docket No. CA 19-01048

Surrogate File No. 45107/15

Surrogate File No. 45107/15/E

JAMES KOTSONES,
Petitioner-Respondent-Movant,

-against-

NOTICE OF MOTION

ELLEN KREOPOLIDES
(a/k/a ELLEN MARIA KREOPOLIDES),
Individually and as Trustee of the
SOPHIE PETER KOTSONES IRREVOCABLE TRUST,
ALEXANDER KREOPOLIDES (a/k/a ALEX KREOPOLIDES),
and 42-52 WEST MARKET STREET LLC,
Respondents-Appellants-Respondents.

MOTION BY: Petitioner-Respondent-Movant James Kotsones

DATE, TIME, AND PLACE OF HEARING:

Tuesday, September 8, 2020

Before the Court of Appeals of the State of New York, Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207.

SUPPORTING PAPERS:

Affirmation of Aaron I. Mullen, Esq., with exhibits, dated August 27, 2020 and all pleadings and proceedings heretofore had herein.

RELIEF REQUESTED:

1. For an order granting leave to appeal to the Court of Appeals from the Order of the Appellate Division, Fourth Judicial Department, dated July 17, 2020;

2. For such other and further relief as is just and proper.

PLEASE TAKE NOTICE that pursuant to CPLR §2214(b), answering affidavits, if any, shall be filed and served on or before the date this motion is noticed to be heard.

Dated: Bath, New York
August 27, 2020

MULLEN ASSOCIATES PLLC
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COURT OF APPEALS
OF THE STATE OF NEW YORK

In the Matter of the Probate Proceeding of the Estate of

Fourth Department Docket No. CA 19-01048

SOPHIE PETER KOTSONES,
Deceased.

Surrogate File No. 45107/15

JAMES KOTSONES,
Petitioner-Respondent-Movant,

-against-

Surrogate File No. 45107/15/E

ELLEN KREOPOLIDES
(a/k/a ELLEN MARIA KREOPOLIDES),
Individually and as Trustee of the
SOPHIE PETER KOTSONES IRREVOCABLE TRUST,
ALEXANDER KREOPOLIDES (a/k/a ALEX KREOPOLIDES),
and 42-52 WEST MARKET STREET LLC,
Respondents-Appellants-Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Aaron I. Mullen, an attorney duly authorized to practice law in the courts of the State of New York, hereby affirms as follows under penalty of perjury:

1. I am a member of Mullen Associates PLLC, attorneys for the Petitioner-Respondent-Movant James Kotsones ("James"). The information set forth in this affirmation is based on the undersigned counsel's personal knowledge.

2. This affirmation is made in support of James' motion for leave to appeal from an order of the Appellate Division, Fourth Department, entered July 17, 2020, pursuant to CPLR 5602 (a)(1)(i).

Procedural History and Timeliness of the Motion

3. This proceeding arises out of an application by Respondents Ellen and Alexander Kreopolides to admit to probate a will of the decedent Sophie Kotsones. Sophie is the mother of James and Ellen. Alex Kreopolides is Ellen's son and Sophie's grandson. The will in question benefitted Ellen and Alex, to the exclusion of James, and replaced earlier wills that primarily benefitted James.

4. This proceeding was commenced by James in Surrogate's Court, Steuben County, objecting to the admission of the will to probate. He also sought to invalidate a trust created on the same date as the contested will and certain subsequent real estate and other financial transactions that also benefitted Ellen and Alex. To the extent relevant to this motion and the proposed appeal, James' objections to the will, trust and other transactions were based on the ground that Ellen and Alex exerted undue influence on Sophie.

5. After a lengthy bench trial, the Surrogate (Patrick F. McAllister, S.) found that Ellen and Alex had, indeed, exerted undue influence on Sophie (Decision and Order, entered March 18, 2019 [Record on Appeal "R." 8–23]). Accordingly, the Surrogate denied the application to admit the contested will to probate and invalidated the trust and other transactions (*id*.). A copy of the Surrogate's decision and order is annexed hereto as Exhibit A.

6. Ellen and Alex appealed to the Fourth Department, which, in an order entered July 17, 2020, reversed, on the law, dismissed James' petition, and granted the application to admit the contested will to probate. Notice of entry of the Appellate Division order was served by regular mail on July 24, 2020. A copy of the Appellate Division order, with notice of entry and affidavit of service,[1] is annexed hereto as Exhibit B. This motion is made within 35 days after service of notice of entry and is therefore timely (CPLR 5513 [b], [d] and CPLR 2103 [b] [2]).

Statement of the Court's Jurisdiction

7. This Court has jurisdiction of the motion and of the proposed appeal pursuant to CPLR 5602 (a) (1) (i). The proceeding originated in Surrogate's Court, Steuben County, and the order of the Appellate Division finally determined the

[1] The affidavit of service mistakenly recites the mailing was made on February, rather than July, 24, 2020. A follow-up mailing with affidavit was made on July 29, 2020 and that affidavit of service is also attached with Exhibit B. This motion is timely in relation to both mailings.

proceeding by: (1) dismissing the objections to the will and petition seeking to invalidate the trust and other transactions; and (2) granting the application to admit the contested will to probate (*see*, Karger, The Powers of the New York Court of Appeals [3d ed.], § 28, p 185 ["There is no question as to the finality of an order of the Appellate Division which determines a proceeding for such relief as the admission of a will to probate."]).

The Questions Presented and Why They Merit Review by the Court of Appeals

8. The questions presented by the proposed appeal are: (1) what is the correct legal standard for determining whether a will or other transaction should be set aside on the ground that it was the product of undue influence; and (2) what is the correct legal standard for determining whether the beneficiary of a transaction was in a fiduciary or confidential relationship with the benefactor, so that the transaction gives rise to an inference of undue influence and the beneficiary bears the burden of demonstrating that the transaction was fair and free from influence? These issues are preserved for review by the Petition and Objections, which allege undue influence (R. 5, 6, 2625; *see also* R. 2214, 2261–62 [closing argument]), and by the Petitioner's specific requests that the Surrogate find that the Respondents were in such a confidential relationship with Sophie (under the doctrine of constructive fraud) (2313 [summary judgment motion]; R. 63:14–64:21 [opening statement]; R. 2241–42, 2261–62 [closing argument]).

9. These issues arise in a case in which the Surrogate made factual findings that Ellen had obtained positions of great trust with Sophie, thus establishing a confidential/fiduciary relationship, and had abused that trust for her own benefit. Without disturbing those factual findings, the Fourth Department held, as a matter of law, that there was neither a confidential relationship nor the exercise of undue influence. The Fourth Department's reasoning raises the following sub-issues:

- Is a benefactor's incapacity, incoherence, and/or incompetence a prerequisite for a confidential relationship to exist? This Court has never suggested that a confidential relationship cannot exist in the absence of such factors, but the Fourth Department's decision does.
- In analyzing whether a confidential relationship existed (and concluding that it did not), did the Appellate Division mistakenly apply this Court's evidentiary rule applicable to the separate and distinct issue of whether there was undue influence ("'[an] inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference"' (*Matter of Walther*, 6 NY2d 49, 54 [1959])? And was it further error to apply such a rule in a case where the evidence of both undue influence and a confidential/fiduciary relationship went far beyond mere "circumstances", i.e., where there was direct, documentary evidence of Ellen's scheme?

- Where there is undisputed evidence (and affirmed findings) that the beneficiaries "held a position of trust with the decedent" (*Matter of Kotsones*, 185 AD3d 1473, 1476 [4th Dept 2020]), and both documentary and testimonial evidence that they were involved in orchestrating the transactions, is the inference of undue influence that arises from such a position negated by evidence that the decedent also "was actively and personally involved"[2] in executing the disputed transactions (*id*.)? By holding that Sophie's involvement in the transactions negated the inference of undue influence, the Fourth Department has essentially established a rule that no inference of undue influence can arise if the confidant is effective enough to manipulate the testator to participate in the transactions. Such a rule serves only to reward those that are most successful at abusing their trust.
- Was the multi-factor test used by the Surrogate to determine undue influence (age; physical and mental condition; changes in testamentary plan; involvement of others in testamentary plan; managing of financial and other affairs; a change in attorneys and advisors; and closeness of family members) an appropriate test for determining whether undue influence occurred?

[2] Although the Fourth Department used this language, the Surrogate never made such a finding. In fact, his findings specifically reject that proffer from Ellen and Alexander. (*See, e.g.*, his analysis regarding "involvement of others in testamentary plan" and "the managing of financial and other affairs", *infra*, paras. 96-102).

This test is consistent with this Court's precedents but was ignored by the Fourth Department in favor of a rule that the testator's participation in the management of her affairs precludes a finding of undue influence.

- Can a person exert undue influence over someone who is not incapacitated, incoherent, or incompetent by internalizing within that person the desires of the influencer? The court below incorrectly answered no.

10. The Appellate Division's decision in this case—by overturning the Surrogate's determinations on these issues as a matter of law—has contributed additional uncertainty and confusion to an area of the law that has already been described as "[a] growing problem without a consistent definition" (M. Quinn, *Defining Undue Influence*, Bifocal, A Journal of the ABA Commission on Law and Aging, Vol. 35, Issue 3 at 72 [Jan.–Feb. 2014], https://www.americanbar.org/content/dam/aba/publications/bifocal/BIFOCALJanuary-February2014.pdf [last accessed Aug. 24, 2020]). As the author of that article notes, "[t]he issue is particularly important because the number of people over 65 is increasing nationwide." As the number of senior citizens grows, and as that growing demographic lives longer, the opportunities for all forms of elder abuse—including the exercise of undue influence in estate planning, contractual relations, and all forms of financial transactions—will only increase. Thus, the legal standard for establishing undue influence is important not only for an increasing number of

people subject to such abuse, but also across a wide variety of transactions. The Appellate Division's decision adds uncertainty to this increasingly important area of the law by conflating the distinct concepts of undue influence and capacity and by misapplying the standards for determining whether a confidential relationship exists for purposes of requiring the confidant to prove that the transaction was fair and free from undue influence. The case is already being cited for its confidential relationship holding (*New York Court: No Confidential Relationship Leads To Reversal of Undue Influence Finding* [Jul. 20, 2020], https://probatestars.com/new-york-court-no-confidential-relationship-leads-to-reversal-of-undue-influence-finding/ [last accessed Aug. 24, 2020]).

11. New York is even more vulnerable than most states due to its aging and wealthy population. According to the New York State Office of Aging, New York State ranks fourth in the nation in the number of individuals age sixty and older, and that population is expected to increase by an additional one million by 2030, such that one in four New Yorkers will be over age sixty. (*Older Adults: An Economic Powerhouse* [Nov. 19, 2019], https://aging.ny.gov/news/older-adults-economic-powerhouse [last accessed Aug. 24, 2020]). Meanwhile, they continue to accumulate wealth as they age. A recent report explained that "older adults and baby boomers" generated sixty-three percent of New York's household income: over $379 billion. (*Id.*) That is income greater than the gross domestic product of

all but 50 countries worldwide. (*CIA Word Factbook*, https://www.cia.gov/library /publications/the-world-factbook/rankorder/2001rank.html [last accessed Aug. 25, 2020]). Such prolific figures have led financial experts to refer to the upcoming generational transfer of wealth from the Baby Boomers as the "great wealth transfer." (Mark Hall, *The Greatest Wealth Transfer in History: What's Happening And What are the Implications*, Forbes [Nov. 11, 2019] https://www.forbes.com/ sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications/#3dd171974090 [last accessed Aug. 26, 2020]). Accordingly, New York's Office of the Statewide Coordinating Judges for Family Violence Cases released a publication in 2017 outlining and calling attention to "normal cognitive declines" contributing to age associated financial vulnerability, including vulnerability to undue influence (Hon. Janet DiFiore, Hon. Lawrence K. Marks & Hon. Deborah A. Kaplan, *Understanding and Preventing Financial Exploitation of Vulnerable Older Adults* at 7 [Nov. 2017], available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/monograph.pdf [last accessed Aug. 24, 2020]). Such trends will lead to injustice and impact judicial caseloads, which will only be compounded by uncertainty:

> The growing number of older Americans, the prevalence of cognitive disorders associated with aging, the concentration of wealth in older adults, and the complexity of modern families is likely to lead to an increase in will and trust contests, entailing allegations of lack of testamentary capacity and of undue influence.

(D. A. Plotkin, J. E. Spar & H. L. Horwitz, Assessing Undue Influence, 44 J Am Acad Psychiatry L 344–51 [Sep. 1, 2016], available at http://jaapl.org/content/jaapl/44/3/344.full.pdf [last accessed Aug. 24, 2020]). (*See also Elder Justice*, http://ww2.nycourts.gov/Admin/OPP/elder-justice/index.shtml [last accessed Aug. 24, 2020] [the New York State Unified Court System Office of Policy and Planning recognizing this shift in demographics will result in judges seeing an increased number of cases involving older adults and announcing initiatives to address the unique challenges of older adults]).

12. Although New York is unique in the level of its vulnerability, the need for clarity and reform is universal. In the face of this growing need, an American Bar Association Commission on Law and Aging publication noted that "Understanding undue influence, dissecting it, defining it, and understanding the term, has proven elusive in social service and legal settings." (Quinn, *supra* para.10). This is in part because "when a perpetrator is able to bend an older adult's will to meet his or her nefarious objectives… [t]his type of manipulation is usually wrapped in declarations of love, affection and friendship." (DiFiore, et al, *supra* para. 11, at 9).

13. Numerous bar associations, academic journals, and service providers have pointed to California's recent treatment of undue influence as instructive in articulating an undue influence standard that offers meaningful protections not only against cases of overt, strong-arm coercion, but also cases of insidious

manipulation within family or other close relationships. (*E.g.*, Quinn, *supra* para. 10 [American Bar Association]; A. Erickson and B. Morrison, *Undue Influence in Estate Planning: When Help Goes Too Far*, available at https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/04/23/undue-influence-in-estate-planning-when-help-goes-too-far [last accessed Aug. 24, 2020]; Plotkin, et al, *supra* para. 11; L. Nerenberg, *Undue Influence: An Insidious Form of Elder Abuse* [Jan. 10, 2013], available at https://nyceac.org/undue-influence-an-insidious-form-of-elder-abuse/ [last accessed Aug. 24, 2020]).

14. The California standard requires a fact-intensive factors-based approach. All factors must be considered, but not all must be present to support a finding of undue influence, lest the more insidious types be missed. For instance, the third factor, analyzing the "actions or tactics used by the influencer" recognizes such tactics may include intimidation, coercion, or affection. (Plotkin, et al, *supra* para. 11 at 346). California's comprehensive, factor-based analysis looks a lot like the Court's standard in *Rollwagen v Rollwagen* (63 NY 504, 519 [1876]). *Rollwagen* has never been overturned by this Court, but the test has not been seriously revisited by this Court since 1928 (*see In re Anna's Estate*, 248 NY 421 [1928]), and it is not the test employed by the Fourth Department in this case. To the contrary, although this Court positively referenced the *Rollwagen* decision in *Walther* (6 NY2d 49 [1959]), the Fourth Department cited *Walther* to overturn a

very detailed, factors-based Decision and Order by the Surrogate that was completely consistent with *Rollwagen*. In the absence of this Court's further guidance, lower Courts will neglect to treat these cases as thoroughly as they should. They will allow portions of language from *Walther* to shield bad actors when the purpose of *Walther* was to refuse to allow the law to be used as a sword to injure a good actor.

15. Moreover, the general standard for undue influence is not the only standard that has been damaged by *Kotsones*. The Fourth Department was equally misguided in the rule it articulated for finding a confidential relationship, which relationship shifts the burden to a beneficiary to show that a transaction was fair and free from undue influence. The standard articulated by the Fourth Department essentially requires incapacity, incoherence, or incompetence for a confidential relationship to exist, regardless of how insidiously the beneficiary abused her relationship with her benefactor. This holding in *Kotsones* is a dangerous extension of recent holdings in the Third Department, e.*g.*, *Matter of Nealon* (104 AD3d 1088, 1089 [3d Dept 2013]), which hold that something close to a benefactor's incapacity is a prerequisite for a confidential relationship.

16. The Fourth Department has further complicated the confidential relationship rule by adding to its confidential relationship analysis a rule that this Court articulated in *Walther* for undue influence (not confidential relationship) cases

devoid of direct evidence: that "an inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference." This mistake requires rectification.

17. Such narrowed standards for undue influence and confidential relationships deviate from Court precedent and leave millions of aging New Yorkers in danger of the subtle, insidious exploitation about which experts across the country are sounding warning bells.

18. Our seniors' collective vulnerability is only compounded in times like the present, where the global pandemic has left many of our elderly isolated from society at large and dependent upon fiduciaries to a greater degree than ever before.

19. The time is ripe for this Court to clarify the law. As the Office of the Statewide Coordinating Judges for Family Violence Cases acknowledged, "'History will judge those who were on the right side of this issue as courageous. Twenty years from now we will look back on our failure to protect the assets of vulnerable older adults with astonishment.'" (DiFiore, et al, *supra* para. 11, at 7 [quoting Dr. Mark Lachs]). The time is ripe, amidst a growing aging population, growing clinical understanding of their particular vulnerabilities, a century's lag of this Court's guidance, and lower court obfuscation, to reestablish nuanced, factors-rich standards for finding undue influence and confidential relationships that are

comprehensive enough to protect vulnerable aging New Yorkers from undue influence ranging from the overt and overpowering to the subtle and insidious.

Brief Statement of Facts

20. As the Fourth Department overturned the Surrogate on the law only, the Surrogate's factual findings are undisturbed. [3] Those facts are well-supported by the record and are summarized in the annexed timeline (attached as Exhibit C[4]), which shows how quickly and dramatically Sophie's well-established estate planning (historically favoring James) changed in response to Ellen's personal intervention and desires, even as Ellen became her aging[5] mother's fiduciary and held herself out to be working for her mother's best interests.

21. Ellen's motivation for doing so was obvious: "it is clear that Ellen and Alex obtained a personal advantage by receiving almost all of the assets of Sophie Kotsones." (R. 14). Sophie had estimated her properties alone to be worth over $1 million. That figure was also estimated by her long-time attorney, George Welch,

[3] Although the Fourth Department explicitly reversed on the law only, it cited evidence in support of its decision that the Surrogate either explicitly or implicitly rejected as not credible, as explained in more detail below. Because the Surrogate's findings were not explicitly overturned, they must be considered undisturbed for purposes of this motion and the proposed appeal and the contrary evidence cited by the Appellate Division should be rejected in favor of the Surrogate's findings (*see Lehigh Valley Ry. Co. v Adam*, 176 NY 420, 423 [1903] [where reversal is on the law, facts as found by trial court must stand for purpose of review by Court of Appeals]).

[4] The Timeline was included in the Record at R. 2218–23 as part of James's closing argument; Exhibit C has been updated to cross-reference Record pagination.

[5] Sophie Kotsones was born March 27, 1923. She was 88 years old when she endured Ellen's 5-day estate planning marathon; 91 years old when Ellen and Alexander obtained her real estate in January 2015; and 92 years old when she died on July 31, 2015.

Sr., who had assisted Sophie with estate planning for many years before Ellen's intervention. (R. 14).

22. Until Ellen's intervention, Sophie's estate planning favored James. The most recent planning (before Ellen's intervention) took place shortly after Sophie left Three Rivers Nursing Home in 2009. (R. 403–04). Sophie went to her long-time attorney, George Welch, Sr., and executed a will leaving nearly everything to James. (R. 1016, 1325). Thus, the nursing home incident that Ellen and her attorneys long claimed was the reason for Sophie disinheriting James in fact drove Sophie closer to James.

23. Then Ellen came back and intervened. "[F]rom the testimony, Ellen had been estranged from Sophie for several years prior to 2011." (R. 20).

24. Ellen came back and developed a relationship with Sophie that she used to manipulate Sophie for her own benefit. Ellen herself explained as much to Attorney Galbraith immediately after she finished five days of estate planning with her mother:

> My mother and I began to reestablish a friendly relationship in the spring, 2011 . . . . I am very grateful because it has allowed me to intervene on her behalf before something tragic happens to her. I would love to have at least the beginnings of these documents drafted so that hopefully when I visit her on January 18 . . . we can solidify some of these documents.
>
> I do have several legal and healthcare advisors in Massachusetts who have indicated a willingness to give me information so that the final

> documents can be in the best interest of my mother keeping her safe and her property secure.

(R. 1370 [emphasis added]). That communication is what the Surrogate cited when he concluded that "the potential 'tragic' event referred to by Ellen that required her intervention was the possibility of James ending up with some or all of the property." (R. 18).

25. The Surrogate's conclusion that Sophie's testamentary planning and the ensuing real estate transactions were the result of "careful planning and manipulation of her mind by her daughter Ellen" (R. 20), is clearly supported by the record.

26. Ellen began manipulating Sophie by isolating her from George Welch, Sr., who "had been Sophie's attorney for over 30 years." (R. 20).

27. Acquiescing to Ellen's importunity, on October 28, 2011, Sophie consulted with Attorney Galbraith—not George Welch—regarding a new will. (*See* R. 943). Even then, Sophie continued to favor James. Under the draft will Attorney Galbraith sent to Sophie on November 28, 2011 (R. 793), James would have received more than Ellen, but it was not completely one-sided, as noted by the Surrogate:

> [t]hat proposed Will actually would have been something relatively fair and equitable to both sides of her feuding family. On December 1, 2011, Sophie writes a letter to Attorney Galbraith confirming the distributions in accordance with his [Nov. 28] Will draft. However, that draft never gets signed by Sophie and takes a dramatic change in

> favor or Ellen and her side of the family. Ellen sent 3 letters and/or e-mails to Attorney Galbraith in the two weeks preceding the signing of the January 11, 2012 Will. In one correspondence Ellen states to Attorney Galbraith, "thankfully I was able to intervene before something tragic happens. Also, George Welch is not to be notified."

(R. 17).

28. During that same timeframe, Ellen was doing some additional planning: in a December 5, 2011 email to Alex, Ellen "outline[d] a plan," about how she and Alex could obtain Sophie's property by a gift disguised as an arm's-length transaction. The Surrogate quoted the relevant portions:

> My lawyer Dan Brodrick[6] and my accountant Al Kazakiatis suggested the following:
>
> - sale of all the property to you for a minimal amount – hundred dollars
> - however the sale has to be what the fair market value is of all the properties
> - Ma needs to state that she has given you as a one-time gift the rest of the value of the property. This paper needs to be notarized and kept by the accountant with a copy to you and her
> - there also needs to be a notarized letter from a doctor stating that she is in excellent health and of sound mind on the day that the sale takes place.
> - that letter is given to the accountant to hold onto when her estate settles

[6] There were at least two other documented occasions where Ellen and/or Alexander contemplated using counsel of their own for advice about Sophie's estate planning. In a letter to Dirk Galbraith, Ellen explained that she had legal advisors who could help her in Massachusetts. (R. 1370). Moreover, in an email exchange between Ellen and Alexander on Sunday November 25, 2012, Ellen forwarded a "Trust Draft" "for review" to Alex and tells him she wants to "set the appointment for signing on Friday." Alex replied, "It is going to be extremely difficult to get a legit lawyer to look over the document by then. How hard is it to change the trust after its filed?" (R. 1404). The trust was executed on December 5, 2012.

- Not sure on change of titles and registry of deeds details that Dirk may have to do, NOT George Welch

(R. 18 [citing R. 1335; R. 1367]). The Surrogate went on to describe the remainder of the correspondence:

> The same e-mail instructs Alex to talk to Sophie and find out from Sophie who gives her rides, who does her hair, etc. and make a list of those people who are most important to her. Then it goes on to instruction to make Sophie comfortable as to what he knows about her so that she will disclose where she hides things around the house (Exhibit B-1). The court also notes that the correspondence from Ellen to Attorney Dirk Galbraith regarding Sophie's Will are filled with "I would like to explore", "I would like to see", "I was surprised to learn", "I am thinking of". (Exhibit L-1) It was clear that Ellen, not Sophie, had changes in store for the Will.

29. Sophie's head was spinning. The Surrogate cited correspondence in which Sophie wrote that she felt as though she was walking in a "sea of mud." (R. 20). She needed to get her bearings back. In that same "sea of mud" letter she said that she wanted to go back and talk to attorney George Welch, Jr.[7] She had to justify it to Ellen in her letter: "I thought I'd go talk to Junior—he's close—& he listens. I know he's a Welch, but—he treats me different—they do my rents—&—things are working" (R. 928).

30. Then Ellen made sure this did not happen. On December 31, 2011, after having not visited Sophie for at least four years (R. 674–75), Ellen showed up at

[7] George Welch, Sr. explained that his son, George Welch, Jr., also did legal work for Sophie and was a friend and former tenant of hers. (R. 452–53).

Sophie's home and kicked off what became a five-day estate planning marathon (*see* R. 1352–70).

31. That crucial timeframe is the timeframe within which "Ellen sent 3 letters and/or e-mails to Attorney Galbraith." (R. 17).

32. For the Court's convenience, excerpts from the Record containing the critical documentary evidence cited by the Surrogate—letters, emails, and proof of Ellen's intervention with Attorney Galbraith during that short period of time—are attached to this Affirmation as Exhibit D. The Letter she emailed to Dirk on January 5, 2012, reproduced at R. 1369–70, shows Ellen's true motivations more than anything else.

33. Ellen should have been seeking her elderly mother's best interests. Though unmoored from any anchor of conscience, she was still bound by the requirements of the law: requirements of the utmost good faith, loyalty, morality, fidelity, and fair dealing.

34. She assumed those responsibilities by inserting herself into fiduciary positions. As described by the Surrogate:

> Ellen nurtured a confidential relationship between herself and her mother. She was not content to share a power of attorney with her brother. Rather she wanted to be the sole power of attorney. Not only did Sophie put the property in a Trust, but Ellen insured that she (Ellen) would essentially have veto power over anything the trust did,

> including the power to sell the property.[8] Ellen used her mother's accounts as if they were her own, paying her own bills and making payments to Alex from her mother's funds. Initially the payments to Alex were characterized as management type fees being paid by Sophie to Alex, but these payments continued even after the property was "sold" to Alex. Ellen took over all the bookkeeping. Ellen cashed the $162,000 + CD that would have gone to her brother upon her mother's death and deposited the money, not in her mother's account, but in her own account. It is clear that Sophie trusted Ellen and Ellen used this trust to her own personal advantage.

(R. 21). As for the trust protector provision referenced by the Surrogate, Ellen was responsible for ensuring any such act that Sophie wanted to undertake was "in the best interest of the trust." (R. 858 [Dec. 5, 2012 Trust, para. L.]). She put herself in that position. She even edited the specifics of it. (*E.g.*, R. 1414 [email from Ellen to Attorney Galbraith's office: "Thanks for your willingness to see these changes. Page 7 of the trust L. Would you please have it as written notarized opinion."]).

35. Having written herself into those fiduciary positions, she should not now be allowed to erase herself out of the accompanying responsibilities.

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[8] Selling real estate was not the only power that Sophie was barred from exercising without Ellen's approval. Sophie could not do any of the following without Ellen's approval: Sell personalty (R. 856–57, para. C); employ an attorney (R. 857, para. E); or "[S]ell, exchange, lease, mortgage or otherwise dispose of real property upon such terms as the Trustee determines . . . ." (R. 857–58, para. K). Sophie could not even retain and pay for her own lawyer without first obtaining Ellen's written approval. (R. 857, para. E).

Ironically, when the time came for Ellen to exercise her gatekeeping power over the real estate transaction between Sophie and Alexander, she did not certify that the transaction was in the best interest of the trust; rather, she simply wrote "I approve" and the banker Jean Wise stamped it with her notary stamp. (R. 1591).

36. But Ellen wielded her power to manipulate her mother away from James and her old attorney and towards herself, her son, and a new attorney. She wrote:

> Dear Dirk,
>
> It was an eventful eye-opening five days that I spent with my mom, Soph Kotsones. She let me review the documents made by George Welch with my brother, James Kotsones, where I elaborated the several shortcomings and potential problems concerning her dispersion of property upon her death, her being put into a nursing home against her will while she is in no need of one, and the probable collusion between George Welch and James Kotsones with how all these documents have been written.

(R. 1369 [Ellen's Jan. 5, 2012 Letter to Attorney Galbraith]).

37. The letter then restates Ellen's desire for her son Alexander to obtain Sophie's property for little or no money:

> I would like to explore some other options she may consider … I am thinking of the second alternative where SPK Real Estate be sold to APK Capital for a modest amount of money with the rest of the current market value be [sic] given as a gift. In the wording of the sale would be that all remains the same for SPK Real Estate until she is no longer able to manage and then APK Capital would be taking over managing the properties. APK Capital is a company that my son Alex started in the spring, 2011, to manage properties we own in Massachusetts. We can discuss this at further length but my feeling currently is that all the what-if's may be contained in the sale, thus eliminating an extensive amount of potential problems and give Soph a simple will. George Welch or any other lawyer is not to be notified about any of these transactions as per her wishes directly, repeated to me several times over this past weekend.

(R. 1369–70). This new letter, written one month after Ellen emailed her plan to Alexander, proposes the same exact plan, including precluding George Welch Sr.—

or any other lawyer—from further involvement. (*Compare id*., *with* R. 1337 [Ellen's Dec. 5, 2011 email to Alexander]).

38. In the final substantive paragraph of the January 5, 2012 letter, Ellen refers to herself seventeen different times and discusses her disdain for her brother James in great detail, beginning with "his wedding ceremony in 1978." (R. 1370 [Jan. 5, 2012 Letter]). The letter was obviously not about "Sophie's best interest."[9]

39. Attorney Galbraith revised the will the very next day on January 6, 2012. (R. 943 [Galbraith time records]). His time records show that he did not talk to Sophie until January 9th—three days after the will was revised in compliance with Ellen's instructions. (*Id*). Sophie may have said that was her will, but it was not her idea or plan. It was Ellen's.

40. That is a consistent pattern set forth throughout the record. Ellen would contact Attorney Galbraith, and the testamentary plan would be changed—each one benefitting her more than the last. (*See infra* at para. 97 [showing the plethora of changes Attorney Galbraith made to Sophie's documents after being contacted by Ellen, and without documentation of contact with Sophie]).

41. The Surrogate recognized how instrumental Ellen's intervention was: "Attorney Galbraith testified that the December 5, 2012 Will was prepared

[9] The Surrogate realized whose interests this letter was really about. This is the letter he referenced as frequently having statements such as with "I would like to explore", "I would like to see", "I was surprised to learn", "I am thinking of". (R. 18 [quoting R. 1369–70]).

according to Ellen's instructions." (R. 20; *see also* R. 179–81 [Attorney Galbraith's cross examination testimony admitting to making changes in accordance with Ellen's instructions and discussing an extraordinary amount of correspondence between his office and Ellen]).

42. Ellen's influence was powerful enough that, by December 5, 2012, Sophie adopted most of Ellen's plan, which included, in the irrevocable trust, a built-in control mechanism for Ellen.

43. But, as the Surrogate noted, "the undue influence did not end on December 5, 2012, when the Will was signed. The influence continued through the trust, real estate sale, and banking transactions." (R. 22).

44. There was still work to do to carry out Ellen's initial plan. The Surrogate found:

> "This December, 2011 'plan' was not fully carried out by the . . . Will of December 2012 . . . . But by the time the property is by the trust to Alex on January 29, 2015, the final result very closely resembles this plan. When Alex purchased the property, he put virtually no money into the property transaction. The purchase price was to be covered by a mortgage. Alex's closing costs were paid by Ellen out of an account. When Sophie died six months later, Alex stopped making any mortgage payments. It appears that the plan was for Alex to never have to pay off the mortgage. An email to Ellen from Alex on September 4, 2014 (before the sale) states 'My concern is the debt I owe the trust. Since the trust holds the mortgage on these buildings, what happens to that debt when Soph dies? Does Jim have claim to those mortgage payments? The mortgage payments finally resumed in December 2016, after James makes application for the business records.

(R. 18–19).

45. Sophie was 91 years old when the real estate transaction closed on January 29, 2015. After Sophie (and her attorney) had estimated her properties to be worth $1 million (R. 14), her "strong will" acquiesced: she "sold" them from the Trust for almost half a million dollars less than she had thought they were worth: $580,000. (R. 1780).

46. But Ellen ensured that Alexander got more than just great purchase terms. The Surrogate further found that, "Ellen was funneling money from Sophie's accounts to Alex so that he had money to use to do repairs, pay closing costs, and make mortgage payments." (R. 22).

47. When Ellen was not giving her son her mother's real property, she was helping herself to her mother's personal property.

> There is no question that as time went on Ellen took over almost all of Sophie's accounts. There were many checks that she wrote on Sophie's accounts to pay for bills that were not Sophie's obligation to pay. She also transferred funds from Sophie's accounts to her own account or an account maintained by herself and Alex. Most notable was the cashing of a CD that would have been payable on death to James. Though Sophie verbally authorized the cashing of the CD over the telephone [Sophie] didn't know that it was being deposited into Ellen's, not Sophie's account. It was cashed and deposited into an account that did not belong to Sophie. Since this CD had a value of over $162,000, this was a sizable transfer. Almost all of these transfers occurred well after December 5, 2012.

(R. 22).

48. The Surrogate was understandably "not convinced" that Ellen was acting in Sophie's best interests. (R. 22). He appropriately characterized Ellen's years-long spending spree as using "her mother's accounts as if they were her own" (R. 19), further noting Ellen was "paying her own bills and making payments to Alex from her mother's funds" (R. 21).

49. But Ellen's plan in all this was not just to act for her own benefit—it was also to hurt her brother, which she continued to do even after her mother died. The Surrogate explained:

> To show what extent Ellen tried to manipulate things to cut her brother out of receiving anything, she went to the bank almost immediately after her mother's death and transferred the remaining $1,520.51 that was the only account James would have received from his mother. It was not enough to have all the real property, the $162,000 CD, and all the other accounts; she transferred this money as well.

(R. 22).

50. Based upon these and other relevant factual determinations, the Surrogate properly concluded: (1) that Ellen and Alex were in a confidential/fiduciary relationship with Sophie at the time the disputed will and trust were executed and continuing through the subsequent transactions; (2) that they failed to meet their resulting burden of demonstrating that the transactions benefitting themselves were fair and free from influence; and (3) that even in the absence of a burden-shifting confidential/fiduciary relationship, James had satisfied his burden of establishing

that the wills, the trust and the subsequent transactions were the product of undue influence.

The Fourth Department Applied Incorrect Standards of Law with Respect to the Burden-shifting Confidential Relationship

1. The Law of Shifting the Burden

a. Two Elements Are Required to Show a Confidential Relationship

51. Where (1) a fiduciary or confidant (2) benefits from a transaction with her benefactor, then the doctrine of constructive fraud requires the defending party to "show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood." (*Aoki v Aoki*, 27 N.Y.3d 32, 39, [2016] [quoting *Cowee v Cornell*, 75 NY 91, 99–100 [1878]] [citing *Gordon v Bialystoker Ctr. & Bikur Cholim, Inc.*, 45 NY2d 692, 698–99 [1978]]). More particularly:

> [W]hen . . . the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.

(*Id*. [emphasis added]).

b. Though the Doctrine is Well Settled, Cases like the Instant Case Are Difficult to Analyze

52. The confidential relationship doctrine was "well settled" when the above-quote was first penned by this Court in 1878 in *Cowee v Cornell*. That *Cowee* test has been the standard for the confidential relationship test ever since, having since been quoted by this Court at least five times. (*Aoki v Aoki*, 27 NY3d 32, 39, [2016]; *Matter of Greiff*, 92 NY2d 341, 345 [1998]; *Gordon v Bialystoker Center*, 45 NY2d 692, 699–700 [1978]; *Greene v Roworth*, 113 NY 462, 470 [1889]; *Barnard v Gantz*, 140 NY 249, 256–57 [1893]).

53. But many determinations are often not easy to make: "This doctrine, as has been said, is well settled, but there is often great difficulty in applying it to particular cases." (*Cowee*, 75 NY at 101).

54. The dearth of analysis from this Court over the last century regarding cases like the instant case—one that falls into the "great difficulty" of analysis category—has only exacerbated this "great difficulty."

55. Of the two elements that must be shown to shift the burden of proof against the confidant in a confidential relationship, one of them—the benefit to the confidant—is easy to analyze: the confidant usually receives property or money under favorable terms. The other element—the relational element—is the element that can create "great difficulty."

56. A confidential relationship may be found where any of five qualifiers are present. Two of those qualifiers focus on the confidant, while the other three focus on the benefactor.

57. Regarding the confidant-focused qualifiers, a person has the potential for abuse either from "superior knowledge of the matter derived from a fiduciary relation or from an overmastering influence." (*Id*. at 99–100).

58. Regarding the benefactor-focused qualifiers, there are three separate tests that this Court uses to determine whether the potential for abuse exists: (1) "weakness" of the benefactor; (2) the benefactor's "dependence" upon the confidant; or (3) the benefactor's "trust justifiably reposed" in the confidant. (*Id*. at 100). The Court's use of the word "or" denotes that the presence of any single qualifier is sufficient to show a potential for abuse.

59. If a qualifier is present, suggesting a potential for abuse, this Court determines whether <u>either</u> the (a) the relationship itself <u>or</u> (b) the weight of the relationship together with evidence of the confidant's intervention is heavy enough to burden the confidant with a shifted burden.

60. The relationship itself is often enough to shift the burden (such relationships generally consist of some sort of fiduciary responsibility on the side of the confidant):

> The law presumes in the case of guardian and ward, trustee and *cestui que trust*, attorney and client, and perhaps physician and patient, from

> the relation of the parties itself that their situation is unequal and of the character I have defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings.

(Id.).

61. In the other relations of trust, confidence, or inequality, where the existence of the relationship itself is not enough to shift the burden, the nature of the relationship and the intervention must be evaluated together. In these more nuanced cases, "the trust and confidence, or the superiority on the one side and weakness on the other must be proved," (*id*. at 101 [emphasis added]), and, as explained below, the x factor in these cases is often evidence of the confidant's selfish intervention.

i. *Cowee* Foreshadowed the Rule for "Other Relations of Trust" Cases

62. While the *Cowee* opinion did not extend so far as to explain the exact test for proving a confidential relationship in those other relations of trust, it did offer a glimpse of the rule that the Court would soon establish. (*See id*. at 101–02 ["These circumstances may have well been of such a character, if not sufficient to shift the presumption, at least to authorize a setting aside of a contract without any decisive proof of fraud but upon the slightest proof that advantage was taken of the relation, or of the use of 'any arts or stratagems or any undue means or the least speck of imposition.'" [emphasis added] [quoting *Whelan v Whelan*, 3 Cow. 537, 538

[1824]]]). The Court was alluding to an additional requirement in such cases of some small level of evidence that the confidant selfishly intervened. *Id*. at 102.

ii. *In re Smith* Firmly Established that "Other Relations of Trust" Are Found When Confidants Intervene for Themselves

63. The test that the Court offered a glimpse of in 1878 (*Cowee*), requiring evidence of the confidant's selfish intervention (in "other relations of trust" cases), was firmly established by 1884:

> The proof is made in the first instance when *the relation and the personal intervention of the party claiming the benefit are shown*. The law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct, and in the case supposed it wisely interposes by adjusting the quality and measure of proof to the circumstances.

(*In re Smith*, 95 NY 516, 522 [1884] [emphasis added]). This Court has reaffirmed that principle multiple times. (*E.g*., *Allen v La Vaud*, 213 NY 322, 326 [1915]; *Barnard v Gantz*, 95 NY 249, 257 [1893]; *Greene v Roworth* 113 NY 462, 471 [1889]). Those cases require an examination of both the parties' relationship and the confidant's intervention to determine whether to shift the burden.

64. The rule has not changed. Both (a) the "relation" and (b) "the personal intervention of the party claiming the benefit" are factors this Court weighs to determine whether to shift the burden. Though recent cases in this Court have not analyzed these "other relations of trust" factors (*e.g.*, *Aoki*, 29 NY3d at 41 [where that question was irrelevant because the case lacked the necessary element of the

confidant benefitting from the transaction]; *Gordon v Bialystoker Ctr & Bikur Cholim*, 45 NY2d at 699–700 [where "other relations of trust" was not analyzed because the relationship itself, nursing home and nursing home patient, shifted the burden]), lower courts have reached the same (exact or general) principle from time to time in more recent cases (*e.g.*, *Sepulveda v Aviles*, 308 AD2d 1, 8 [1st Dept 2003] ["Appellate courts in this State have, time and time again, applied this burden-shifting mechanism to evaluate transactions which, at least on the surface, appear to involve the exploitation of elderly or mentally incapacitated persons by those intent on violating the trust reposed in them." [emphasis added]]; *Meaney v Meaney*, 213 AD 756, 759 [1st Dept 1925] ["The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit is shown" [internal quotations omitted]]; *In re Hearn's Will*, 158 Misc. 370, 376 [Sur Ct Kings County 1936] ["The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit is shown" [internal quotations omitted]]; *see also In re Neenan*, 35 AD3d 475, 476 [2d Dept 2006] [where the Second Department focused on the acts of the confidant and overturned the Surrogate, finding the great-nephew to be in a confidential relationship as a matter of law when he "acted as the decedent's accountant, . . . assisted her with her finances, . . . played in active role in selecting the decedent's

attorney, . . . and was directly involved in the preparation of the testamentary instrument offered for probate."]).

c. One's Daughterhood Is Not a Shield to a Confidential Relationship

65. This line of cases has no special exemption that shields a daughter's relation and personal intervention in her mother's transactions from scrutiny. This Court has already determined that a child can be a confidant with her mother, shifting the burden and requiring her to show that all was fair and free from undue influence:

> It will be assumed without consideration that this rule, as applied to the relation of parent and child, primarily contemplated the possibility of the exercise of undue influence by the parent over the child, rather than the reverse operation of the relationship. There is, however, no doubt that it may be applied where the parent has become the weaker personality.

(*Allen v La Vaud*, 213 NY 322, 327 [1915] [citations omitted]). Being a child or grandchild of a benefactor does not act as a shield to allow a confidant to act with impunity. (*E.g.*, *Blase v Blase*, 148 AD3d 1777 [4th Dept 2017] [where the court found a confidential relationship between father and son when two sons were beneficiaries of their father's account and one of them used a power of attorney to remove his brother from those accounts]; *Matter of Kurtz*, 144 AD2d [2d Dept 1988] [where a son was found to be in a confidential relationship with his mother after she sold him property for less than its full value while he was "looking after [his mother's] financial needs"]; *Hennessey v Ecker*, 170 AD2d 650, 651 [2d Dept 1991] [where the court found a confidential relationship to exist when a son

received from his mother, who was in her eighties and in a nursing home, property he had been managing for her and which he urged her to convey to him]).

2. The Fourth Department's Reversal of the Surrogate with Respect to the Confidential Relationship Was a Mistake of Substantive and Procedural Law

66. The Surrogate's analysis of both elements of the confidential relationship was proper.

67. The Surrogate found that the first element—the benefit to the confidant—occurred based upon the large sums of money and property received by Ellen and Alex. He also found that the relational element existed based upon the trust Sophie reposed in Ellen, together with evidence that Ellen manipulated that trust for her own personal gain. (R. 21).

68. The Fourth Department did not disagree regarding the first (benefit) element. (*Matter of Kotsones*, 185 AD3d 1473, 1474–75 [4th Dept 2020]).

69. It was the second element—the relational element—about which the Fourth Department erred. The Fourth Department erred both in substance, as to the applicable standard of a confidential relationship, and in procedure, in that it failed to give proper deference to the Surrogate's findings.

70. The Surrogate found that the relation together with the personal intervention of the party seeking the benefit created a confidential relationship based on: (1) Ellen's fiduciary responsibilities deriving from (a) her role as power of attorney; (b) assuring that she had "veto power over anything the trust did, including the

power to sell property"; and (c) the fact that she "took over all of the bookkeeping"; (2) the control she exercised over her mother's accounts by using them as her own, "paying her own bills and making payments to Alex from her mother's funds," which payments continued "even after the property was 'sold' to Alex," including how she "cashed the $162,000 CD that would have gone to her brother upon her mother's death and deposited the money, not into her mother's account, but in her own account." (R. 21). A recurring theme in the Surrogate's Decision is how any innocent motives that Ellen may have been able to claim were stained by the underhanded plan she clearly outlined to benefit herself and Alexander to the detriment of James. He concluded: "the evidence in this case clearly shows that Ellen nurtured a confidential relationship between herself and her mother. . . . It is clear that Sophie trusted Ellen, and Ellen used this trust to her own personal advantage." (R. 21).

71. But the Fourth Department overturned the Surrogate, mistaking the purpose of a confidential relationship analysis for the basic test itself; requiring incapacity, incoherence, and/or incompetence as a condition precedent to a confidential relationship; and comingling with its confidential relationship analysis a rule that is specific to undue influence generally, particularly when the case is devoid of direct evidence.

72. The Fourth Department articulated the basic test (the rule it used before adding in the *Walther* inference quote) for finding a confidential relationship as one requiring evidence that "demonstrates inequality or controlling influence," adding it "has been described as 'one that is "of such a character as to render it certain that [the parties] do not deal on terms of equality.'" (*Matter of Kotsones*, 185 AD3d at 1475 [quoting *Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125 [3d Dept 2014]]; *see Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013], *aff'd* 22 NY3d 1045 [2014]). Thus, the Fourth Department articulated (as the test) only what a confidential relationship is—not how it is found.

73. In doing so, it completely missed this Court's standards for what constitutes "an unequal or controlling nature."

74. A search for a demonstration of "inequality or controlling influence" is the purpose for applying the confidential relationship test; it is not the test itself. (*Doheny v Lacy*, 168 NY 213, 222 [1901] ["That rule, within the cases, requires as a basis for its application that a fiduciary relation exist between the parties, which will give to the one, in legal presumption, a controlling influence over the other."] [emphasis added]; *Cowee*, 75 NY at 100, 102 [explaining that when a confidential relationship exists from the relation itself, "the law presumes . . . that their situation is unequal and of the character I have defined" [100] and parenthetically equating a

"stronger and weaker party" with "a fiduciary *in hac re* and the party reposing confidence" [102]]).

75. Thus the terms "confidential relationship"; "stronger and weaker party"; or a position of "inequality or controlling influence", as used in the precedent are all synonymous terms which then shift the burden to require a confidant to show that the transaction was fair and free from undue influence. One is shown to be the "stronger party" or the "controlling influence[r]" or in a "confidential relationship" not by unnatural physical strength or physically controlling someone but by showing "either on the one side . . . superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed." (*See, e.g.*, *Aoki v Aoki*, 27 NY3d 32, 39, [2016] ["it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used"] [emphasis added; internal citations omitted]).

76. The Fourth Department did not articulate that as the rule or analyze whether there was either on the one side . . . superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed. Rather—despite acknowledging that "the record establishes that Ellen and Alexander held a position of trust with decedent, and that Ellen assisted decedent with her finances

and was named power of attorney" (*Matter of Kotsones*, 185 AD3d at 1475), and later acknowledging that "Ellen and Alexander wanted to benefit from decedent's estate, and that Ellen assisted decedent in executing the relevant estate plan and making the disputed transactions" (*id*. at 1476)—it ruled the Surrogate was incorrect as a matter of law. It explained: "despite Ellen's position of trust," Sophie articulated to others (such as her attorney and banker) what she wanted to do and had testamentary capacity. (*Id*. at 1475). The Fourth Department concluded based on those explanations that "petitioner failed to meet his initial burden of establishing that the relationship of Ellen and Alexander with decedent was of such an unequal or controlling nature as to give rise to an inference of undue influence." (*Id*.).

77. In doing so, the Fourth Department was guided by, and further developed, a line of jurisprudence metastasizing within the Third Department that is narrowing this Court's rule for analyzing confidential relationships. This line of jurisprudence essentially bars a Surrogate from considering the acts and intervention of the confidant unless the benefactor has no capacity. (*Compare id*. ["various nonparty witnesses acted pursuant to decedent's direction, not Ellen's or Alexander's, and decedent's testamentary capacity is not at issue on this appeal"], *with Bonczyk v Williams*, 119 AD3d at 1127 ["the relationship may not be unequal as a matter of law if, at the time of the challenged transactions, the physically weaker party

remained able to exercise free will"], [10] *and Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013] ["respondents were entitled to have the jury consider all the evidence regarding decedent's relationship with respondents and to determine as a factual matter whether decedent maintained the ability to exercise free will"] [emphasis added]).

78. But so limiting a Surrogate is contrary to this Court's precedent (as well as the Second Department's recent decision in *In re Neenan* (35 AD3d 475 [2d Dept 2006])) and strikes at the very heart of the difference between undue influence (including the confidential relationship subset of undue influence), and testamentary capacity cases. That difference was rightly recognized by the Surrogate:

> 'Mental competence and undue influence are distinct issues. Mental incapacity implies the lack of intelligent mental power; while undue influence implies within itself the existence of a mind of sufficient mental capacity to make a Will, if not hindered by the dominant or overriding influence of another in such a way as to make the instrument speak the will of the person exercising undue influence, and not that of the testator.'

[10] Although the Third Department articulated that standard, it did so while deferring to the Surrogate's discretion, emphasizing: "[i]mportantly, the existence of a confidential relationship is ordinarily a factual determination based upon 'evidence of other facts or circumstances showing inequality or controlling influence.'" (Id. at 1126 [emphasis added] [quoting *Matter of Nealon*, 104 AD3d, 1088, 1089 [3d Dept 2013]]). Before *Kotsones*, those Third Department holdings could reasonably have been interpreted as refusing to allow such a fact-intensive issue to be decided as a matter of law but requiring them to be left to a fact finder. They no longer can be so interpreted. A confidant can manipulate her benefactor so long as her benefactor appears to manage her own affairs.

(R. 15 [quoting *Weber v Burman*, 22 Misc 3d1104[A] 2008 NY Slip Op 52598[U], *9 [Sup Ct Nassau County 2008]]).

79. Compounding the inequity, the Fourth Department raised the bar for finding a confidential relationship even further by adding to the test a standard that this Court used in *Walther* while discussing circumstantial evidence: "'[f]urther, an inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference.'" (*Matter of Kotsones*, 185 AD3d at 1475 [quoting *Walther*, 6 NY2d at 54]). The Fourth Department's analysis clearly relied upon this rule, as it (1) accepted that Ellen and Alexander held positions of trust, were trying to benefit from her planning, and assisted in executing documents and in making the plans, yet (2) said there could be no confidential relationship because Sophie had capacity, had involvement with her business, and talked about that planning to others as if the plans were her own.

80. The problem is that the "not inconsistent with a contrary inference" standard has never been used by the Court or an Appellate Division in the confidential relationship test. That standard is a part of the general undue influence standard.

81. Moreover, even in the general undue influence context, that standard is designed for and applies to circumstantial cases devoid of direct evidence. In *Walther*, the Court found, "The record is devoid of any direct evidence that the

proponent interfered with the making of the will," and opined, "[a]n inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference." (*Matter of Walther*, 6 NY2d at 54 [emphasis added]). In contrast, the instant case is replete with direct evidence of Ellen's interference. (*E.g.*, R. 17–18 [the Surrogate's finding that Ellen declared at R. 1370 she "intervene[d]" to prevent the "tragic" possibility of James ending up with some or all of the property]).

82. *Walther* originally shielded a good actor from suffering an injustice due to circumstantial evidence. It should not serve as a sword to slay a mountain of direct evidence testifying against a bad actor.

83. Finally, as discussed in detail below (*see infra*, paras. 123–32), because the Fourth Department's conclusion that there was no confidential relationship was based in large part upon discredited testimony from her attorney and banker, such a conclusion would never have been reached had the Fourth Department properly deferred to the Surrogate on his findings of fact and credibility.

The Fourth Department Applied the Wrong Standard of Law on Undue Influence

84. Undue influence is present where the perpetrator had motive and opportunity and actually exercised undue influence. (*Matter of Fiurmara's Estate*, 47 NY2d 845, 846 [1979]).

85. Motive and opportunity were found by the Surrogate and uncontested on appeal. The cases generally revolve around whether it was actually exercised.

86. The exercise of undue influence is present where the factfinder finds the "exercise [of] a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity [that] could not be resisted, constrained the testator to do that which was against [his or] h[er] free will" (*Matter of Kumstar*, 66 NY2d 691, 693 [1985], *rearg denied* 67 NY2d 647 [1986] [internal quotation marks omitted]). The factfinder must recognize that such influence may be of "a silent resistless power" (*Matter of Walther*, 6 NY2d at 53 [citations omitted]), that subverts "the victim's will to the point where it becomes the willing tool to be manipulated <u>for the benefit of another</u>" (*Matter of Burke*, 82 AD2d 260, 269 [2d Dept 1981] [emphasis added], and "<u>internalizes within the mind of the testator the desire to do that which is not his intent but the intent and end of another</u>" (*Matter of Collins*, 124 AD2d 48, 53 [4th Dept 1987] [emphasis added] [citations omitted]).

87. In contrast to the "gross, obvious and palpable type" of undue influence wherein the victim's will is overpowered (*id*., [citations omitted]), this second strain is a more insidious type wherein the will of the influencer is substituted for (rather than overpowering) the victim's. These cases are more difficult to discern

and require an extensive factual analysis and factors-based approach. They can be found at least as early as *Rollwagen v Rollwagen*, 63 NY 504, 519 (1876):

> [U]ndue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person.

(*See also In re Anna's Estate*, 248 NY 421, 423–24 [1928]).

88. The Surrogate performed such an analysis, analyzing eight factors at length and making factual findings along the way that remain undisturbed by the Fourth Department's ruling on the law. (R. 16–20). All eight factors have been applied by the various departments of the Appellate Division in other cases to analyze whether undue influence occurred:

- 1. Age of the person being influenced: *E.g.*, *Matter of Taylor*, 241 A.D. 768, 768 [2d Dept 1934].
- 2. The physical condition of the person: *E.g.*, *In re Elmore's Will*, 42 AD2d 240, 241 [3d Dept 1973]; *Matter of Panek*, 237 AD2d 82, 85 [4th Dept 1997].
- 3. The mental condition of the person: *E.g.*, *In re Elmore's Will*, 42 AD2d 240, 241 [3d Dept 1973]; *Matter of Panek*, 237 AD2d 82, 85 [4th Dept 1997].

- 4. Any changes in the testamentary plan: *In re Elmore's Will*, 42 AD2d 240, 242 [3d Dept 1973].
- 5. The involvement of others in the testamentary plan: *E.g.*, *Matter of O'Brien*, 182 AD2d 1135, 1135 [4th Dept 1992]; *Matter of Collins*, 124 AD 2d 48, 54 [4th Dept 2004].
- 6. The managing of financial and other affairs: *E.g.*, *Matter of Panek*, 237 AD2d 82, 85 [4th Dept 1997].
- 7. A change in attorneys or other advisors: *E.g.*, *In re Elmore's Will*, 42 AD2d 240, 241 [3d Dept 1973].
- 8. The closeness of the family members: *E.g.*, *Matter of Panek*, 237 AD2d 82, 85 [4th Dept 1997]; *Matter of O'Brien*, 182 AD2d 1135, 1135 [4th Dept 1992].

89. The Surrogate made the following findings regarding those factors:

- 1. Age, and 2. Physical weakness:

90. Sophie was "advanced in age." (R. 16). She "experienced one bout of hospitalization and extended rehabilitation in a nursing care facility before she made her last Will and then had a second such period before she sold the Market Street properties," "no longer went to the YMCA for exercise," "stopped driving," and "slowed down considerably." (*Id*.).

- 3. Mental Condition:

91. “[Sophie’s] son, James, had been a trusted resource for years, but that relationship ended around the end of 2011, about the time Ellen re-entered the picture and about the time Sophie wrote that what she was going through was worse than Hitler brainwashing.” (R. 16–17). Sophie wrote about her struggle in that instance, but she was also clearly mistaken about several life events recounted in a video that she struggled through in Attorney Galbraith’s office—phantom memories counted to James’s detriment that were in fact proved never to have occurred at trial. (R. 17).

92. She was susceptible to manipulation. Her “will could be turned or manipulated against another,” and “Sophie’s mind was weak enough to be a factor to be considered in evaluating a claim of undue influence.” (*Id*.). For example, Sophie’s dedication to her Market Street properties could be manipulatively weaponized against her and James. (*Id*.).

93. He concluded that even though Sophie was strong willed, Ellen and Alex could subvert Sophie’s instinct to control. (*Id*.). Ellen was likewise confident in their ability to do so; she wrote to Alex: “[Sophie] likes to have control yet I know you can phrase it in a way so that you won’t be burned.” (R. 1337).

- 4. Changes in the testamentary plan:

94. The Welch Will and codicils executed in 2009 and 2010 were very favorable to James. (R. 1326–27, 1331–32, 1969–70). Further, the Surrogate found that even the first (pre-Ellen) Galbraith will draft that was approved by Sophie on December 2011 was "relatively fair and equitable." (R. 17).

95. The version signed a few weeks after Ellen's self-declared "intervention," however, "takes a dramatic change in favor of Ellen and her side of the family." (*Id*.). And things got progressively worse for James.

> [Ellen's] December, 2011 "plan" was not fully carried out by the Will of January, 2012 or even the Will of December, 2012 which is seeking to be probated. But by the time the property is "sold" by the Trust to Alex on January 29, 2015, the final result very closely resembles this plan.

(R. 18).

- 5. The involvement of others in the testamentary plan:

96. The Surrogate found "Ellen sent 3 letters and/or e-mails to Attorney Gailbraith in the two weeks preceding the signing of the January 11, 2012," one of which expressed her gratitude at being "able to intervene before something tragic happens," that tragedy being the potential of "James ending up with some or all of the property." (R. 17–18). He also noted Ellen's many references to her own concerns, which indicated "Ellen, and not Sophie, had changes in store for the Will" (R. 18), and, further, that Attorney Galbraith "testified that the December 5,

2012 Will was prepared according to Ellen's instructions" (R. 20; *see also* R. 177, 179 [Attorney Galbraith's testimony indicating the January 11, 2012 and the December 5, 2012 wills and trust were drafted according to Ellen's written instructions]).

97. After the December 1, 2011 letter from Sophie to Attorney Galbraith confirming her "relatively fair and equitable" will plan (R. 17), there is evidence that every single estate planning change was directed by Ellen, not Sophie. Ellen's direct steps in the planning are documented on the following dates:

- January 1–5, 2012: R. 1351–67 (Ellen writing, e-mailing, and calling Attorney Galbraith with changes to Sophie's plans before Sophie's January, 2012 will).
- February 10, 2012: Ellen called Attorney Galbraith's office; the record shows no communication between Sophie and Attorney Galbraith before the March 14, 2012 will was signed. (R. 943–44).
- November 15, 2012: R. 1401 (Attorney Galbraith acknowledging Ellen's call with instructions for Sophie's trust.).
- November 30, 2012: R.1409, 1410, 1415 (Ellen and Alexander emailing each other and Attorney Galbraith's office regarding trust edits).
- December 2, 2012: R. 1312, 1414 (Ellen emails various changes to testamentary documents).

- December 5, 2012: Ellen takes Sophie to Attorney Galbraith's office to execute the will and irrevocable trust. (R. 207, 783, 852).

98. By the time the real estate transaction took place just months before Sophie's death, Ellen's involvement was not optional to Sophie. Ellen had "veto power over anything the trust did, including the power to sell property." (R. 21).

- 6. The managing of financial and other affairs:

99. The Surrogate found that Ellen and Alex sought ways to take control of Sophie's affairs. Ellen's December 5, 2011 email to Alex

> instructs Alex to talk to Sophie and find out from Sophie who gives her rides, who does her hair, etc. and make a list of those people who are most important to her. Then it goes on to instruct him to make Sophie comfortable as to what he knows about her so that she will disclose where she hides things around the house.

(R. 18).

100. He found they were successful.

101. "Alex was making the decisions on what needed to be done on the buildings, well before he was the owner of the buildings" (R. 15), and the handyman confirmed Sophie was phasing out (R. 19).

102. "Ellen gradually took over almost every other area of Sophie's affairs" (besides the property management that Alex handled). (R. 19). Specifically, he found "Ellen took over the bookkeeping" (R. 16), and "Ellen took over most of the financial and medical decisions concerning Sophie" (R. 14).

Ellen's management progressed to the point where she "used her mother's accounts as if they were her own, paying her own bills." (R. 19).

- 7. A change in attorneys or other advisors:

103. The Surrogate found a change of attorneys and noted Ellen's role in the switch. Attorney George Welch "had been Sophie's attorney for over 30 years." (R. 20). During that time, he "had prepared many leases and several Wills for her." (R. 17). Yet, "In one correspondence Ellen states to Attorney Galbraith . . . 'George Welch is not to be notified.'"' (R. 17). Ellen's command was in contrast to Sophie's December 28, 2011 letter in which she hoped to go back to the Welches. (R. 927–28 ["I thought I'd go talk to Junior," ["Junior" being George Welch, Jr., who had likewise been a trusted friend and counselor of Sophie's. [R. 452–53]]]).

104. The Surrogate similarly found that Ellen took over for Sophie's long-time bookkeeper after the banker convinced Sophie to trust Ellen. (R. 20).

- 8. The closeness of the family members:

105. After a years-long hiatus, Ellen used her relationship to drive a wedge between Sophie and James' good relationship.

106. "Ellen had been estranged from her mother for several years prior to 2011. However, Ellen re-established a relationship with her mother starting in the spring of 2011," and "By December of 2011 Ellen had resumed periodic visits with her mother." (R. 19–20).

107. Conversely "[w]hile Ellen was estranged from her mother prior to 2011, James enjoyed a close relationship with [her]." (R. 20). But as the Surrogate previously noted, James' relationship with Sophie, "ended around the end of 2011, about the time Ellen re-entered the picture." (R. 16).

108. The timing was important. "The more Ellen and Alex become close to Sophie the more distant becomes the relationship between Sophie and her son, James" (R. 20); "Ellen and James clearly do not like each other" (R. 20).

109. In light of the his fact-intensive findings on these factors, the Surrogate held that "Sophie's Will and Trust and real estate sale were not the product of her own free will, but were the careful planning and manipulation of her mind by her daughter Ellen." (R. 20).

110. The Surrogate's thorough, factors-based analysis was proper.

111. Yet the Fourth Department gave no serious consideration to those factors. Rather, it casually dismissed the Surrogate's conclusions by recharacterizing pages of findings and analysis in a light most favorable to Ellen and Alexander. On the law, it did so by neglecting to employ the factors-based test. It then (1) repurposed Ellen's and Alexander's motives and actions; and (2) recycled discarded evidence regarding Sophie's vigor for (and personal effect on) her business and estate planning: failing to defer to the Surrogate's factual findings in both instances.

112. The Fourth Department repurposed Ellen's and Alexander's motives and actions. It uncritically summarized Ellen and Alexander's motives as "wanting to benefit from [Sophie's] estate " and their actions as "assist[ing]" Sophie with accomplishing the transactions: as if the plan was Sophie's and they obligingly offered their assistance after she requested it!

113. The Surrogate, however (in his "Involvement of Others in Testamentary Plan factor), specifically found that "It was clear that Ellen, and not Sophie, had changes in store for the Will." (R. 18). He found that Ellen's "wanting to benefit" was not a passive hope to benefit as intimated by the Fourth Department; rather (in his "Change in Testamentary Plan" factor), he found that Ellen specifically intervened in order to ensure that James did not inherit property. (R. 17–18). His conclusion was based upon plenty of evidence.

114. The Fourth Department also recycled Ellen's old arguments about who it was that was doing the planning, undeterred by the fact that the Surrogate made contrary findings.

115. The Fourth Department wrote that Sophie "worked with her attorney directly in order to revise her estate plan"; that the "decedent discussed with her attorney her personal reasons for altering her prior estate plan to the exclusion of petitioner"; and that Attorney Galbraith testified that "he never prepared a

document that the decedent did not personally authorize." *Matter of Kotsones*, 185 AD3d at 1476.

116. But the Surrogate explained that "Attorney Gailbraith testified that the December 5, 2012 Will was prepared according to Ellen's instructions." (R. 20). He also found that "Ellen sent 3 letters and/or e-mails to Attorney Gailbraith in the two weeks preceding the signing of the January 11, 2012 Will," and cited "numerous documents that showed not only her corresponding with Attorney Gailbraith, but her clearly interjecting her own thoughts and questions into the discussion." (R. 20).

117. Moreover, even if she had "discussed" her plan with her attorney and/or "worked with her attorney directly in order to revise her estate plan," those actions are irrelevant to whether undue influence occurred if her mind was already influenced by Ellen when she took those actions.

118. That is exactly the point of undue influence. The result of one succumbing to another's silent power, manipulation, and coaxing, is of course the victim stating the influencer's will as her own. Even if Sophie spoke it, that does not mean she wanted it, particularly apart from Ellen's undue influence. What Sophie said to her attorney is not dispositive to that inquiry. The court's reliance on any such statements to her attorney without explaining how they overcome the

Surrogate's well-supported finding that Sophie's statements were the result of Ellen's illicit influence—not Sophie's free will—shows the court missed the mark.

119. The Fourth Department's contrasts with (1) relevant legal and analytical standards and (2) the Surrogate's findings did not stop there.

120. The Fourth Department improperly cited "decedent's capacity" as a factor in analyzing whether she was unduly influenced. As explained by the Surrogate (see *supra*, para. 78), undue influence and capacity are separate and distinct issues.

121. As to additional conflicts with the Surrogate, the Fourth Department's statement regarding Sophie's "active management of her own affairs during the relevant timeframe, albeit with the assistance of Ellen" may not withstand its own logic and is certainly at odds with both the record and the Surrogate's findings. For example, "Sophie's handyman, Joseph Elliot, testified Sophie was less involved in her real estate the last couple years of her life and after 2013 Ellen was around more than ½ of the time." (R. 19). "Alex was calling the shots on what needed to be done on the buildings, well before he was the owner of the buildings." (R. 21). Ellen was helping as well. [11] Eventually, "Ellen gradually took over almost every other area of Sophie's affairs." (R. 19). Sophie was not actively managing, and

[11] Joseph Elliot explained regarding real estate issues that as Sophie faded, Ellen "became the primary contact. She would more or less let me know what needed to be done." Elliot also explained that Ellen was living with Sophie at the time. (R. 258).

Ellen was not simply helping. “It is clear that Sophie trusted Ellen, and Ellen used this trust to her own personal advantage.” (*Id*.).

122. Accordingly, the Fourth Department erred in overturning the Surrogate’s factor’s-based undue influence decision.

The Fourth Department Improperly Failed to Defer to the Surrogate’s Factual Findings and Credibility Determinations

123. Furthermore, in addition to applying the wrong standards of law, the Fourth Department committed additional error in its handling of the Surrogate’s factual findings. Instead of deferring to the Surrogate’s findings of fact, the Fourth Department functionally substituted its own findings—while purporting to make its ruling only on the law. This was especially egregious because the Fourth Department reached its differing factual findings by relying on witnesses the Surrogate expressly or implicitly found to be biased and unreliable. Some of those instances are already referenced above, but the most egregious issues relate to the two primary witnesses cited by the Fourth Department for the idea that Sophie was acting of her own volition: Attorney Galbraith and the banker, Jean Wise.

124. The Fourth Department said Sophie “directed her personal attorney and the branch manager at her bank to act according to her own desires based on her own personal, stated reasons.” (*Matter of Kotsones*, 185 AD3d at 1475). However, as explained below, the Surrogate implicitly discounted their testimony,

while explicitly finding that Sophie's stated "desires" were not actually her own: Ellen had manipulated Sophie's mind. (R. 20).

125. But the Surrogate, in addition to finding that Ellen's testimony was "not believable" (*id*.), made implicit credibility determinations against the attorney and banker. He had good reason to do so: their testimony contradicted the documentary evidence and testimony of other witnesses. The Surrogate's well-supported factual findings plainly show that he believed the documents and non-party witnesses over the drafting attorney and banker.

126. Attorney Galbraith's testimony was biased and unreliable in the way he (1) asserted a chronologically nonsensical narrative to explain Sophie's supposed disenchantment with James, and (2) persisted in maintaining several points of mistaken pro-Ellen testimony until confronted with contradictory evidence.

127. Attorney Galbraith began his testimony by explaining Sophie changed her will because she was upset with her son James for putting her in the nursing home in 2011, which nursing home incident soured her relationship with her son and led to her revoking his power of attorney. (R. 68:16–70:8; 72:1–13). On cross examination he reiterated the whole story. (R. 136:6–14). The Fourth Department cited the Power of Attorney Revocation. (*Matter of Kotsones*, 185 AD3d at 1476).

128. But Attorney Galbraith's recollection was almost completely inaccurate. Sophie was entered into the nursing home in 2009, not 2011. (R. 403–04; 450:6–7; 451:13–18). Shortly after Sophie got out she went to her usual attorney and actually changed her will to remove Ellen and give James a larger portion of her estate. (*Compare* R. 1016–22, *with* R. 1326–27). She did, years later, revoke James's power of attorney, but then put him back on in December 2011. (R. 802–05). That last power of attorney was not revoked until after Ellen influenced Sophie to execute the January 2012 will plan.

129. Attorney Galbraith showed similar bias and inaccuracy in other important events. He repeatedly insisted that the June, 2013, video was taken on the day Sophie signed her will (it was actually seven months after the will). (R. 172:13–21; 174:11–22; 1391). He also testified broadly that he "never prepared a document or had Ms. Kotsones sign a document that she did not authorize" (R. 208:1–2). However, his testimony on specific documents and the paper trail in his office show otherwise. For instance, his timesheets show he made revisions to the January 2012 will draft after receiving Ellen's written instructions and before speaking with Sophie (R. 176–77; 943), and he prepared an Assumed Name Certificate, "At your daughter Ellen's request" (R. 152:11–17; 1556).

130. The Surrogate watched Attorney Galbraith determinedly make excuse after excuse to defend Ellen's version of the facts, only to sheepishly admit he was

mistaken when confronted with documentary evidence. The Fourth Department did not. Attorney Galbraith's pattern of errors and bias, which the Surrogate witnessed firsthand, show why the Surrogate did not find his testimony on Sophie's mindset and private discussions to be credible.

131. The Surrogate similarly chose not to believe much of the banker, Jean Wise Wicks's, testimony. For instance, the court characterizes Ellen's cashing of Sophie's CD as "Ellen cashed the $162,000 + CD that would have gone to her brother upon her mother's death." (R. 19). This characterization indicates that the Surrogate did not find the narrative advanced by the banker—that the transaction was really conducted by Sophie—to be credible. He watched as she failed to keep her story straight. (*Compare* R. 285–86 [testifying Ellen followed Sophie's instructions to cash James's CD and put the money in Sohpie's account for property improvements], *with* R. 309 [testifying "I closed out [the] CD and put it into a savings in Ellen's name" after being confronted with bank records of the transaction]).

132. The Surrogate also had other good reasons to discount the banker's testimony. She testified she was a friend of Ellen's (R. 318–19; *see also* R. 740:9–19 [where Ellen characterized their friendship as "meaningful"]); she hoped the outcome of the case disfavored James (R. 323:4–11 [expressing loyalty to Sophie's

stated wish to disinherit James]); and discussed the case with both Ellen and Alexander (R. 739:3–4; 645:9–18).

133. Thus, while the Fourth Department apparently found the banker and the drafting attorney's testimony to be credible and case-determinative (*Matter of Kotsones*, 185 AD3d at 1475), the Surrogate had good reason to find such testimony neither credible nor persuasive. The Fourth Department should have yielded to his factual findings and credibility determinations. He was the one who listened to every single word of the trial, watched their body language, and watched them change their testimony.

134. Properly analyzed, the Record supports the Surrogate's conclusion. These findings of fact cannot be overturned absent a finding that they are contrary to the weight of the credible evidence viewed in the light most favorable to upholding the Surrogate's decision. The Fourth Department did not even propose to undertake such a finding. Therefore, the Fourth Department's overruling of the Surrogate's undue influence decision should be overruled.

Conclusion

135. As our seniors age and endure the "greatest transfer of wealth in history," the issues presented in this case are sure to be repeated. To ensure that such transfers occur according to the desires of the transferors, rather than the underhanded manipulations of the transferees, this Court must rehabilitate its old

guideposts for finding confidential relationships and undue influence. While those guideposts, as driven into our collective jurisprudence by the holdings of *Cowee*, *Smith*, and *Rollwagen*, still stand, the direction they give has been obscured by a hundred years of cases being tacked on. Accordingly, this Court must act to protect those like Sophie Kotsones, who in her eighth and ninth decades, was manipulated out of her estate by her own daughter.

136. No prior request for the relief sought herein has been filed with this Honorable Court.

WHEREFORE, James respectfully requests that this Court grant leave to appeal from the Order of the Appellate Division, Fourth Department dated July 17, 2020 and such other and further relief as is just and proper.

Dated: Bath, New York
August 27, 2020

Aaron I. Mullen

COURT OF APPEALS
OF THE STATE OF NEW YORK

In the Matter of the Probate Proceeding of the Estate of

SOPHIE PETER KOTSONES,
Deceased.

JAMES KOTSONES,
Petitioner-Respondent-Movant,

-against-

ELLEN KREOPOLIDES
(a/k/a ELLEN MARIA KREOPOLIDES),
Individually and as Trustee of the
SOPHIE PETER KOTSONES IRREVOCABLE TRUST,
ALEXANDER KREOPOLIDES (a/k/a ALEX KREOPOLIDES),
and 42-52 WEST MARKET STREET LLC,
Respondents-Appellants-Respondents.

Fourth Department Docket No.
CA 19-01048

Surrogate File No. 45107/15

Surrogate File No. 45107/15/E

CERTIFICATION OF NON-FRIVOLITY

SIRS: Pursuant to 22 NYCRR 130-1.1a, the undersigned, an attorney admitted to practice law in the courts of the State of New York, certifies that, upon information and belief, and after reasonable inquiry, the contentions contained in the annexed Affirmation are not frivolous.

Dated: Bath, New York
August 27, 2020

MULLEN ASSOCIATES PLLC
Attorneys for Petitioner-Respondent-Movant, James Kotsones
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In the Matter of the Probate Proceeding of the
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SOPHIE PETER KOTSONES,
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JAMES KOTSONES,
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Fourth Department Docket No. CA 19-01048

Surrogate File No. 45107/15

Surrogate File No. 45107/15/E

CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing Affirmation was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count. The total number of words in this Affirmation, inclusive of point headings and footnotes and exclusive of pages containing the table of contents,

table of citations, proof of service, certificate of compliance, exhibits or any authorized addendum, etc., is 13,985 words.

Dated: Bath, New York
August 27, 2020

MULLEN ASSOCIATES PLLC
Attorneys for Petitioner-Respondent-Movant, James Kotsones

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EXHIBIT A

DECISION AND ORDER OF THE HONORABLE PATRICK F. MCALLISTER, DATED AND FILED MARCH 18, 2019, APPEALED FROM [8 - 23]

STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF STEUBEN

File # 2015-45107

In the Matter of the Probate Proceeding of the Estate of

SOPHIE PETER KOTSONES,

Deceased.

JAMES KOTSONES,

Petitioner,

-v-

ELLEN KREOPOLIDES (aka Ellen Maria Kreopolides), Individually and as Trustee of the SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES (aka Alex Kreopolides), and 42-53 WEST MARKET STREET LLC,

Respondents.

DECISION and ORDER

FILED
MAR 18 2019
SURROGATE'S COURT
STEUBEN COUNTY

PRESENT: Hon. Patrick F. McAllister
Surrogate Court Judge

The Proponent/Executor, Ellen Maria Kreopolides and the Alternate Executor, Alex Kreopolies move the court to admit the Last Will and Testament of Sophie Peter Kotsones signed December 5, 2012 to probate. The Objectant/Contestant, James Kotsones, objected to the admission of the Will to probate and brought a separate action to invalidate the Trust and the real estate transaction, all on the grounds of fraud and undue influence. The Executrix, Ellen Kreopolides, is represented by Anthony Elia, III, Esq.; and Alexander Kreopolides, is represented by Gabriel Rossettie, Esq. The Objectant/Contestant, James Kotsones is represented by Aaron Mullen Esq. and Elizabeth Oklevitch, Esq.

The court has received and reviewed the following 79 exhibits by the Proponent, Ellen Kreopolides and/or Alex Kreopolides:

Last Will and Testament dated December 5, 2012,
Revocation of Power of Attorney sworn to November 14, 2011,

Letter from Sophie to Dirk dated November 14, 2011,
Note from Sophie to Dirk dated November 30, 2011,
Letter from Dirk to Sophie dated November 28, 2011,
Letter from Sophie to Dirk dated December 1, 2011,
Letter from Sophie to Dirk dated December 6th,
Letter from Dirk to Sophie dated December 9, 2018 - POA
Letter from Sophie to Dirk dated December 14, 2011 - Will changes,
Letter from Ellen Kreopolides to Dirk Galbraith dated January 1, 2012 with Will,
Letter from Ellen to Dirk dated January 1, 2012 with POA,
Letter from Ellen to Dirk dated January 2, 2012,
POA dated January 11, 2012,
POA dated December 19, 2011,
Last Will and Testament dated January 11, 2012,
Memo from Dirk to AKH dated February 13, 2012,
Trust Agreement dated December 5, 2012,
Letter from Sophie to Jim Kotsones dated June 12, 2013
Note from Sophie to Dirk dated July 22, 2014,
Note from Sophie to Dirk dated September 11, 2014,
Contract for Sale and Purchase of Real Property,
Real Estate Closing documents,
Death Certificate,
Note from Sophie (undated),
Letter from Sophie to Alex dated January 7, 2014,
Birthday Card to Alex from Sophie,
Letter from Sophie to Alex dated February 16, 2012,
Note from Sophie and Ellen dated December 5, 2012,
Letter from Sophie to Ellen (undated),
Letter from Sophie to Ellen (undated),
Letter from Sophie to Ellen (undated),
Notes from Sophie (undated),
Letter from Sophie dated December 28, 2011,
Letter from Sophie to Ellen dated June 15, 2012,
Letter from Sophie to Ellen dated June 20, 2012,
Letter from Sophie to Alex dated August 7, 2012,
Letter from Sophie to Alex dated August 9, 2012,
Letter from Sophie to Dirk dated December 1, 2012,
Bill from Dirk to Sophie dated October 31, 2016,
Letter from Dirk to Jim dated December 2, 2011,
Last Will and Testament dated March 14, 2012,
Mailing Envelope to Ellen dated December 31, 2013,
Letter from Denise to Sophie dated December 24th,
Letter from Jim to Sophie dated November 9th,
Letter from Jim to Sophie dated December 7, 2011,

Note from Sophie to Ellen with letter from Jim attached,
HIPPA for Sophie,
Mother's Day card from Jim to Sophie,
Last Will and Testament dated January 31, 2008,
Last Will and Testament dated September 18, 2008,
Photographs (7),
Bill from George Welch dated December 30, 2009,
Repair bills by Joe Elliott,
Bill for fish dinners and check dated April 7, 2014,
Bill from Black's Auto Service dated January 18, 2014,
Bill from Black's Auto Service dated July 1, 2014,
Bill from Corning Natural Gas and check dated January 13, 2014,
Ledgers for SPK Real Estate (2011),
Ledgers for SPK Real Estate (2012),
Ledgers for SPK Real Estate (2013),
Bank accounts Ellen and Alex,
Withdrawal and deposit July 19, 2011,
Bank accounts and CD for Sophie,
Statement for accounts closed 1/10/2011 - 11/14/2011,
Certificate of Deposit August 22, 2013,
Transcript of April 16, 2016 proceeding,
Photograph of Sophie,
Affidavit of Timothy Leach sworn to August 31, 2016, and
Videotape of Sophie Kotsones]

The court has received and reviewed the following A-1 through H - 5 exhibits of the Contestant, James Kotsones:

E.B.T. of Ellen Kreopolides taken May 11, 2018,
Bank records for SPK Real Estate (7/31/13 - 9/30/2015),
Cancelled checks for SPK Real Estate,
Estate Planning Costs - February 29, 2012,
Power of Attorney for Sophie Kotsones dated January 11, 2012,
Express Mail postal receipt,
Reimbursement request and sales receipts,
Cancelled checks Sophie Kotsones,
Bank statements account XXXXXX2716,
Note from Ellen to Dirk Galbraith and letter from Dirk dated August 18, 2014,
E-mail from Ellen to Dirk dated September 4, 2014,
Last Will and Testament of Sophie Kotsones dated July 27, 2009,
E-mail form Ellen to Alex dated December 5, 2011,
Notes from Sophie Kotsones for Will and Trust,
2011 planning book,

Letter from Dirk Galbraith dated December 9, 2011 about P.O. A,
Revision for Will from Ellen to Dirk dated January 1, 2012
Letter from Ellen to Dirk dated January 1, 2012 - P.O.A. & health care proxy,
Letter from Ellen to Dirk dated January 2, 2012,
Note from Ellen to Dirk dated January 2, 2012,
Phone message from Ellen to Dirk dated January 3, 2012,
E-mail from Ellen to Dirk dated January 5, 2012,
Letter from Ellen to Dirk (undated),
E-mail from Alex to Ellen dated February 6, 2012,
Letter from Dirk to AKH dated February 13, 2012,
E-mail from Ellen to Alex dated February 14, 2012,
E-mail from Ellen to Alex dated March 20, 2012,
E-mail from Ellen to Alex dated August 27, 2012,
Letter from Dirk to AKH dated October 4, 2012,
Letter from Dirk dated November 15, 2012,
E-mails Alex to Ellen dated November 25, 2012,
E-mail Ellen to Alex dated November 29, 2012 - Will & Trust,
E-mails from Jenelle Callaghan to Ellen dated December 2, 2012 - Will & Trust,
E-mail from Ellen to Alex dated December 4, 2012,
E-mail from Ellen to Alex dated December 8, 2012,
E-mail from Ellen to Alex dated January 4, 2013,
Letter David Sprague to Dirk dated January 29, 2013 - gift tax return,
E-mails from Alex dated February 8 & 18, 2013,
E-mails from David Sprague to Ellen dated March 21, 2013,
E-mails from Ellen to David Sprague dated March 20 & 21, 2013,
Lease Extension and Modification Amendment and Lease agreements,
E-mail from Ellen to Alex dated April 18, 2013 - leases,
E-mail from Dirk to Ellen dated June 6, 2013 - leases,
Telephone messages from Ellen and Nancy Battersby to Dirk,
Notice of prorated taxes to be paid by tenants October 2013,
E-mails from Seth Hiland to Dirk dated October 28, 2013,
E-mail from Ellen to Alex dated February 11, 2014 - leases & repairs,
Tax return 2013 Kotsones Irrevocable Trust,
Tax return 2013 Sophia Kotsones,
E-mails from Ellen to David Sprague dated March 23 & 24, 2014 - tax return,
Letter from Dirk dated March 26, 2014 - assumed name certificate,
Letter from Dirk dated April 8, 2014 - business certificate,
Letter from AKH to Dirk dated August 6, 2014,
E-mail Gabriel Rossettie to Alex dated August 8, 2014
Notes dated August 17 - business certificate,
E-mail from Ellen to Alex dated September 21, 2014 - tenants & projects,
E-mail from Ellen to Alex dated December 2, 2014 - utility costs per unit,
E-mail from Angela (law office) to Ellen dated Dec. 23, 2014- contract for sale,

E-mail from Ellen to Angela dated December 24, 2014,
Approval by Ellen sworn to December 24, 2014,
E-mail law office to Ellen dated January 28, 2015 - amortization table,
E-mail Gabriel Rossettie to Alex dated January 29, 2015 - closing statement,
E-mail from George Welch to Ellen dated February 11, 2015 - law files,
E-mail from Ellen to Laura Nemecek dated February 25, 2015 - taxes,
Receipt for tax return signed by Ellen March 18, 2015,
E-mail from Ellen to Alex dated April 13, 2015,
Memorandum of Lease Agreement and e-mails - cellular tower,
Affidavit of Service by Margo Cecce sworn to November 14, 2016 - subpoena,
Release of Part of Mortgage Premises dated September 29, 2017,
Telephone message from Ellen to Dirk dated March 25th,
Suggestions from Ellen to Alex (undated),
Alex's story for chia seeds and Greek yogurt,
List of tenants,
Estimate value of properties and savings accounts,
Photographs,
CD cashed November 14, 2014,
Deposit CD into Ellen's account on November 14, 2014,
Cancelled checks,
Deposits Chemung Canal account XXXXXX7180,
Payments from Ellen to 42-52 West Market St. LLC,
Deed to 42-52 W. Market St. LLC and closing documents dated January 29, 2015,
Operating Agreement for Ellen, Alex and Michael Kreopolides,
Cancelled checks SPK Real Estate,
Cancelled checks Sophie Kotsones Household Account,
DDA- Debit July 25, 2012,
Cancelled checks household account signed by POA Ellen,
Cancelled checks SPK Real Estate signed by POA Ellen
CD cashed August 22, 2013,
Bank statement trust account,
EBT of Alex Kreopolides taken May 11, 2018,
Cancelled checks from Estate of Sophie Kotsones,
Cancelled checks from SPK Real Estate,
Cancelled check of Ellen Kreopolides dated February 15, 2015,
Bank account for Sophie, Ellen and Alex,
Codicil dated October 7, 2009,
Cancelled checks for Sophie Kotsones,
Bank Account information,
Cancelled check from 42-52 W. Market St. LLC dated December 1, 2016,
Jeffrey James qualification and report,
Appraisal Report from GAR, and
Account statement for SPK Real Estate]

BACKGROUND:

Sophie Kotsones had two children, James Kotsones and Ellen Kreopolides. James and Ellen have not gotten along for many years. Ellen wrote the following about their relationship "My brother has not nicely communicated with me since his wedding ceremony in 1978." Ex. L-1. That is over 40 years ago. The court observed the parties throughout the various motions and four days of trial and finds that the hard feelings and lack of communication between the two siblings is mutual. It is no wonder that their mother wrote on December 28, 2011, "I think I'm walking in a sea of mud. This is worse than Hitler brain washing." The court, although lacking an emotional attachment to either party, can certainly agree that the parties ongoing hostility is like walking in a sea of mud.

The court has reviewed six Wills, a codicil and two trusts prepared by Sophie between January, 2008 and December, 2012. The court is not at liberty to pick which one would be most fair and equitable. The court will focus on the last Will signed by Sophie on December 5, 2012, the Will being offered for probate.

PROVING THE WILL AND TRUST:

The Proponent under Surrogate's Court Procedure Act § 1408 needs to demonstrate that Sophie Kotsones' Will was duly executed and that she had the capacity on December 5, 2012, to make a Will. The Proponent must show that the Decedent understood the nature and consequences of making a Will, knew the nature and extent of her property that would be disposed of, and knew who would be the natural objects of her bounty. Matter of Safer's Will, 29 AD2d 725 (Second Dept. 1963).

After the SCPA §1404 examination of the attesting witnesses, Hon. Marianne Furfure ruled that Sophie Kotsones had the testamentary capacity to make the Will. The Will was prepared by Attorney Dirk Galbraith. Therefore, the Proponent is entitled to rely on the statutory presumption that the Will was duly executed. There was no evidence presented to the contrary, therefore the court finds that the Proponent has met her initial burden of proof. The burden now shifts to the Contestant to demonstrate fraud and/or undue influence.

The capacity to sign a trust is higher than that for making a Will. Matter of Lewis, 59 Misc3d 1271(A) (NY Sur. Ct. 2018). This court received no evidence that Sophie lacked the mental capacity to make the Will or the Trust on December 5, 2012. Therefore, the court finds Sophie had the capacity to execute a Trust.

FRAUD:

Although the objections allege fraud the Contestant failed to present clear and convincing evidence that Sophie Kotsones was fraudulently induced to sign the Will or that she did not know that she was signing a Will. The court has lost count of the number of Wills that

Sophie signed during her lifetime. Based on the evidence it is clear that Sophie knew she was signing a Will on December 5, 2012. It is also clear Sophie knew she was creating the Trust. Therefore, the Contestant's fraud claim is dismissed.

UNDUE INFLUENCE:

The Contestant bears the burden of proving by a fair preponderance of the evidence that the Will signed by Sophie Kotsones on December 5, 2012, was the product of undue influence. "Undue influence has been defined as any improper constraint, urging or persuasion whereby a decedent's will is overcome and he or she is induced to do an act with reference to the disposition of his or her property which he or she would not do if left to act freely and of his or her own volition." 39 NY Jur. Decedents' Estates §513.

To make a showing of undue influence, the Objectant must establish by a preponderance of the evidence the following three elements:

1) that the perpetrator(s) had the motive to exercise the undue influence,
2) that the perpretator(s) had the opportunity to exercise the undue influence, and
3) that undue influence was actually exercised.

Matter of Fiumara's Estate, 47 NY2d 845 (1979); In re Walther's Will, 6 NY2d 49 (1959): In re Haggart's Will, 33 AD2d 124 (Fourth Dept. 1969).

Motive:

The Objectant/Contestant alleges that Ellen and Alex went from having no interest in the Corning, New York, Market Street properties in 2011 to complete ownership of those properties in 2015. According to Sophie's estimate, those Market Street properties were worth over one million dollars. The million dollar figure was also estimated by George Welch, a real estate lawyer whose office is located on Market Street. Before the sale from the Trust to Alex, Attorney Rossettie listed an estimated value of $800,000. This court is not determining the actual value of those properties at this time. But, in the end it is clear that Ellen and Alex obtained a personal advantage by receiving almost all of the assets of Sophie Kotsones. These assets were valuable and would provide sufficient worth for the court to conclude there was motive to exert undue influence.

Opportunity:

Ellen eventually became Sophie's sole Power of Attorney in January, 2012. Ellen became the Trustee of the Sophie Kotsones Trust and the Trust contained an unusual provision whereby even Sophie could not dispose of Trust assets without Ellen's permission. Sophie added Ellen to bank accounts. Ellen took over most of the financial and medical decisions concerning Sophie. Starting in 2011 Ellen made regular visits to Corning, New York where her

mother lived, whereas before 2011 Ellen's relationship with Sophie was strained to say the least.

Alex developed a trust relationship with his grandmother by showing interest in her properties, doing repairs, etc. Eventually Alex was making the decisions on what needed to be done on the buildings, well before he was the owner of the buildings.

James testified that before the fall of 2011 his mother regularly confided in him about her business and personal affairs. But then suddenly he was shut out.

The court finds that Ellen and Alex had the opportunity to unduly influence Sophie.

Exercise of Undue Influence:

Undue influence "is seldom practiced openly but it is, rather, the product of persistent and subtle suggestion imposed on a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another." Matter of Panek, 237 AD2d 82, at 84 (Fourth Dept. 1997). "Mental competence and undue influence are distinct issues. Mental incapacity implies the lack of intelligent mental power; while undue influence implies within itself the existence of a mind of sufficient mental capacity to make a Will, if not hindered by the dominant or overriding influence of another in such a way as to make the instrument speak the will of the person exercising undue influence, and not that of the testator." Weber v. Burman, 880 NYS2d 228, at 228 (Sup. Ct. Nassau Co. 2008).

Even where there is a paucity of evidence of incapacity, the court must still consider the undue influence claim. Matter of Donovan, 47 AD2d 923 (Second Dept. 1975). The court must consider the testator's mental, emotional, and physical condition in deciding whether she had succumbed to undue influence. Matter of Donovan, (id.).

Normally the court would look only at the alleged undue influence leading up to the preparation and signing of the Will. However, in this case the Objectant/Contestant contests the Will, Trust, and real estate transaction and alleges the undue influence extended not only to the making of the December 5, 2012 Will, but continued uninterrupted to the making of the Trust and even to the sale of the real estate by the Trust to Alex. While the Will and Trust were signed on December 5, 2012 the real estate transfer did not occur until January 29, 2015. The Objectant/Contestant has submitted some evidence that from as early as December, 2011 Ellen and Alex were working together to get Sophie Kotsones' Corning, New York Market Street properties into Alex's possession at little to no cost to Alex. The Proponent argues the Market Street property was sold to Alex by Sophie at fair market value because that is what the Decedent, a strong willed woman, desired. To evaluate whether there was such a plan and whether undue influence was exerted over that entire period of time this court will look at everything from the time period leading up to the making and execution of the December 5,

2012 Will and Trust until the time surrounding the transfer of the Market Street properties.

Because direct proof of undue influence is seldom available, undue influence is usually established by demonstration of all the facts and circumstances surrounding the testator at the time the Will was prepared and executed.

Courts have looked at the following eight factors in determining whether undue influence actually occurred. Those factors include:

1) the age of the person being influenced
2) the physical condition of the person
3) the mental condition of the person
4) any changes in the testamentary plan
5) the involvement of others in the testamentary plan
6) the managing of financial and other affairs
7) a change in attorneys or other advisors
8) the closeness of the family members

See, In re Smith, 95 NY 516 (1884).

Age:

Sophie was 88 years old when she died and 85 years old when she made the Will that is being offered for probate. The court finds Sophie Kotsones was advanced in age.

Physical Weakness:

Sophie had already experienced one bout of hospitalization and extended rehabilitation in a nursing care facility before she made her last Will and then had a second such period before she sold the Market Street properties. She had also gotten to the point where she no longer went to the YMCA for exercise after 2010 per Michelle Costanza, and she stopped driving. Sophie's longtime bookkeeper testified that once she came home from rehabilitation the second time at the nursing home she slowed down considerably and he didn't see her much after that as Ellen took over the bookkeeping.

Mental Condition:

The court heard the testimony of several lay witnesses who gave their opinion of Sophie's mental abilities. Most knew her to always be strong willed and yet some could see in her later years that she was slowing down and not able to do as many things for herself. Sophie had a few close friends upon whom she would rely when she needed help. Her son, James, had been a trusted resource for years, but that relationship ended around the end of 2011, about the time Ellen re-entered the picture and about the time Sophie wrote that what she was going

through was worse than Hitler brainwashing. (Petitioner's Exhibit 38). What came through loud and clear at the trial of this matter was how important the commercial Market Street properties were to Sophie. She wanted those properties to stay in the family at all costs. Even though Sophie was undoubtedly "strong willed" this court believes that same strong will could be turned or manipulated against another, in this case, James, if Sophie thought her commercial real properties would be sold or left to deteriorate. There was no evidence at trial that James actually had any intention of selling those properties or running them into the ground.

The creation by a beneficiary of resentment or a false impression in the mind of a testator constitutes undue influence. Matter of Burke, 82 AD2d 260 (Second Dept. 1981).

The Proponent showed a video at trial made around June, 2013, though (perhaps though an oversight) the video was not admitted into evidence. This court did note that Sophie Kotsones made several mistakes when she made her video. Her video was apparently an attempt to prove to the court that she was mentally alert. In the video Sophie claims that she had not been invited to her son's children's baptisms, also claiming she never met his son's wife's family before the wedding, etc. However, photographic evidence submitted at trial proved that Sophie had indeed not only been invited, but had in fact attended these events. A letter from Sophie to Alex admitted as Petitioner's Exhibit 41 states in part "what a wonderful and caring - person Denise (son's wife) is - I would be lost without her." Yet in Sophie's video, which was made 7 months later, she rants against Denise and claims they never had a good relationship. The court is left to conclude that either Sophie's mind was not as sharp as proposed by the Proponent or those facts had been twisted. There was undisputed evidence that Ellen's husband's family had not met Sophie prior to her wedding, and that Ellen's husband and Sophie did not get along. It may be that Sophie had replaced in her mind grudges and slights caused by events in Ellen's past and replaced them with Jim. In any event, the court finds Sophie's mind was weak enough to be a factor to be considered in evaluating a claim of undue influence.

Change in Testamentary Plan:

In October, 2011, Sophie contacted Attorney Dirk Gailbraith about preparing a new Will. That proposed Will actually would have been something relatively fair and equitable to both sides of her feuding family. On December 1, 2011, Sophie writes a letter to Attorney Gailbraith confirming the distributions in accordance with his last Will draft. However, that draft never gets signed by Sophie, and the Will that was ultimately signed on January 11, 2012, takes a dramatic change in favor of Ellen and her side of the family. Ellen sent 3 letters and/or e-mails to Attorney Gailbraith in the two weeks preceding the signing of the January 11, 2012 Will. In one correspondence Ellen states to Attorney Gailbraith, "Thankfully I was able to intervene before something tragic happens. Also, George Welch is not to be notified." (Exhibit L-1) Attorney George Welch was a long time attorney and confidante of Sophie and had prepared many leases and several Wills for her in the past over a period of many years. Sophie was not facing any medical or financial issues in late December, 2011, or early January, 2012.

So the court must conclude that the potential "tragic" event referred to by Ellen that required her intervention was the possibility of James ending up with some or all of the property.

Involvement of Others in Testamentary Plan:

In a December 5, 2011 e-mail from Ellen to her son, Alex, Ellen outlines a plan as follows:

" My lawyer Dan Brodrick and my accountant Al Kazakiatis suggested the following:

- sale of all the property to you for a minimal amount - hundred dollars
- however the sale has to be what the fair market value is of all the properties
- Ma needs to state that she has given you as a one-time gift the rest of the value of the property. This paper needs to be notarized and kept by the accountant with a copy to you and her
- there also needs to be notarized letter from a doctor stating that she is in excellent health and of sound mind on the day the sale takes place.
- that letter is given to the accountant to hold onto when her estate settles
- Not sure on change of titles and registry of deeds details that Dirk may have to do, NOT George Welch." (Exhibit B-1)

Whether Alex and Ellen had talked about this plan before this e-mail the court does not know. But, Alex had been working for Sophie on her buildings and developing an interest in them.

The same e-mail instructs Alex to talk to Sophie and find out from Sophie who gives her rides, who does her hair, etc. and make a list of those people who are most important to her. Then it goes on to instruct him to make Sophie comfortable as to what he knows about her so that she will disclose where she hides things around the house. (Exhibit B-1) The court also notes that the correspondence from Ellen to Attorney Dirk Gailbraith regarding Sophie's Will are filled with "I would like to explore" , "I would like to see", "I was surprised to learn", "I am thinking of". (Exhibit L-1) It was clear that Ellen, and not Sophie, had changes in store for the Will.

In an e-mail from Ellen to Alex on February 6, 2012, Ellen cautions Alex to not be in a rush or "this will bite us both." Further, "Shit takes more than three seconds and to get it done takes a graciousness to handle it, not grumbling about having to do it. . . . Neither Ma nor I minded my working on the several drafts to think out a realistic answer."

This December, 2011 "plan" was not fully carried out by the Will of January, 2012 or even the Will of December, 2012 which is seeking to be probated. But by the time the property is "sold" by the Trust to Alex on January 29, 2015, the final result very closely resembles this plan. When Alex purchased the property, he put virtually no money into the property transaction. The purchase price was to be covered by a mortgage. Alex's closing costs were

paid by Ellen out of an account. When Sophie died six months later, Alex stopped making any mortgage payments. It appears that the plan was for Alex to never have to pay off the mortgage. An e-mail to Ellen from Alex on September 4, 2014, (before the sale) states "My concern is the debt I owe to the trust. Since the trust holds the mortgage on these buildings, what happens to that debt when Soph dies? Does Jim have claim to those mortgage payments?" The mortgage payments finally resumed in December, 2016, after James makes application for the business records. But then the mortgage was modified in July, 2017, at a reduced mortgage amount, with a lower interest rate (1%) and one key renovated property was released from the mortgage. The court was offered no proof of any consideration being given for any of these pro-Alex "gifts".

Managing of Sophie's Affairs:

As previously stated Alex gradually took over management of the real estate. Sophie's handyman, Joseph Elliot, testified Sophie was less involved in her real estate the last couple years of her life and after 2013 Ellen was around more than ½ of the time. Alex testified he used over $300,000 of Sophie's money on building renovations, even though there was no documentary proof evidencing the repairs or expenditures.

Ellen gradually took over almost every other area of Sophie's affairs. With Sophie's advanced age and deteriorating condition it was evident someone needed to assist Sophie in managing her affairs. The banker, Jean Wise, testified that even before Ellen became involved, Sophie would drive up to see Jean and have Jean balance her checkbook on a monthly basis.

Ellen used her mother's accounts as if they were her own, paying her own bills and making payments to Alex from her mother's funds. Initially the payments to Alex were characterized as management type fees being paid by Sophie to Alex, but these payments continued even after the property was "sold" to Alex. Ellen took over all of the bookkeeping. Ellen cashed the $162,000 + CD that would have gone to her brother upon her mother's death and deposited the money, not in her mother's account, but in her own account. Ellen also cashed a similar size CD that would have gone to Ellen upon her mother's death and Ellen deposited that money in her own account rather than in one of her mother's accounts. Ellen is said to have eventually put the money into Alex's LLC account. It is clear that Sophie trusted Ellen, and Ellen used this trust to her own personal advantage. Though Sophie apparently gave approval of the cashing out of the two CD's, it was apparent that Sophie was susceptible to undue influence starting well before this point in time.

Change in Attorney and Advisors:

Sophie had used the same bookkeeper for years. While the bookkeeper did not testify that he had been phased out by Ellen, testifying that he was about ready to retire anyway, the court did not find the bookkeeper totally credible in this regard and sensed he was harboring some resentment toward Ellen, who took over the bookkeeping duties from him. Sophie

continued to rely on Jean, her banker friend, and Jean testified that she convinced Sophie that she could trust Ellen.

Attorney Welch was phased out when Attorney Gailbraith started preparing the Wills and the Trust. Ellen testified that she had no involvement in her mother's testamentary planning with Attorney Gailbraith. She stated this despite the numerous documents that showed not only her corresponding with Attorney Gailbraith, but her clearly interjecting her own thoughts and questions into the discussion. Further, Attorney Gailbraith testified that the December 5, 2012 Will was prepared according to Ellen's instructions. Attorney Welch had been Sophie's attorney for over 30 years. Accordingly, the court finds the testimony of Ellen Kreopolides to not be believable.

Closeness of Family Members:

From the testimony, Ellen had been estranged from her mother for several years prior to 2011. However, Ellen re-established a relationship with her mother starting in the spring of 2011. By December of 2011 Ellen had resumed periodic visits with her mother. According to Jean Wise (Sophie's trusted banker), it was Jean that convinced Sophie that she could trust Ellen. So by late 2011 Sophie is hearing competing advice from her two children.

While Ellen was estranged from her mother prior to 2011, James enjoyed a close relationship with his mother. The more Ellen and Alex become close to Sophie the more distant becomes the relationship between Sophie and her son, James.

Ellen and James clearly do not like each other.

Conclusion:

Almost every factor used by courts to create an inference of undue influence can be found in this case. The Proponent did not offer a sufficient explanation for the Will and Trust provisions or the terms of the real estate transaction. The court concludes that Sophie's Will and Trust and real estate sale were not the product of her own free will, but were the careful planning and manipulation of her mind by her daughter Ellen. The Objectant/Contestant has met his burden to establish undue influence. Since the documentation shows that the scheme started at least by December, 2011 the court finds all Wills, Trust, and real estate transaction from that date on were tainted by the undue influence and therefore the court cannot consider any Will that is signed after December, 2011 as being appropriate for submission to probate.

Confidential Relationship:

The Contestant seeks to have the court find that Ellen and Alex as a matter of law had a confidential relationship with Sophie Kotsones. Particularly with regard to Ellen, there are

many factors which could give rise to a finding of a confidential relationship. Things such as being the power of attorney, having a joint bank account, assisting in financial and medical decisions, being a trustee of the trust, etc. have all been found to give rise to the inference that a confidential relationship exists. If Ellen were not the decedent's daughter, the court would have no problem granting a finding that Ellen had a confidential relationship with Sophie such that the burden would shift to Ellen to prove that the dealings between she and Sophie and the Trust were fair and free from undue influence. However, courts are reluctant in close familial relationships to find a confidential relationship that shifts the burden of proof. See, Dwyer v. Valachovic, 137 AD3d 1369 (Third Dept. 2016); Demarco-McClusky v. DeMarco, 2006 NYLJ LEXIS 1663 (Sup. Ct. Queen Co. 2006); Presvelis v. Forella, 2008 NY Misc LEXIS 9585 (Sup. Ct. Queen Co 2008); Connelly v. Connelly, 798 NYS2d 343 (2004).

However, even in close familial relationships, courts have found a confidential relationship sometimes exists and thus shifted the burden of proof, particularly where one sibling greatly benefits to the detriment of his/her other siblings. In the case of In re Kurtz, 144 AD2d 468 (Second Dept. 1988) the court found a confidential relationship existed between the deceased mother and one of her sons, thus shifting the burden to the son to establish that his agreement with his mother was not the product of fraud or undue influence. Likewise in Blase v. Blase, 148 AD3d1777 (Fourth Dept. 2017) the court found a confidential relationship existed between the decedent and one of his sons. "Thus, in order to meet his burden on the motion of establishing his entitlement to judgment as a matter of law (citations omitted), the defendant was required to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood." Blase v. Blase, (id. at 1778).

Even without a finding of a "confidential relationship", the court has already concluded that Ellen unduly influenced her mother to make the December 5, 2012 Will and Trust and to sell the real estate. Notwithstanding, the court believes that the evidence in this case clearly shows that Ellen nurtured a confidential relationship between herself and her mother. She was not content to share a power of attorney with her brother. Rather she wanted to be the sole power of attorney. Not only did Sophie put the property in a Trust, but Ellen insured that she (Ellen) would essentially have veto power over anything the trust did, including the power to sell the property. Ellen used her mother's accounts as if they were her own, paying her own bills and making payments to Alex from her mother's funds. Initially the payments to Alex were characterized as management type fees being paid by Sophie to Alex, but these payments continued even after the property was "sold" to Alex. Ellen took over all of the bookkeeping. Ellen cashed the $162,000 + CD that would have gone to her brother upon her mother's death and deposited the money, not in her mother's account, but in her own account. It is clear that Sophie trusted Ellen, and Ellen used this trust to her own personal advantage.

Alex developed a trust relationship with his grandmother by showing interest in her properties, doing repairs, etc. Eventually Alex was calling the shots on what needed to be done on the buildings, well before he was the owner of the buildings.

The court finds that the burden shifted to the Proponent to show that these actions and dealings were in her mother's best interest, and were fair and free from undue influence The only evidence Ellen produced was 1) testimony that Sophie was strong willed and independent and did exactly what she wanted to do with regard to the Will, Trust, and real estate transaction; and 2) a claim that Sophie benefitted by receiving a mortgage payment from a 30 year mortgage at her advanced age of 88 .

There is no question that as time went on that Ellen took over almost all of Sophie's accounts. There were many checks that she wrote on Sophie's accounts to pay for bills that were not Sophie's obligation to pay. She also transferred funds from Sophie's accounts to her own account or an account maintained by herself and Alex. Most notably was the cashing of a CD that would have been payable on death to James. Though Sophie verbally authorized the cashing of the CD over the telephone didn't know that it was being deposited in Ellen's, not Sophie's account. It was cashed and deposited in an account that did not belong to Sophie. Since this CD had a value of over $162,000, this was a sizable transfer. Almost all of these transfers occurred well after the December 5, 2012 date. The Proponent contends that the court should limit this review to only those actions which were taken by Ellen on or before that date. This court disagrees. There is certainly ample evidence before December 5, 2012, that Ellen and Alex had a plan whereby Alex was to end up with the properties and Jim was to receive little or nothing. But the undue influence did not end on December 5, 2012, when the Will was signed. The influence continued through the trust, real estate sale, and banking transactions.

Additionally Ellen was funneling money from Sophie's account to Alex so that he had money to use to do repairs, pay closing costs, and make mortgage payments. The court is not convinced that the Proponent was acting in Sophie's best interest. To show to what extent Ellen tried to manipulate things to cut her brother out of receiving anything, she went to the bank almost immediately after her mother's death and transferred the remaining $1,520.51 that was in the only account James would have received from his mother. It was not enough to have all the real property, the $162,000 CD, and all the other accounts; she transferred this money as well.

Because of a confidential relationship the burden of proof shifted to the Proponent to demonstrate by a preponderance of the evidence that there was no undue influence being used. This the Proponent failed to do. The Contestant did demonstrate by a preponderance of the evidence that the December 5, 2012 Will, as well as the Trust created the same day, and the 2015 real estate sale were the products of undue influence by Ellen and to a lesser extent Alex on Sophie Kotsones, and as such, these documents must be voided.

The Court will go one step further. Even if the burden of proof had not shifted to the Proponent due to a confidential relationship, the Objectant has met his burden of proof on the issue of undue influence.

When undue influence is found by the court, then the Will, Trust, and real estate

transaction must all be invalidated. Matter of Lewis, (id.)

NOW, therefore, upon due consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED the Proponent's application to have the December 5, 2012 Will of Sophie Peter Kotsones admitted to probate be, and hereby is, denied; and it is further

ORDERED, ADJUDGED, and DECREED that Ellen Kreopolides and Alex Kreopolides had a confidential relationship with Sophie Kotsone such that the burden shifted to them to demonstrate that they did not use that relationship to unduly influence Sophie Kotsones, a burden that was not met; and it is further

ORDERED, ADJUDGED, and DECREED that even without the finding of a confidential relationship between Ellen Kreopolides and Alex Kreopolides and Sophie Kotsones, the Objectant/Contestant, James Kotsones, has proven by a preponderance of the believable evidence that Ellen Kreopolides and Alez Kreopolides exerted undue influence on Sophie Kotsones; and it is further.

ORDERED, ADJUDGED, and DECREED that Ellen Kreopolides and Alex Kreopolides are found to have unduly influenced Sophie Kotsones since late 2011, and as such the Wills, Trust, real estate transfers, and banking transactions are invalidated; therefore, the court will not consider any Will that was signed on or after December 2011 for admission to probate.

Dated: March 18, 2019

Hon. Patrick F. McAllister
Surrogate Court Judge

ENTER

FILED
MAR 18 2019
SURROGATE'S COURT
STEUBEN COUNTY

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1205

CA 19-01048

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF SOPHIE PETER KOTSONES, DECEASED.

JAMES KOTSONES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES, AND 42-52 WEST MARKET STREET LLC, RESPONDENTS-APPELLANTS.

MILLER MAYER LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR RESPONDENT-APPELLANT ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST.

ROSSETTIE ROSSETTIE MARTINO LLP, CORNING, SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (MARY C. FITZGERALD OF COUNSEL), FOR RESPONDENT-APPELLANT ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES AND 42-52 WEST MARKET STREET LLC.

MULLEN ASSOCIATES PLLC, BATH (AARON I. MULLEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Surrogate's Court, Steuben County (Patrick F. McAllister, S.), entered March 18, 2019. The order, among other things, denied the application to admit to probate the December 5, 2012 will of the deceased and invalidated various transactions.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is dismissed, and the application is granted.

Memorandum: Petitioner and respondent Ellen Kreopolides, also known as Ellen Maria Kreopolides (Ellen), individually, and as trustee of the Sophie Peter Kotsones Irrevocable Trust (trust), are the children of Sophie Peter Kotsones (decedent). Respondent Alexander Kreopolides, also known as Alex Kreopolides (Alexander), is Ellen's son. After Ellen and Alexander made an application to admit decedent's December 5, 2012 will to probate, petitioner objected to the admission of the will to probate and filed a petition seeking to invalidate the trust and certain real estate transactions involving

decedent's property, all on the ground that, inter alia, Ellen and Alexander had exerted undue influence on decedent. Respondents now appeal from an order entered following a nonjury trial that, inter alia, denied the application to admit the will to probate, granted petitioner's objection to the will, and granted his petition insofar as it sought to invalidate the trust and real estate transactions. Surrogate's Court determined that the will, trust, and real estate transactions had been procured by Ellen and Alexander exerting undue influence upon decedent. We reverse.

As an initial matter, we reject the contention of Alexander and respondent 42-52 West Market Street LLC that the Surrogate erred in denying their pretrial cross motion for summary judgment dismissing the petition against them (*see generally Matter of Randall*, 73 AD3d 1465, 1465 [4th Dept 2010]). Regarding the Surrogate's determination following the trial, however, we agree with respondents that the Surrogate erred in concluding that a confidential relationship between Ellen, Alexander, and decedent existed, which thereby triggered an inference that Ellen and Alexander exerted undue influence on decedent with respect to the will, trust, and real estate transactions. "It is well settled that, 'where there was a confidential or fiduciary relationship between the beneficiary and the decedent, [a]n inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction' " (*Blase v Blase*, 148 AD3d 1777, 1778 [4th Dept 2017]), i.e., requiring the beneficiary " 'to prove the transaction fair and free from undue influence' " (*Matter of Prievo v Urbaniak*, 64 AD3d 1240, 1241 [4th Dept 2009]). Here, however, petitioner had the initial burden of establishing " 'the requisite threshold showing that a confidential relationship existed' " (*id.*; *see generally Matter of DelGatto*, 98 AD3d 975, 977 [2d Dept 2012]; *Matter of Moran* [appeal No. 2], 261 AD2d 936, 936-937 [4th Dept 1999]).

" 'In order to demonstrate the existence of a confidential relationship, there must be evidence of circumstances that demonstrate inequality or a controlling influence' " (*Matter of Nurse*, 160 AD3d 745, 748 [2d Dept 2018]). Indeed, a confidential relationship has been described as "one that is 'of such a character as to render it certain that [the parties] do not deal on terms of equality' " (*Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125 [3d Dept 2014]; *see Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]). Further, " '[a]n inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference' " (*Matter of Walther*, 6 NY2d 49, 54 [1959]). Here, although the record establishes that Ellen and Alexander held a position of trust with decedent, and that Ellen assisted decedent with her finances and was named decedent's power of attorney, the record also reflects that, despite Ellen's position of trust, decedent was actively and personally involved in managing her real estate and in drafting her estate plan, and that she directed her personal attorney and the branch manager at her bank to act according to her own desires based on her own personal, stated reasons. Indeed, the trial testimony established that various nonparty witnesses acted pursuant to decedent's direction, not Ellen's or Alexander's, and

decedent's testamentary capacity is not at issue on appeal. Under these circumstances, petitioner failed to meet his initial burden of establishing that the relationship of Ellen and Alexander with decedent was of such an unequal or controlling nature as to give rise to an inference of undue influence.

We likewise agree with respondents that the Surrogate erred in finding undue influence aside from the existence of a confidential relationship. To establish undue influence under such circumstances, there must be a showing of the "exercise[of] a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity [that] could not be resisted, constrained the testator to do that which was against [his or] h[er] free will" (*Matter of Kumstar*, 66 NY2d 691, 693 [1985], *rearg denied* 67 NY2d 647 [1986] [internal quotation marks omitted]; *see Matter of Lee*, 107 AD3d 1382, 1383 [4th Dept 2013]; *Matter of Alibrandi*, 104 AD3d 1175, 1177-1178 [4th Dept 2013]). Here, the record reflects that Ellen and Alexander wanted to benefit from decedent's estate, and that Ellen assisted decedent in executing the relevant estate plan and making the disputed transactions. The relevant inquiry, however, is not what Ellen and Alexander may have wanted, asked for, or facilitated, but rather whether decedent's free will, independent action, and self-agency were overcome by their conduct (*see Walther*, 6 NY2d at 53-54). In this case, the record establishes that decedent informed her attorney in 2011 that she did not want petitioner to have any further power over her affairs, that decedent thereafter worked with her attorney directly in order to revise her estate plan, and that decedent discussed with her attorney her personal reasons for altering her prior estate plan to the exclusion of petitioner. Indeed, decedent's attorney testified that he never prepared a document that decedent did not personally authorize, and testimony from numerous non-beneficiaries established decedent's capacity and active management of her own affairs during the relevant time frame, albeit with the assistance of Ellen. Simply put, the record does not reflect that decedent at any time lost her free will or agency, and instead the record reflects that she took the disputed actions based on her stated personal motives. We thus conclude that the Surrogate erred in concluding that the will, the trust, and the real estate transactions were procured by undue influence. Consequently, we reverse the order, dismiss the petition, and grant the application to admit the will to probate.

In light of our determination, we do not address respondents' remaining contentions.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

STATE OF NEW YORK
SURROGATE COURT: COUNTY OF STEUBEN

In the Matter of the Probate Proceeding of the Estate of,

SOPHIE PETER KOTSONES,

Deceased.

AFFIDAVIT OF SERVICE

Hon. Patrick F. McAllister, Surrogate

File No.: 2015-45107

JAMES KOTSONES,

Petitioner,

v.

File No.: 2015-45107/E

ELLEN KREOPOLIDES, INDIVIDUALLY AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES (AKA ALEX KREOPOLIDES), AND 42-52 MARKET STREET LLC,

Respondents.

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

I, Amber Volbrecht, being duly sworn, depose and say that I a4m not a party to this action, am over 18 years of age and reside in Lansing, New York. On the 24th day of February, 2020, I served a copy of the attached Notice of Entry on Aaron Mullen, Esq. and Elizabeth Oklevitch, Esq., attorneys for James G. Kotsones in the above action, at their last known place of business at 12 West Pulteney Square

MILLER MAYER, LLP
215 East State Street
Ithaca, New York 14850
(607) 277-4200

Bath, NY 14810, and Gabriel Rossettie, Esq., attorney for Alex Kreopolides in the above action, at their last known place of business located at 269 W Pulteney St., Corning, New York 14830 by depositing copies of same enclosed in a postage prepaid properly addressed wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York.

Amber L. Volbrecht

Amber Volbrecht

Sworn to before me on
this 24 day of July, 2020.

Notary Public

ANTHONY NICHOLAS ELIA
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02EL6256142
QUALIFIED IN TOMPKINS COUNTY
MY COMMISSION EXPIRES APR 22, 2020

h:\1645\001\draft pleadings\affidavit of service_2-28-2018 - combined discovery demands.doc

MILLER, MAYER, LLP
215 East State Street
Ithaca, New York 14850

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF STEUBEN

In the Matter of the Probate Proceeding
of the Estate of

SOPHIE PETER KOTSONES,

Deceased.

NOTICE OF ENTRY

File # 2015-45107

File # 2015-45107/E

JAMES KOTSONES,

Petitioner,

v.

ELLEN KREOPOLIDES (AKA ELLEN MARIA KREOPOLIDES), INDIVIDUALLY AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES (AKA ALEX KREOPOLIDES), AND 42-52 WEST MARKET STREET LLC,

Respondents.

Please take notice that a Memorandum and Order, a copy of which is attached hereto, was duly entered by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial District (1205 CA 19-01048) on the 17th day of July, 2020.

Dated: Ithaca New York
July 24, 2020

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Gabriel Rossettie, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

AFFIDAVIT OF SERVICE

JAMES KOTSONES,

Docket No.: CA 19-01048

Petitioner- Respondent,

v.

ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES, AND 42-52 WEST MARKET STREET LLC

Respondents- Appellants.

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

I, Katherine Hayes, being duly sworn, depose and say that I am not a party to this action, am over 18 years of age and reside in Lansing, New York. On the 28th day of July, 2020, I served a copy of the Notice of Entry on Aaron Mullen, Esq. and Elizabeth Oklevitch, Esq. at their last known place of business at 12 West Pulteney Square, Bath, NY 14810, by depositing a copy of same enclosed in a postage prepaid properly addressed wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York.

Katherine Hayes

Sworn to before me on
this 28th day of July, 2020.

Notary Public

AMBER L. VOLBRECHT
Notary Public, State of New York
Qualified in Tompkins County
REG. NO. 01VO6341609
Commission Expires May 9, 2024

MILLER MAYER, LLP
215 East State Street
Ithaca, New York 14850
(607) 273-4200

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

JAMES KOTSONES,

Petitioner- Respondent,

v.

ELLEN KREOPOLIDES, ALSO KNOWN AS ELLEN MARIA KREOPOLIDES, INDIVIDUALLY, AND AS TRUSTEE OF THE SOPHIE PETER KOTSONES IRREVOCABLE TRUST, ALEXANDER KREOPOLIDES, ALSO KNOWN AS ALEX KREOPOLIDES, AND 42-52 WEST MARKET STREET LLC

Respondents- Appellants.

NOTICE OF ENTRY

Docket No.: CA 19-01048

Please take notice that a Memorandum and Order, a copy of which is attached hereto, was duly entered by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial District (1205 CA 19-01048) on the 17th day of July, 2020.

Dated: July 28, 2020

Anthony N. Elia III, Esq.
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To:

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EXHIBIT C

TIMELINE			APPEAL RECORD
Date	Event	Exhibit	
Within last 5-10 years of Attorney Welch's representation of Sophie	Sophie discusses real estate values as $1 million plus, with George Welch, Sr.	G. Welch 20:25-22:25	R. 455
January 31, 2008	Sophie goes to George Welch, Sr. and has a will made that devises the Market Street properties to a testamentary trust and the residue to James and Ellen equally. James is the lifetime income beneficiary of the trust, and the three grandsons receive the properties at his death. James is Trustee and Executor; Ellen as backup.	Ex. 52	R. 1016
September 18, 2008	Sophie goes to George Welch, Sr. and has a will made that gives $4,500 to charity, certain personal effects to Ellen, and the residue to Jim and Ellen equally.	Ex. 53	R.1027
Approximately one month before the July 27, 2009 Will was signed	Sophie Kotsones leaves Three Rivers Rehab facility.	J. Kotsones 185:24:186:4	R. 403-04
July 27, 2009	Sophie executes a will with George Welch, Sr. leaving everything to James Kotsones or to her three grandsons if not survived by James. Ellen was disinherited.	Ex. A-1	R. 1325
October 7, 2009	Sophie executes a codicil to will that gives Ellen certain personal effects. Other contents of home and proceeds from sale of home (260 Cayuta) split between Ellen and Alex. Everything else still to James.	Ex. Q-4	R. 1968
May 6, 2010	Sophie executes codicil to will that gives all the contents of home to Ellen.	Ex. A-1	R. 1325
2007-2010	Ellen does not visit Sophie between 2007 & 2010	E. Kreopolides 39:10-11	R. 674-75
October 28, 2011	Sophie consults with Dirk Galbraith regarding a new will he sends her in draft form on November 8, 2011.	Ex. 43 (Attorney timesheet); Ex. 2	R. 943; R. 788

		(Nov. 8, 2011 cover letter)	
November 14, 2011	Sophie sends Dirk a letter correcting him for leaving 44 out of James's share. 52 goes to Alex; 42-44 and 46-48 to James; Cayuta Street to Ellen.	Ex. 3	R. 790
November 28, 2011	Dirk sends Sophie a revised draft. The draft will gives 42 and 52 to Alex. House, contents, and furniture to Ellen. Everything else (including 44, 46-48, and hundreds of thousands of dollars) still to James.	Ex. 5 (cover letter) Ex. F-1 (includes draft will)	R. 793; R. 1351
December 1, 2011	Sophie sends Dirk a letter confirming the distributions contained in the draft.	Ex. 6	R. 794
December 5, 2011	**Ellen emails Alexander an email containing the following:** **My lawyer Dan Brodrick and my accountant Al Kazakiatis suggested the following**: • **sale of all the property to you for a minimal amount – hundred dollars** • **however the sale has to be what the fair market value is of all the properties** • **Ma needs to state that she has given you as a one-time gift the rest of the value of the property. This paper needs to be notarized and kept by the accountant with a copy to you and her** • there also needs to be a notarized letter from a doctor stating that she is	Ex. B-1	R. 1335

	in excellent health and of sound mind on the day that the sale takes place. • that letter is given to the accountant to hold onto when her estate settles • Not sure on change of titles and registry of deeds details that Dirk may have to do, **NOT George Welch**		
December 14, 2011	Alex advises Sophie regarding title to the Market Street properties.	Ex. 11	R. 812
"Very Late 2011"	Ellen comes back into her mother's life	E. Kreopolides 39:13-14	R. 675
"Late 2011"	Sophie stops communicating with James.	J. Kotsones 188:14-189:7. D. Kotsones 53:13-19.	R. 406-07 R. 487
5 Days prior to January 5, 2012	Ellen spends 5 days at Sophie Kotsones's house.	Ex. L-1	R. 1367
January 1–5, 2012	Ellen sends 4 letters and a note to Dirk Galbraith in 5 days—every one of which was about Sophie's estate planning (or Ellen's hopes for Sophie's estate planning).	Exhibits F-1, G-1, H-1, J-1, L-1	R. 1351 Rep. 1357 R. 1361 R. 1363 R. 1367
January 3, 2012	Ellen calls Dirk's office, gives her contact information in Massachusetts, and explains she's doing the "legwork" for Sophie's estate planning.	Ex. K-1	R. 1365
January 6, 2012	Dirk Galbraith revises will in conformance with Ellen's letters.	Ex. 43 (Attorney timesheet)	R. 943
January 11, 2012	Sophie signs will that is substantially better for Ellen, and only leaves James certain furniture and life use of two of the five Market Street properties. (James also received half of the residue, but only after all of the other real estate, the Chemung	Ex. 16	R. 838, 845, 849

	Canal bank accounts, and Sophie's vehicle(s) went to Ellen or Alex).		
February 10, 2012	Ellen has a phone conference with Dirk. (NO conference—phone or otherwise—noted with Sophie, or correspondence from Sophie to Dirk, between the signing of the January 11th and March 14th wills).	Ex. 43	R. 943
February 14, 2012	A car crashes into one of Sophie Kotsones's storefronts; Alexander Kreopolides and Ellen Kreopolides begin coming to Corning more frequently thereafter.	Ex. S-1; E. Kreopolides 39:16-17; A. Kreopolides Jan. 14, 2019 5:21-25.	R. 1392 R. 675 R. 638
October 4, 2012	Dirk's interoffice memo notes Sophie estimated of real estate values at $1 million to $1.5 million.	Ex. U-1; D. Galbraith 135:9-14	R. 1399
March 14, 2012	Sophie Kotsones signs will that is even better for Ellen and worse for James than the January 2012 will.	Ex. 45	R. 946
November 15, 2012	Dirk acknowledges receiving **Ellen's** phone call with instructions for Sophie's trust.	Ex. V-1	R. 1401
November 29, 2012	Dirk's office e-mails draft will and draft trust to **Ellen**.	Ex. X-1	R. 1409
November 30, 2012	**Ellen** sends the draft will and trust to Alex. Alex reviews Sophie's trust.	Ex. X-1; A. Kreopolides Jan. 14, 2019 11:21-25	R. 1409 R. 644
November 30, 2012	**Ellen** e-mails Dirk's office regarding changes to make to the trust.	Ex. Y-1, p.3	R. 1415
December 1, 2012	**Ellen** mails a document to Dirk Galbraith from Painted Post that according to Ellen was "probably" the 12/1/2012 letter from Sophie to Dirk (Exhibit 21) that was very negative towards Jim.	Ex. R-4 (p.18, a 12/1/12 Express Mail receipt to Ithaca included in Ellen's expenses); S-4 (Ellen's Mailing Receipt); and E. Kreopolides 102:24	R. 1973, 1991 Re. 1992 R. 743
December 2, 2012	**Ellen** e-mails Dirk's office regarding changes to make to the trust.	Ex. Y-1, p.2	R. 1412 R. 1414
December 3, 2012	**Ellen** e-mails Dirk's office regarding the will and trust.	Ex. Y-1	R. 1412
December 5, 2012	Ellen takes Sophie to Dirk Galbraith's office and Sophie executes her will and irrevocable trust.	Ex. 1 (Will) Ex. 22 (Trust) J. Callahan April 19, 2016 82:8-14; D. Galbraith	R. 783 R. 852 R. 207

		164:9-11.	
June 2013	A video is taken where Sophie mistakenly claims, among other things, that she never attended the baptisms of James Kotsones's sons.	D. Kotsones 66:15–69:18; Ex. T-3 (including photos of Sophie at James's sons' baptisms)	R. 500-03 R. 1710
June 20, 2013	Dirk Galbraith sends a letter and invoice to **Ellen** for the video that they did of Sophie. Dirk also notes in that letter that he has kept a sealed envelope in his safe for James. Dirk admitted that that was likely the same letter as Exhibit 23, which was negative towards James.	Ex. R-1; 145:14-22.	R.1388 R. 188
June 21, 2013	**Ellen** calls Dirk's office regarding Sophie's Trust, asking for it to be sent to her e-mail address.	J. Callahan 86:9-20 – 87:2	p.1314
February 11, 2014	Ellen emails Alex a seven-paragraph to-do list for managing Sophie's properties, and instructs him to "bring back any papers" from Cayuta Street and say "Hi to Jean at the Painted Post branch of Chemung Canal."	Ex. O-2	R. 1472
July 2014 – October 2014	Sophie goes into nursing home (Three Rivers) with hairline fracture in her spine; stays until October 2014.	E. Kreopolides 42:2-4; 42:7-18	R. 677-78 R. 678
July 25, 2014	Sophie's last visit at YMCA	Ex. 78; T. Leach 156:5-6.	R. 1324 R. 590
August 4, 2014	Dirk reaches out to his law partner, Anna Holmberg, drafter of the Trust, who questions that the Trust allows any gift of the property and cautions that the sale of the property to Alex should be backed up with a valuation.	Ex. U-2	R. 1561
August 18, 2014	Dirk mails Sophie a letter about starting a real estate transaction with Alexander. He cc's Gabriel Rossettie via email.	Ex. X-2 (page 2)	R. 1569
August 18, 2014	Sophie Kotsones, who did not use computers, receives and responds	E. Kreopolides 39:24-25 (no computers); X-	R. 675

	Dirk's letter the same day he mailed it— the letter that Ellen Kreopolides claimed to have nothing to do with (until pressed).	2 (page 1); E. Kreopolides 47:14-49:8 (Ellen on delivering to Sophie)	R. 1569 R. 683-85
August 19, 2014	Ellen hand-delivers Sophie's August 18, 2014 response to Dirk's office.	Ex. X-2	R. 1569
August 29, 2014	Ellen begins writing almost all of Sophie's checks, including many to herself and Alexander.	Ex. W-3 showing sudden increase in checks written by Ellen; Ex. H-4, consisting of checks written by Ellen to Ellen, Alex, her husband Mike, or their business accounts.	R. 1731 R. 1857
October 2014 – December 2014	Alexander is regularly being paid property management fees of $400/month by Ellen. Sometimes she writes these checks to herself.	Ex. H-4	R.1857
Sometime prior to November 22, 2014 GAR inspection	Alexander begins maintaining office space in several buildings of Sophie's in order to help her run her real estate business.	A. Kreopolides Jan 14, 2019 9:14-11:4	R. 642-644
November 14, 2014	Ellen cashes out a CD in the amount of $167,447.16 that was held in trust for James Kotsones and deposits the money into her own personal account. She signs the transfer slip as POA for Sophie Kotsones.	J. Wise 89-92; Ex. U-3	R. 307-10 R. 1716
November 14, 2014	Ellen adds Alexander as a joint account holder on the account that the $167,447.16 that was in trust for James Kotsones is deposited into.	J. Wise 92; Ex. V-3	R. 310 R. 1722
December 24, 2014	Alexander signs a contract that on its face says it is for $580,000, but which at trial Alexander admits he never would have done if the $150,000 that Ellen placed in his LLC account was not placed in his account.	Ex. 26; A. Kreopolides Jan. 14, 2019 32:4-6.	R. 872 R. 667
1/27/15	Ellen transfers $150,000 from her joint account with Alexander (funded by the CD that named James) to Alexander's LLC.	Ex. U-3	R. 1716

1/29/15	The real estate transaction closes. This allows Alexander to purchase the properties under favorable terms—that he would not even be held to by Ellen—and it allows Ellen to receive in the form of a Note Payable the purported value of all of the real estate rather than just the two Market Street properties, Cayuta Street house, and remainder interest in two more Market Street properties (income to James for life) which was her inheritance in the Trust.	Ex. 27 (real estate documents) Ex. 22 (Trust)	R. 876 R. 852
February 15, 2015	Ellen writes a check from her personal account and deposits it in the Trust on March 17, 2015 for $10,542.32 which amount was for Alexander's closing costs.	Ex. O-4	R. 1943
2/11/15 – 9/30/15	Alexander takes electronic withdrawals from Sophie's account even after the real estate transaction. Ellen testified that these $600/month payments were the same category as the $400/month payments. She said it was "Reimbursement money [Sophie] was giving him," that it was "four hundred most of the time," and for things like "property repairs" and "gas expenses." The $400/month payments were clearly marked management fees in the memo lines of the checks.	Ex. E-4; E. Kreopolides 71:12-25 See also A. Kreopolides Jan. 14, 2019 17:5-9; and Ex. H-4	R. 1839 R. 710 R. 650 R. 1857
Undisclosed Time After Real Estate Transfer	Ellen is added on to Alexander's LLC account as a signatory	A. Kreopolides Nov. 14, 2018 196:21-197:15	R. 630-31
March 23, 2015	Ellen makes a withdrawal from the Trust and a deposit into SPK Real Estate in the same amount of $10,542.32. She and Alexander were joint on that account (*0284).	Ex. O-4 (check from Ellen for closing costs); Ex. H-4 p.17 (shows withdrawal) Ex. P-4 shows Ellen & Alexander joint with Sophie.	R. 1943 R. 1857 (R.1874) R. 1946

		Ex. V-3 p.5 (shows Ellen and Alex joint on *0284)	R. 1722 (R.1727)
2015	Sophie is bedridden for at least the last couple months of her life per Jean Wise, and Ellen and Alexander were living with her at the time.	J. Wise 97:16-23.	R. 315
	Ellen continues to write checks from Sophie's accounts for the properties and business expenses even after the real estate transaction.	Ex. F-4 p.1; Ex. H-4 p. 16;	R. 1851 (R.1852) R. 1857 (R.1873)
July 31, 2015, 12:55 A.M.	Sophie Kotsones Dies	Ex. 28	R. 900
July 31, 2015, During Banking Day	Ellen, as POA, removes $1,520.51 from the one account that is left with James Kotsones's name on it.	Ex. J-5	R. 2206
November 9, 2016	Financial records are subpoenaed by Snavely, Plaskov & Mullen, PLLC	Ex. M-3	R. 1689
December 1, 2016	$47,073.17 is paid to the Trust from Alexander's LLC for 17 months of unpaid mortgage payments—beginning the month after Sophie Kotsones died. A payment of $8,151.18, is also paid, purportedly for reimbursement for taxes that were paid by the Trust.	Ex. V-4 Regarding Taxes & $8k: A. Kreopolides Nov. 14, 2018 190:1-4.	R. 2007 R. 624
July 15, 2017	The principal balance on the note is reduced to $504,599.77 and the interest is reduced to 1% for no consideration. Per Ellen's testimony: Alexander's Attorney, Gabriel Rossettie, would need to be asked why it was done. (Per A-5, $554,599.79 would have been owed at the time if regular payments had been made. It was clear at trial, though, and from Ex. B-5, that many payments were late and the mortgage was not being prepaid).	Ex. N-3 (Restated Mortgage Note) E. Kreopolides 91:12-16 Ex. A-5; Ex. B-5.	R. 1691 R. 731-32
September 29, 2017	52 West Market Street—the property that would have been inherited by Alexander if the real estate transaction had not occurred—is released to his LLC out of the mortgage for no consideration.	Ex. N-3 (Release of Part of Mortgaged Premises)	R. 1691

Various dates apparently after property is transferred to Alexander's LLC	Ellen uses $100,000+ of her own money in order to pay for various Market Street property improvements.	E. Kreopolides 85:10-18.	R. 725
	Substantial costs of the LLC continued to be paid personally by Ellen despite the fact that she and Alexander have claimed not to be partners.	E. Kreopolides 88:16-21.	R. 88

EXHIBIT D

1351

RESPONDENT'S EXHIBIT F-1 -
LETTER FROM ELLEN KREOPOLIDES AND SOPHIE KOTSONES TO DIRK GALBRAITH, DATED JANUARY 1, 2012 [1351 - 1356]

Exhibit F-1

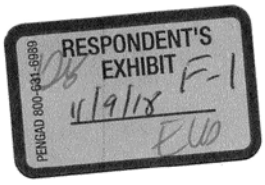

Exhibit 4

260 Cayuta Street

Corning, New York

RECEIVED

JAN - 4 2012

January 1, 2012

Dear Dirk,

In reviewing the last will and testament for Sophie Peter Kotsones, she asked me to type below the revisions marked on the enclosed last will and testament you recently mailed her. She is doing this to have it more legible.

First: OK as is

Second: only give Alex 52 West Market Street

Second: give Ellen Maria Kreopolides, my daughter, 42 West Market Street

Third: I bequeath the furniture in his bedroom at my residence at 260 Cayuta Street, Corning, New York, and all records pertaining to my real property at 44, 46 and 48 West Market Street, Corning, New York, unto my son, James George Kotsones, to be his...

This is is where I need your legal wording....he is not allowed to ever sell the property and when he dies these three properties are never be to be part of his estate. It is to go directly to her daughter, Ellen Maria Kreopolides.

I am assuming the phrase for Third, "absolutely and forever, per stripes" will be removed.

Fourth: OK as is

Fifth: is being equally divided between James and Ellen

Sixth: OK as is

Please have it be last will and testament be for Sophie Peter Kotsones, not Sophie P. Kotsones

She wants the will kept private, accessible to no one during her lifetime. We did want your opinion on who holds the original copy. I suggested you hold it and a copy be placed in her safety deposit box.

She also has the power of attorney to amend along with health care proxy. This will be sent in a separate letter.

I am available for any questions, clarifications, and information at 27 Dunedin Road, Wellesley Hills, MA 02481 and have included a business card with my phone and email. Since we plan to drive to your office to sign the will, please feel free to contact me to arrange a convenient time, hopefully in the near future.

Thank you for your assistance.

Sincerely,

Ellen Maria Kreopolides Sophie Peter Kotsones

Ellen Maria Kotsones Kreopolides and Sophie Kotsones

LAST WILL AND TESTAMENT

OF

SOPHIE P. KOTSONES

I, SOPHIE P. KOTSONES, presently residing at the City of Corning, County of Steuben, State of New York, being of sound mind and memory, do hereby make, publish and declare this as, for and to be my Last Will and Testament, hereby revoking all former wills and codicils heretofore made by me at any time.

FIRST: I hereby direct my Executor, hereinafter named, to pay all of my just debts, funeral and testamentary expenses as soon after my decease as may be practicable.

SECOND: I hereby devise my real property at 42 West Market Street and 52 West Market Street, Corning, New York unto my grandson, ALEX KREOPOLIDES, to be his absolutely and forever.

THIRD: I bequeath the furniture in his bedroom ~~and chair~~ at my residence at 260 Cayuta Street, Corning, New York, and all records pertaining to my real property at 46-48 Market Street, Corning, New York unto my son, JAMES G. KOTSONES, to be his, (? ~~absolutely and forever, per stirpes.~~) In the case when Jim dies, the property is to be given to my daughter, Ellen Kreopolid

FOURTH: I hereby give, devise and bequeath my residence at 260 Cayuta Street, Corning, New York, together with the contents of my residence and any vehicles which I may own at the time of my death unto my daughter, ELLEN MARIA KREOPOLIDES, to be hers, absolutely and

MBERG, GALBRAITH,
N HOUTEN & MILLER
ATTORNEYS AND
OUNSELORS AT LAW
G EAST BUFFALO ST.
SUITE 502
A, NEW YORK 14851-6599

forever, per stirpes. I direct that my daughter shall conduct no public sale of my personal property.

FIFTH: I hereby give, devise and bequeath all of the rest, residue and remainder of my property, whether real, personal or mixed, of which I may die seized or to which I or my estate may become entitled, wheresoever the same may be situate, ~~unto~~ JAMES G. KOTSONES, ~~to be his, absolutely and forever, per stirpes~~. to be equally divided between and Ellen Maria Kreopolides

SIXTH: I ~~hereby nominate, constitute and appoint~~ ~~CHEMUNG CANAL TRUST COMPANY as Executor of this, my Last Will and Testament, with full power of sale~~. leave this here

IN WITNESS WHEREOF, I have hereunto subscribed my name this ____ day of _____, 2011.

_____{L.S.}
SOPHIE P. KOTSONES

MBERG, GALBRAITH,
N HOUTEN & MILLER
ATTORNEYS AND
OUNSELORS AT LAW
)0 EAST BUFFALO ST.
SUITE 502
:A, NEW YORK 14851-6599

SUBSCRIBED by the Testatrix, SOPHIE P. KOTSONES, in the presence of us and each of us, and at the same time declared by her to us and each of us to be her Last Will and Testament, and thereupon we, at her request and in her presence and in the presence of each other, subscribed our names hereto as witnesses this ____ day of _____, 2011.

_____ residing at _____
New York

_____ residing at _____
New York

_____ residing at _____
New York

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N HOUTEN & MILLER
ATTORNEYS AND
COUNSELORS AT LAW
00 EAST BUFFALO ST.
SUITE 502
CA, NEW YORK 14851-6599

STATE OF NEW YORK
COUNTY OF TOMPKINS : ss.:

_____, _____, and

_____, being severally sworn, depose and say that:

They are acquainted with SOPHIE P. KOSTONES, the Testatrix named in the attached instrument; the subscription of the name of said Testatrix at the end of said instrument was made by said Testatrix on the ____ day of _____, 2011, in their presence; at the time of making such subscription, said Testatrix declared the instrument so subscribed by her to be her Last Will and Testament, and they, at the request of said Testatrix and in her sight and presence and in the presence of each other, thereupon signed their names as subscribing witnesses at the end thereof; said Testatrix at the time of the execution of said instrument was upwards of the age of 18 years, and in the opinion of each deponent, based on personal observation, was of sound mind, memory and understanding and in all respects competent to make a Will and not under any restraint; they are making this affidavit at the request of said Testatrix.

_____

_____

_____

Sworn to before me this
____ day of _____, 2011.

_____
Notary Public

MBERG, GALBRAITH,
N HOUTEN & MILLER
ATTORNEYS AND
OUNSELORS AT LAW
0 EAST BUFFALO ST.
SUITE 502
A, NEW YORK 14851-6599

1357

RESPONDENT'S EXHIBIT G-1 -
LETTER FROM ELLEN KREOPOLIDES AND SOPHIE KOTSONES TO DIRK GALBRAITH, DATED JANUARY 1, 2012 [1357 - 1360]

Exhibit G-1

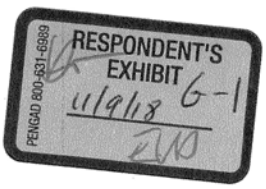


Exhibit S

260 Cayuta Street

Corning, New York

January 1, 2012

Dear Dirk,

This is the letter with information regarding the power of attorney to amend along with health care proxy.

Soph has decided to have Ellen Maria Kreopolides as the second agent, address 27 Dunedin Road, Wellesley Hills, MA 02481. The agents may NOT act separately. She wants to have the Chemung Canal as the monitor. We will hand write that information in those blanks found on pages 1 and 3 of 6. James has already signed and notarized the document December 19, 2011. Ellen needs to have (o) Agent's Signature and Acknowledgement of Appointment added to the document. I have typed what you have for James with the name changed. We plan to have it notarized January 2, 2012, attaching it to the six pages you sent her. We know this is an important legal document to be included in this letter for your inspection and any changes necessary.

For the Health Care Proxy Soph wants you to write the document rather than provide a standard fill in the blank form hospitals, medical facilities or the internet have available. Keeping it simple, though the standard form asks for one, she is assigning two agents to act on her behalf together. The medical facility must notify both James and Ellen at the same time when Soph is taken to any medical facility, hospital, or place where she is given beyond the normal health care. Health care decisions are very limited. Any person in the facility or any other person connected with her health care who discusses information and/ or possible health care decisions with only one of the agents can be held liable because they are not allowed to have information or make any decisions independently. Conference calls can be done in the event either or both of the agents cannot be physically present. They have to be in agreement to follow her wishes. Spouses cannot be involved in any part of the information, discussions between agents and/ or final decisions. In the event they cannot agree within a reasonable time designated for her best care, the information and decision goes to an alternate, her grandson, Alexander Peter Kreopolides.

Soph wishes are that she be in charge of her information and possible decisions for her care before finalizing any decisions and can choose to discuss it with her agents together. Unless she is in life threatening situations, in a coma, with no hope of recovery, it is only then that she allows the agents to follow her wishes to have appropriate care as described in her living will. No release of any of her medical forms without her express consent.

Living will: NO LONG TERM CARE NURSING HOME, she is to remain living in her own home, no organ donations, transplants, artificial respiration when there is no hope of recovery. She is to be kept hydrated but not put on life sustaining treatment when there is no hope of recovery.

She wants to have the best care possible when she is mentally alert and will be in charge of it. Please let me know any other specifics and am letting you decide which belongs in the Health Care Proxy or the Living Will.

The last thing is whether to have a separate letter for the medical facility describing that they are liable discussing things with only one agent. I would like it sent early so it is on record while Soph is healthy. Is there a need for her to have a notarized statement on letter head stationery from her doctor stating that he finds her in sound mind and health at the time she is signing these papers?

Sincerely,

Sophie Dulce Kotsones Ellen Maria Kreopolides

Ellen Kreopolides and Soph Kotsones

Dirk, she may have signed previous Living Will, HIPA + Health Care Proxy that she did not dictate. So, included in the forms, should be that previous ones are invalid.

(o) **AGENT'S SIGNATURE AND ACKNOWLEDGEMENT OF APPOINTMENT**

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I, **ELLEN MARIA KREOPOLIDES,** have read the foregoing Power of Attorney. I am the person identified as second agent for the principal named therein.

I acknowledge my legal responsibilities.

Second agent sign here: _____

ELLEN MARIA KREOPOLIDES

STATE OF _____)
) ss:
COUNTY OF _____)

On the _____day of _____, 20_____, before me, the undersigned,

personally appeared **ELLEN MARIA KREOPOLIDES,** 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 she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____

Notary Public

1361

RESPONDENT'S EXHIBIT H-1 -
LETTER FROM ELLEN KREOPOLIDES TO DIRK GALBRAITH,
DATED JANUARY 2, 2012 [1361 - 1362]

Exhibit H-1

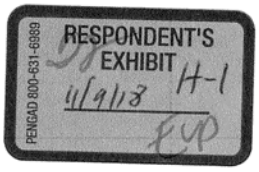


Exhibit 6

260 Cayuta Street

Corning, New York

January 2, 2012

Dear Dirk,

After typing Soph's wishes for her will, I am considering so "what-ifs" for your legal advice.

1. No debt on 44-48 West Market Street. James takes debt, loans, mortgages, and/ or liens on 44-48 West Market Street so the value of the property goes to his estate. This is not the intent of what Soph wants. I have listed some specifics but am unclear how it needs to be legally worded.

Basically, James is to have full use of the rents during his lifetime once he pays for the expenses, repairs, taxes and his own taxes for the profits...and whatever else you feel needs to be included. The property is to go to Alex free of any debt, all taxes paid and current, building in excellent condition. She wants James to keep the building maintained in continued good condition with repairs done as needed, expenses and taxes paid on time, kept current, and every attempt is made to keep the property continually rented. He can communicate at any time with Alex on decisions.

2. James dies before Soph, his portion goes to Alex. Soph can leave a letter of her wishes to Alex indicating what moneys may go the Christopher and Nathan Kotsones and at what age.
3. Ellen dies before Soph, her portion goes to Alex.
4. Ellen dies after Soph but before James, What I receive from Soph, goes to Alex. My will of May, 2011, states that anything inherited from Soph's estate goes only to Alex. At that time, I had no knowledge of her specific wishes for the dispersion of her estate. But, I have always been aware that she wanted nothing to go to either my husband or to James's wife. Since Alex is 24 years old, responsible, and aware of both Soph's and my desires, I was confident to have this in my will.

I may be reached by email at elliek76@verizon.net, cell phone of 617.645.0750, home phone 781.235.0043.

Also, with the other papers concerning her health, she only wants the agents to act on her behalf when she is in such poor health that she is not conscious or mentally alert, and unable to write. Any checks and papers she signs while under medical care must be monitored by Chemung Canal and they have the right to cancel any check they find is misappropriation of funds or redirected to any person(s) beyond prior approved documented expenses with receipts.

Thank you.

Sincerely, Ellen Kreopolides

Ellen Maria Kreopolides

1363

RESPONDENT'S EXHIBIT J-1 -
NOTE FROM ELLEN KREOPOLIDES TO DIRK GALBRAITH,
DATED JANUARY 2, 2012 [1363 - 1364]

Exhibit J-1

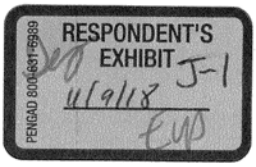


Exhibit 11

Ms. Sophie Kotsones

Dirk
This is important
hey - to get here soon.
can't sleep thinking -
about this situation
- - Soph -

jan 2, 2012

Dirk,

We found these papers. - Soph likes the Living Will.

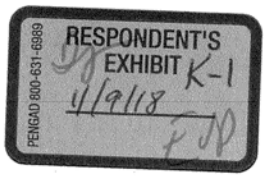
The rest need revisions and either my name or address is misspelled and the documents are not accurate,

Ellen Kreopolides

1365

RESPONDENT'S EXHIBIT K-1 -
PHONE NOTES FROM DIRK GALBRAITH, DATED JANUARY 3, 2012 [1365 - 1366]

Exhibit K-1



1366

Exhibit 12

TO DAG Call OR Email

Phone Message

M Ellen Kreopolides

of Wellsley MA

Phone 617-645-0750 Cell

☒ Telephoned	☐ Call him/her	☐ Returned your call
☐ Came in	☐ Will call you	☐

Message 781-235-0043 Home

RE: Sophie Kotsones

Ellen is Sophie's daughter. She has gone over everything with her mom. Sophie has sent you

By DH Date 11/3/12 Time 4:30 a.m. (p.m.)

TO info in the mail which

Phone Message

M you should be receiving

of tomorrow or Thurs.

Phone They did the papers

☒ Telephoned	☐ Call him/her	☐ Returned your call
☐ Came in	☐ Will call you	☐

Message together but the daughter is doing the legwork. (So you don't have to travel. She also said she'd like her mom to live in her home the remainder of her life.

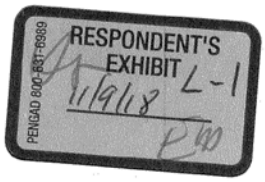
By DH Date 11/3/12 Time 4:30 a.m. (p.m.)

email: elliek76@verizon.net

1367

RESPONDENT'S EXHIBIT L-1 -
E-MAIL FROM ELLEN KREOPOLIDES TO DIRK GALBRAITH,
DATED JANUARY 5, 2012 [1367 - 1370]

Exhibit L-1



Jenelle Callaghan

From: "Ellen Kreopolides" <elliek76@verizon.net>
To: <dag@hgvmlaw.com>
Sent: Thursday, January 05, 2012 6:35 PM
Attach: Ellen's letter at home to Dirk Jan 2012.docx
Subject: Soph Kotsones details

Dear Dirk,

Attached is a letter drafted with thoughts on alternatives to explore for my mother's best interests.

Looking forward to working with you.

Sincerely,
Ellen Kreopolides

Exhibit 7

27 Dunedin Road
Wellesley Hills, MA 02481
January 5, 2012

Dirk Galbraith
Holmberg, Galbraith, Van Houten and Miler
200 East Buffalo Street, Suite 502
Ithaca, NY 14851

Dear Dirk,

It was an eventful eye-opening five days that I spent with my mom, Soph Kotsones. She let me review the documents made by George Welch with my brother, James Kotsones, where I elaborated the several shortcomings and potential problems concerning her dispersion of property upon her death, her being put into a nursing home against her will while she is in no need of one, and the probable collusion between George Welch and James Kotsones with how all these documents have been written. Several people in her community have expressed concern and it is our desire to keep Soph in the best of circumstances for her.

In examining the what-ifs, and what Soph has indicated for her will, I would like to explore other options that she may consider. It is her belief that she owns her buildings and home until her death. By giving them to specific people, she thinks that having money aside in her bank account for inheritance taxes is the only way she can have control over the buildings with their expenses and profit. It is my understanding that this particular method is the most expensive and I would like to consider other options so that the inheritance taxes are the most minimal as possible. I would like to see the money that she has set aside for inheritance taxes being used by her while she is alive for however she wishes in order to live comfortably rather than being kept aside for taxes that could be avoided. I was surprised to learn how she wanted the buildings given to Alexander after James's death. Yet, there is the possibility that my brother will misuse the three storefronts he is to be given so that they will return in disrepair and debt. Also in the event that Soph becomes ill so that the power of attorney is in place, there is probable concern that the bills will not be paid because both agents cannot act separately. So I am thinking of the second alternative where SPK Real Estate be sold to APK Capital for a modest amount of money with the rest of the current market value be given as a gift. In the wording of the sale would be that all remains the same for SPK Real Estate until she is no longer able to manage and then APK Capital would take over managing the properties. APK Capital is a company that my son Alex started in the spring, 2011, to manage properties we own in Massachusetts. We can discuss this at further length but my feeling currently is that all the what-if's may be contained in the sale, thus eliminating an extensive amount of

potential problems and give Soph a simple will. George Welch or any other lawyer is not to be notified about any of these transactions as per her wishes directly, repeated to me several times over this past weekend.

In thinking about the two health documents remaining, H I PA is really only supposed to be one person and that would be me with Alexander as the alternate. For the Health Care Proxy, it should be joint for James and Ellen with Alexander as the alternate.

It is my desire for things to be peaceful among family members. But, at the present time this is not case. My brother has not nicely communicated with me since his wedding ceremony in 1978. After that time it was my calling him mostly at very limited times, seeing him at two funerals, one baptism, and reading two letters he recently sent to my mother that try to discredit me as a human being. It is painful but in 2001 after yet the fourth abusive phone discussion I could see the reality of the abuse, that I no longer needed to try to communicate kindly with my brother. At that point in time he indicated to my mother that she was never to talk about him again to me. I have never met his children and I was told I was unwelcome to visit his home in Michigan and I have no idea of what he does, where he lives, what his lifestyle is like except by reading the documents disclosed to me this past weekend. My mother and I began to reestablish a friendly relationship in the spring, 2011, and it has been a joyful experience. I am very grateful because it has allowed me to intervene on her behalf before something tragic happens to her. I would love to have at least the beginnings of these documents drafted so that hopefully when I visit her on January 18 to meet with the moderator of the power of attorney who is Chemung Canal that we can solidify some of these documents.

I do have several legal and healthcare advisors in Massachusetts who have indicated a willingness to give me information so that the final documents can be in the best interest of my mother keeping her safe and her property secure.

Thank you very much for your willingness to help us in the situation.

Sincerely,
Ellen Kreopolides