

**Court of Appeals**  
of the  
**State of New York**

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

*Deceased.*

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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.*

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**OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

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COURT OF APPEALS  
OF THE STATE OF NEW YORK

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In the Matter of the Probate Proceeding of the  
Estate of

SOPHIE PETER KOTSONES  
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Fourth Department Docket  
No.  
CA 19-01048

Surrogate File No.  
45107/15

JAMES KOTSONES,  
*Petitioner-Respondent-Movant,*

Surrogate File No.  
45107/15/E

-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.*

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**AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO  
THE COURT OF APPEALS**

I, Anthony N. Elia III, an attorney duly admitted to practice law in the courts of  
the State of New York, and not a party to the above entitled cause, affirm the following  
under the penalties of perjury pursuant to CPLR 2106:

1. I represent Ellen Kreopolides and I submit this Affirmation in opposition to the motion for leave to appeal.

THERE IS NO BASIS TO FIND ELLEN OR ALEX HAD A CONFIDENTIAL RELATIONSHIP WITH DECEDENT

2. James Kotsones asserts that Ellen and Alex had a confidential relationship with the Sophie Kotsones (“Decedent”) because: 1) Ellen had a power of attorney; 2) Decedent’s trust required Ellen’s approval of real estate transactions; 3) Ellen took over bookkeeping; 4) Ellen used the power of attorney to withdraw money from Decedent’s account. The Surrogate cited different facts: 1) Ellen had a power of attorney; 2) Ellen had a joint bank account with Decedent; 3) Ellen assisted in financial decisions; 4) Ellen assisted in medical decisions; 5) Ellen was a trustee of the Decedent’s trust; and, 6) Ellen “was not content to share a power of attorney with her brother.”

3. As set forth below, none of these reasons is sufficient to shift the burden of proof to Ellen or Alex.

4. The Power of attorney. The Will and Trust were signed by Decedent, not by a power of attorney. Decedent had executed a power of attorney in Ellen’s favor on January 11, 2011 but Ellen did not use it until July 24, 2014 – long after the Will and Trust were signed. Moreover, the power of attorney did not grant Ellen power for real estate or estate matters. The Fourth Department has held that the mere existence of a power of attorney does not by

itself constitute a basis to shift the burden. (*Matter of Lee*, 107 AD3d 1382, 1383-1384 [4th Dept 2013].)

5. The Joint Bank Account. A joint bank account does not create a fiduciary duty. *See, Mullen v. Linnane*, 218 A.D.2d. 50, 636 N.Y.S.2d 783 [First Dept. 1996].

6. Medical Decisions. There was no evidence that Ellen assisted Decedent with medical decisions until 2014 - years after the Will and Trust were signed. Decedent mailed letters to Ellen in Massachusetts in March 2014 – proving Ellen did not live with Decedent.

7. Ellen's position as Trustee. Ellen was a successor trustee and did not become a trustee until decedent's passing.

8. Trust provision requiring Ellen's Approval of Transactions. The Trust required that Ellen approve certain real estate transactions by the Trust but that power came about only when the Will and Trust were signed. Any such power cannot be retroactively applied to shift the burden to the proponent in the signing of the Will and Trust.

9. "Ellen was not content to share a power of attorney with her brother." The Surrogate cited Ellen's unwillingness to share a power of attorney with James, as a basis to shift the burden to Ellen. Even if the record

demonstrated that Ellen disapproved of a two-agent power of attorney (which it does not) it should not be a basis to shift the burden of proof to Ellen.

10. Ellen Assisted in Financial Decisions. There is no evidence that any of the assistance was other than that appropriate between a daughter and a mother.

11. Ellen took over bookkeeping. Decedent did her own bookkeeping in long hand ledgers through the year 2013 – which were admitted into evidence. The Will and Trust were signed on December 5, 2012.

12. Ellen's use of Decedent's bank accounts. Ellen did use the power of attorney to reimburse herself for certain expenses she incurred in traveling and assisting Decedent with the buildings (which Ellen testified were authorized). The first such use of the power of attorney, however, was in 2014 -long after the Will and Trust were signed.

13. At the time the Will and Trust were signed on December 5, 2012, Decedent: lived alone; drove her car; exercised regularly at the YMCA; kept the books for her commercial real estate; directed her handyman; paid bills; regularly communicated with her banker about her accounts; collected rents and managed tenants. The capacity claim had been dismissed. There was no indication in the record that Decedent was under any disability or impairment at all. Witnesses testified that she maintained her mental capacity through the end.

14. Decedent executed three wills in 2012 (January, March and December) which were prepared by Attorney Galbraith. Attorney Galbraith was not an attorney selected and controlled by anyone other than Decedent. Attorney Galbraith had defended Decedent in a will challenge three decades earlier. Decedent hired Attorney Galbraith to draft a will for her in the 1990s and also contacted him in 2009 about her right to leave a nursing home / rehab facility that she felt her son James had forced her into (Attorney Galbraith told her she was free to leave, so she did).

15. Under these facts, the Appellate Division did not find “circumstances that demonstrate inequality or a controlling influence” sufficient to find a confidential relationship. *Nurse v. Dacres (In re Nurse)*, 160 A.D.3d 745, 75 N.Y.S.3d 545 (N.Y. App. Div. 2018); *In re Estate of Nealon*, 104 A.D.3d 1088, 962 N.Y.S.2d 481, 2013 N.Y. Slip Op. 2121 (N.Y. App. Div. 2013); *Affrmd.*, 22 N.Y.3d 1045, 981 N.Y.S.2d 353, (N.Y. 2014).

16. During the oral argument at the Appellate Division, one Justice asked movant at what point in time was the Ellen’s control over Decedent was ‘complete.’ The answer I recall was ‘by early 2012.’ Decedent signed three similar wills in 2012 (all favoring Ellen) and transferred the real estate to Alex in early 2015. James favored a 2009 will and thus contended that his mother was

subject to undue influence for years – during which she lived independently and managed all her own affairs.

#### JAMES' FOUR BEST DOCUMENTS

17. James attaches his four best documents as exhibits to his motion for leave to appeal:

- Two letters dictated by Decedent and typed by Ellen sent to Attorney Galbraith [R1352-1355 and 1358-1359] dated January 1, 2012 with instructions for a new will and health care proxy. The letters are signed by Decedent and Ellen. The uncontradicted evidence is that Decedent's signatures are authentic. Attorney Galbraith testified that he confirmed all directions personally with his client.
- Two letters from just Ellen to Galbraith dated January 2<sup>nd</sup> [1362] and January 5<sup>th</sup>, 2012 [1369] in which Ellen tries to assist Attorney Galbraith with her mother's estate plan: "After typing Soph's wishes for her will, I am considering so [sic] "what-ifs" for your legal advice" and "thoughts on alternatives to explore for my mother's best interests."


18. The letters simply do not contain anything that suggests improper influence or misleading information. Decedent was fully independent. She had her own counsel who "testified that he never prepared a document that decedent did not personally authorize. . ."

19. Decedent executed three wills after the letters (January 2012, March 2012 and he subject Will and Trust in December 2012).

20. Given that the letters were James' best evidence, the Appellate Division correctly held that James did not prove that Decedent was subject to undue influence from early 2012 until her death in July 2015.

WHEREFORE, Ellen respectfully requests that this Court deny 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: Ithaca, New York  
September 10, 2020

  
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