WBASNY

The Women's Bar Association of the State of New York

presents

Convention 2024
Continuing Legal Education Series

Ageism, Elder Abuse and Financial Exploitation During COVID and Beyond

May 31, 2024
2:00 pm - 3:30 pm

Presenters: Hon. Deborah A. Kaplan
Joan Levenson, Esq.

New York Official Reports

202 A.D.3d 1418, 163 N.Y.S.3d 691, 2022 N.Y. Slip Op. 01220

**1 In the Matter of the Estate of Virginia A. Mary, Deceased. Tina M. Kilkeary, as Executor of the Estate of Virginia A. Mary, Deceased, Respondent; Raymond L. Mary Jr., Appellant.

Supreme Court, Appellate Division, Third Department, New York
532934
February 24, 2022

CITE TITLE AS: Matter of Mary

*1419 HEADNOTE

Wills
Probate
Undue Influence by Son Established

Niles & Bracy, PLLC, Plattsburgh (Evan F. Bracy of counsel), for appellant.
Law Offices of Stephen A. Johnston, Plattsburgh (Stephen A. Johnston of counsel), for respondent.

Garry, P.J. Appeal from an order of the Surrogate's Court of Clinton County (Wait, S.), entered August 6, 2020, which, among other things, denied respondent's application for a decree admitting to probate an instrument purporting to be the last will and testament of decedent.

In March 2008, Virginia A. Mary (hereinafter decedent) purportedly executed a will in which she bequeathed all her property and assets, in equal shares, to her three children: petitioner, respondent and their sister (hereinafter the third sibling). In March 2018, decedent executed a new will, leaving her financial accounts to her three children in equal shares but leaving her home and its contents to respondent and his wife. Following decedent's death, petitioner sought to admit a copy of the 2008 will to probate, asserting that the original could not be located. Respondent objected and sought a decree admitting the 2018 will to probate. Following a bench trial, Surrogate's Court determined that decedent possessed testamentary capacity to execute the 2018 will but denied respondent's objections and his request to admit that will to probate, concluding that the 2018 will was the result of undue influence. The court also declined to admit a copy of the 2008 will to probate. Respondent appeals.

In reviewing a determination rendered after a nonjury trial, "this Court independently assesses the weight of the evidence and grants judgment warranted by the record, giving due deference to the trial court's determinations of witness credibility unless such findings are contrary to a fair interpretation of the evidence" (*Mazza v Fleet Bank*, 16 AD3d 761, 762 [2005]; *see Matter of Jewett*, 145 AD3d 1114, 1116 [2016]). A party claiming undue influence bears the burden of showing " 'that the influencing party's actions are so pervasive that the will is actually that of the influencer, not that of the decedent' " (*Matter of Prevratil*, 121 AD3d 137, 142 [2014], quoting *Matter of Malone*, 46 AD3d 975, 977 [2007]). "Undue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon 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 Burke*, 82 AD2d 260, 269 [1981]; *accord Matter of Collins*, 124 AD2d 48, 53 [1987]). For influence in creating a will to be considered undue, "[i]t must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind *1420 acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Matter of Walther*, 6 NY2d 49, 53-54 [1959] [internal quotation marks and citations omitted]). **2 "Although undue influence may be proven through circumstantial evidence, such evidence must be 'of a substantial nature' " (*Matter of Prevratil*, 121 AD3d at 142, quoting *Matter of Walther*, 6 NY2d at 54). Where the circumstantial evidence would support conflicting inferences that the will was executed based on either undue influence or the decedent's own volition, a conclusion of undue influence cannot reasonably be drawn (*see Matter of Walther*, 6 NY2d at 54; *Matter of Malone*, 46 AD3d at 978).

"Where there is a confidential relationship between parties to a transaction, . . . the burden shifts to the stronger party in such a relationship to prove by clear and convincing evidence that a transaction from which he or she benefitted

was not occasioned by undue influence" (*Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125 [2014] [internal quotation marks, brackets and citations omitted]; *accord Matter of Giaquinto*, 164 AD3d 1527, 1530 [2018], *affd* 32 NY3d 1180 [2019]; *see Matter of Connelly*, 193 AD2d 602, 603 [1993], *lv denied* 82 NY2d 656 [1993]). "Although close family ties may negate the presumption of undue influence that would otherwise arise from a confidential or fiduciary relationship," a factfinder could still decide that the stronger party "acted not out of family duty," but rather out of greed (*Matter of Antoinette*, 238 AD2d 762, 764 [1997]; *see Matter of Giaquinto*, 164 AD3d at 1532).

The third sibling lived in Maine but visited decedent several times each year. Petitioner cleaned decedent's house every weekend and arranged and transported decedent to all her medical appointments. Petitioner handled decedent's finances for 40 years, including balancing decedent's bank accounts and writing checks to pay bills. Respondent lived next door to decedent and would spend time at her house each day to check on her and make sure that she had regular meals. Thus, decedent depended on petitioner and respondent, each of whom provided increased care for her during her final months.

In the four months prior to the execution of her 2018 will, decedent was in declining physical and mental health, including a potential diagnosis of dementia, and spent half that time in medical facilities. During that time, respondent contacted an attorney to draft a new will for decedent and conveyed a sense of urgency. All correspondence with the attorney's office ***1421** regarding the will was channeled through respondent, who was present throughout the initial meeting and the execution of the will. Although the 2008 will divided decedent's assets equally among her children, the 2018 will differed from that testamentary plan by bequeathing the house and its contents to respondent and his wife. Petitioner, who had power of attorney and handled decedent's financial matters, was not informed regarding the new will until after its execution. When petitioner was made aware of the new will by decedent a few days afterward and read it to decedent, decedent stated that she ****3** did not understand and disputed the contents of the will; when respondent confirmed the meaning of the 2018 will, decedent stated immediately, and a few times thereafter, that "[w]e've got to fix this." Petitioner did not attempt to obtain another will because she questioned decedent's capacity to execute one.

Bank records show that, the day after the 2018 will was executed, someone withdrew a large amount of money from decedent's joint bank account with petitioner. Petitioner denied having made that withdrawal. The record indicates that decedent had not driven in years and, during that time period, she left the house only for medical appointments. The same day as the withdrawal, an equal amount was placed into a certificate of deposit (hereinafter CD) that listed all three children as beneficiaries, the same as decedent's other CDs. Bank records reflect that, a few weeks later, the third sibling's name was removed from the beneficiary designations on decedent's two largest CDs. Respondent testified that he brought decedent to the bank and she signed the CD documents; petitioner disputed that decedent would have left the house at that time. Petitioner testified that, when she discovered the change in CD beneficiaries and confronted respondent, he tried to convince petitioner that she had told him to make the change; petitioner disagreed and told respondent that they needed to add the third sibling back to the CD documents, but respondent repeatedly refused.

Accepting Surrogate's Court's credibility determinations, as it had the advantage of seeing the witnesses and hearing the testimony, the circumstantial proof was substantial and supports the inference of undue influence by respondent. "No single circumstance is dispositive in this regard; rather, it is the confluence of many factors," including the nature of decedent's interactions with both petitioner and respondent, decedent's lack of involvement in her own financial matters at the relevant time and the abrupt and otherwise unexplained change in ***1422** decedent, culminating in the alteration of her long-standing testamentary disposition shortly after respondent and his wife were observed to take more of an interest in decedent's day-to-day affairs (*Matter of Antoinette*, 238 AD2d at 763). The record showed decedent's own apparent uncertainty and lack of understanding regarding some of the terms of the 2018 will that she purportedly sought to effect with respondent's assistance, suggesting that the 2018 will did not truly reflect decedent's independent testamentary intentions. Evidence of undue influence is further supported by the fact that respondent made all arrangements for the 2018 will, in relative secrecy, and was present at both the initial meeting with the attorney and the execution of the 2018 will (*see Matter of Paigo*, 53 AD3d 836, 840 [2008]; *see also Matter of Collins*, 124 AD2d at 55; *compare Matter of Ruhle*, 173 AD3d 1389, 1391 [2019]; *Matter of Malone*, 46 AD3d at 977).

Moreover, **4 shortly after execution of the 2018 will and directly contrary to its testamentary plan—to divide the financial accounts equally among the three children—respondent acted in secrecy to effectuate changes to decedent's financial accounts without including or informing petitioner, who was generally responsible for handling decedent's financial matters. Placing money from decedent's joint account with petitioner into a CD listing all three children as beneficiaries, and removing the third sibling as a beneficiary from two other large CDs, inured to respondent's financial benefit, as did the provision in the 2018 will leaving the house to him and his wife. As noted by Surrogate's Court, "the undisputed facts reveal a distinct pattern" of respondent not acting in decedent's best interest but simply engaging in self-dealing (*see Matter of Rosen*, 296 AD2d 504, 505-506 [2002]; *compare Matter of Zirinsky*, 43 AD3d 946, 948 [2007], *lv denied* 9 NY3d 815 [2007]). Considering the evidence and his confidential relationship with decedent, respondent bore, but failed to overcome, the burden of proving a lack of undue influence (*see Matter of Giaquinto*, 164 AD3d at 1530; *Matter of Boatwright*, 114 AD3d 856, 859 [2014]; *Matter of Mazak [Nauholnyk]*, 288 AD2d 682, 684 [2001]; *Matter of Connelly*, 193 AD2d at 603). We find no error in Surrogate's Court's conclusions that the evidence does not support conflicting inferences and that the 2018 will was the result of undue influence by respondent. Under the circumstances, respondent's close family relationship to decedent did not negate the presumption of undue influence, as his actions were consistent with a motive of greed, rather than family duty (*see Matter of Boatwright*, 114 AD3d at 859; *see also Matter of Antoinette*, 238 AD2d at 764; *compare Jacks v D'Ambrosio*, 69 AD3d 574, 575 [2010]).

**1423 Clark, Aarons and Colangelo, JJ., concur. Ordered that the order is affirmed, with costs.

57 A.D.3d 1325, 870 N.Y.S.2d 578, 2008 N.Y. Slip Op. 10238

****1** In the Matter of the Estate of Muriel M. Nealon, Deceased. Christopher J. Nealon, as Executor of Muriel M. Nealon, Deceased, Appellant; Peter J. Nealon et al., Respondents.

Supreme Court, Appellate Division, Third Department, New York
December 31, 2008

CITE TITLE AS: Matter of Nealon

HEADNOTE

Executors and Administrators
Discovery of Property

In proceeding brought by petitioner executor in order to determine legitimacy of certain disbursements to respondents from decedent's bank accounts prior to her death, Surrogate's Court did not err in dismissing claim premised upon decedent's alleged incapacity—while there was some proof that decedent had diminished competency during relevant time period, there was lack of proof concerning decedent's capacity at time of transactions at issue—with respect to claim alleging undue influence, factual issues precluded summary judgment; witnesses testified as to decedent's increasing confusion during relevant period; after decedent moved in with respondents, respondents began spending money on things beyond their means; respondents were vague or unresponsive when questioned about many of withdrawals or transactions at issue; petitioner testified that when he met with respondent about missing money, respondent "indicated he would make restitution" and stated that he "basically took [his] inheritance early"; during his deposition testimony, respondent stated that he was willing to renounce his right to inherit one third of decedent's estate.

Nicholas E. Tishler, Niskayuna, for appellant.
O'Connell & Aronowitz, Albany (Kevin P. Hickey of counsel), for respondents.

Cardona, P.J. Appeal from an order of the Surrogate's Court of Schenectady County (Kramer, S.), entered September 18, 2006, which, in a proceeding pursuant to SCPA 2103, granted respondents' motion for summary judgment dismissing the petition. ***1326**

Petitioner, the executor of the estate of his late mother (hereinafter decedent), commenced this proceeding pursuant to SCPA 2103 against one of his two brothers, respondent Peter J. Nealon (hereinafter respondent), and respondent's wife in order to, among other things, determine the legitimacy of certain disbursements to respondents from decedent's bank accounts prior to her death and, if necessary, recover them for the estate. The record shows that, following her husband's death in May 2001, decedent lived by herself until September 2002 when she moved into respondents' home after being diagnosed with the beginning stages of dementia of the Alzheimer's type. It appears this decision was prompted by decedent's increasing difficulties with forgetfulness or confusion which, according to her physician, would "wax and wane" from day to day. Shortly after decedent moved in, respondents initiated construction of an addition to their home, which included a large master bedroom suite for themselves as well as a bedroom and handicapped-accessible bathroom for decedent on the ground floor. The addition was ****2** completed in approximately May 2003. During that period and afterwards, decedent's condition grew progressively worse. After a bout with a sepsis infection requiring a hospital stay in February 2004, decedent spent a period of time in a nursing home before she returned to respondents' home, where she passed away in May 2004.

Shortly before decedent's death, petitioner began making inquiries about the whereabouts of money that had been withdrawn from decedent's bank accounts, principally through checks made out to respondents, along with automatic teller machine transactions, which were all disbursed during the period of time that she lived with them. [1] Dissatisfied with respondents' responses, petitioner commenced this proceeding in January 2005 asserting two causes of action: the first claiming that decedent suffered from diminished mental capacity at the time of the subject transactions and the second containing allegations sounding in undue influence. Respondents main ***1327** tained that, until she became incapacitated shortly before her death,

decedent had voluntarily signed all checks and approved all withdrawals from the accounts for expenditures such as assisting respondents with the cost of the addition to their home, their taxes and monthly bills, various gifts and helping to pay for respondents' wedding. Following discovery, respondents moved for summary judgment dismissing the petition. Surrogate's Court granted the motion, prompting this appeal.

Initially, petitioner argues that Surrogate's Court erred in dismissing his claim premised upon decedent's alleged incapacity. A person's competency to engage in a transaction is presumed and the party challenging such bears the burden of proving incompetence (*see Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1284-1285 [2007]). Additionally, a diagnosis of progressive dementia, standing alone, does not create a triable issue of fact as to mental capacity (*see Matter of Friedman*, 26 AD3d 723, 725 [2006], *lv denied* 7 NY3d 711 [2006]). Instead, it must be demonstrated that the individual was incompetent at the specific time of the challenged transaction, i.e., he or she was "so affected as to render him [or her] wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (*Feiden v Feiden*, 151 AD2d 889, 890 [1989] [internal quotation marks and citation omitted]).

Here, while petitioner did provide some proof supporting his claim that decedent had diminished competency during the relevant time period, we agree with Surrogate's Court that the evidence was insufficient to withstand summary judgment given the lack of proof in the record concerning decedent's capacity at the time of the *specific* money transactions at issue herein. Notably, while decedent's physician, Robert Donahue, testified as to decedent's progressive ****3** deterioration, he also clearly stated that individuals with decedent's condition would have lucid moments and waning moments; therefore, the fact that she lacked capacity on one day would not mean that she could not be considered competent on the next. Consequently, in light of the failure to show proof rebutting the presumption in favor of competency, Surrogate's Court did not err in dismissing the diminished mental capacity cause of action.

Turning to the claim alleging undue influence, however, we reach a different result and conclude that factual issues preclude summary judgment (*see Matter of Johnson*, 6 AD3d 859, 861 [2004]).[2] Here, petitioner and other witnesses testified as to decedent's increasing confusion during the relevant period and ***1328** her susceptibility to verbal suggestion, a situation supported by Donahue's testimony. Prior to moving in with respondents, the record indicates that decedent treated her three sons equally and was very independent and frugal with her money, always living below her means. After the move, however, she became almost completely dependent on respondents, who took over decedent's finances, healthcare and personal needs. At that time, according to some witnesses, respondents began spending money on things allegedly beyond their means, such as jewelry, vacations and other outings, as well as the addition to their home.

Notably, respondents were vague or unresponsive when questioned about many of the specific withdrawals or transactions at issue herein. While respondents maintain that decedent wanted to contribute her "portion" or "share" of the cost of the addition that added her bedroom and bathroom to the home, at no point did respondents claim that decedent said she would pay for it in its entirety as a gift to them. Nor did respondents provide an explanation as to what part of the total cost of the project constituted decedent's "share." In fact, although questioned under oath, respondent did not provide a figure as to the total cost of the addition, although at various times he mentioned estimates between $60,000 and $85,000. When asked about numerous large withdrawals from decedent's accounts after the addition was completed, respondent had no explanation.

Significantly, petitioner testified that, in March 2004, when he met with respondent about the missing money, respondent "indicated he would make restitution." According to petitioner, respondent made no mention of receiving gifts from decedent and, instead, told him that he "basically took [his] inheritance early" and "deserved this money because he was treated as a second-class citizen" in the family. During his deposition testimony, respondent acknowledged meeting with petitioner and indicating to him that, since he could not "account for" $70,000 of their mother's money, he was willing to renounce his right to inherit one third of decedent's estate. Since we conclude that direct and circumstantial proof in the record (*see Matter of Paigo*, 53 AD3d 836, 839-840 [2008]) raised triable issues of fact regarding the allegations of undue influence, summary judgment was inappropriate on this cause of action (*see Matter of Johnson*, 6 AD3d at 861). ****4** ***1329**

The remaining issues raised by petitioner are either unpersuasive or unnecessary to reach given the above disposition.

Peters, Carpinello, Kavanagh and Stein, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as granted respondents' motion for summary judgment dismissing the undue influence cause of action; motion denied to that extent; and, as so modified, affirmed.

FOOTNOTES

Footnotes

1 Notably, at the time she began residing with respondents, decedent's Charter One Bank account had a balance of approximately $92,000, with no withdrawals made in the preceding two-year period and only interest payments deposited. Decedent's Key Bank checking account had a balance of approximately $14,800 at that time, and her records demonstrate that approximately $2,400 in pension and Social Security payments were directly deposited into that account every month. Between November 2002 and March 2004, approximately $92,600 was withdrawn from the Charter One Bank account, leaving a balance of approximately $64. Furthermore, at the time of decedent's death, there was less than $2,000 left in her Key Bank checking account.

2 We note, however, our disagreement with petitioner's contention that respondents must be held to a higher level of conduct commensurate with that imposed on attorneys-in-fact. While the record indicates that a document granting respondents power of attorney was executed in February 2003, there is no proof disputing respondents' testimony that said power of attorney was never used until February 2004, well after the transactions of which petitioner complains.

296 A.D.2d 504, 747 N.Y.S.2d
99, 2002 N.Y. Slip Op. 05920

In the Matter of the Estate of Louis Rosen,
Deceased. Warren Silverman, Appellant;
Hyman Rosen et al., Respondents.

Second Department,
2000-09551, 3012/92
(July 15, 2002)

CITE TITLE AS: Matter of Rosen

HEADNOTE

WILLS
PROBATE
Undue Influence

(1) Determination that will was product of undue influence was not against weight of evidence --- in view of facts and circumstances, particularly decedent's weakened physical condition and personality changes at time will was executed, and control decedent's sister had assumed over his finances, there was sufficient evidence to establish that will was result of "subtle, but pervasive, form of coercion and influence, by which [sister] overwhelmed and manipulated decedent's volition to advance her own interests" --- Surrogate properly considered events which occurred after execution of will as relevant in determining issue of undue influence; there was sufficient evidence not only that sister had motive and opportunity to exercise undue influence, but that such influence was actually utilized.

In a contested probate proceeding, the proponent appeals from a decree of the Surrogate's Court, Kings County (Feinberg, S.), dated September 14, 2000, which, after a nonjury trial, denied probate of the purported will.

Ordered that the decree is affirmed, with costs payable by the proponent personally.

The decedent, Louis Rosen, a retired New York City Transit Authority employee, was an active and successful investor, and he left an estate valued at approximately $7,000,000. He never married and had no children. In a will executed in October 1988, the decedent left his residuary estate in equal shares to his sister Miriam Silverman (hereinafter Miriam), his brotherHyman ***505** Rosen (hereinafter Hyman), the two children of his deceased brother Irving Rosen, and Miriam's three children (hereinafter Warren, Karen, and Richard). The will revoked a 1986 will which had included, as equal residuary beneficiaries, the two children of his deceased brother Nathan (hereinafter Ronald and Shelly) and which had named Ronald as executor. In the 1986 will, Karen had received only a $100 bequest.

Miriam was named executor in the 1988 will, but she died in 1991. The decedent died in 1992 at age 87. Warren, the successor executor, offered the 1988 will for probate, and Hyman, Ronald, and Shelly filed objections. Following a nine-day nonjury trial, the Surrogate denied probate of the will on the grounds that the will was the product of undue influence exerted by Miriam and that the decedent lacked testamentary capacity.

The determination by the Surrogate that the 1988 will was the product of undue influence was not against the weight of the evidence. Undue influence "can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the conditions 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" (*Matter of Anna,* 248 NY 421, 424 [internal quotation marks omitted]; *see also* *Matter of Bach,* 133 AD2d 455; *Matter of Collins,* 124 AD2d 48).

The evidence credited by the Surrogate established that Miriam exerted control over the decedent's finances in the spring of 1988, which was about the same time that other witnesses observed that the decedent, who previously lived very independently and took an avid interest in his investments, began to show personality changes. His personal hygiene declined, his apartment was in disarray and smelled of urine, and his financial records were uncharacteristically in disorder. Also in May 1988, the decedent opened at least one new bank account for which Miriam had the authority to sign checks. Miriam thereafter wrote checks, which the decedent

signed, transferring several hundred thousand dollars from his bank accounts into this new account and another account. Miriam subsequently wrote checks to her children from the funds in these accounts, totaling approximately $10,000 each, allegedly based on tax advice from the decedent's accountant and bank manager. However, the Surrogate concluded that such advice was never given. Although the decedent had retained his personal friend and attorney, David Susser, to draft his previous ***506** three wills, his 1988 will was drafted by a new attorney recommended by Miriam's husband.

Between May 1988 and January 1989, the decedent became severely malnourished and, in effect, was on a starvation diet. This malnourishment would be a cause of the decedent's disorientation, which was noted in a medical examination in January 1989. There was expert testimony that the decedent's medical records supported a diagnosis of progressive dementia in early 1989, which would explain the personality changes observed in the spring of 1988. The decedent was hospitalized in early 1992, where he was diagnosed with advanced dementia, and a conservator was appointed shortly before his death in 1992.

The evidence established that Miriam's daughter Karen had virtually no relationship with the decedent, and while she was bequeathed only $100 under the 1986 will, she became an equal residuary beneficiary under the 1988 will. Of his siblings, the decedent maintained the most contact with his brother Nathan, who died in 1986. However, Nathan's children, Ronald and Shelly, who were named as equal residuary beneficiaries under the decedent's previous wills, were omitted as residual beneficiaries under the 1988 will.

Considering these facts and circumstances, particularly the decedent's weakened physical condition and personality changes at the time the will was executed, and the control Miriam had assumed over his finances, there was sufficient evidence to establish that the 1988 will was the result of "a subtle, but pervasive, form of coercion and influence, by which [Miriam] overwhelmed and manipulated decedent's volition to advance her own interests" (*Matter of Antoinette,* 238 AD2d 762, 763; *see also Matter of Itta,* 225 AD2d 548).

Finally, the Surrogate properly considered events which occurred after the execution of the will as relevant in determining the issue of undue influence (*see Matter of Steinhardt,* 228 AD2d 685). Before Miriam's involvement in his financial affairs, the decedent had given only small gifts to his relations. In addition to the large outright gifts to her children which Miriam made from the decedent's accounts, in January 1990, the decedent set up a joint account with right of survivorship in Miriam's three children to which he transferred approximately $1.5 million from his other accounts. Thus, as the Surrogate found, there was sufficient evidence not only that Miriam had a motive and opportunity to exercise undue influence, but that such influence was actually utilized (*see Matter of Walther,* 6 NY2d 49, 55; *Matter of D'Agostino,* 284 AD2d 857, 861). ***507**

In light of our determination that the Surrogate properly denied probate of the 1988 will on the ground of undue influence, we need not address the issue of whether the decedent lacked testamentary capacity. We have considered appellant's remaining contentions and find them to be without merit.

Feuerstein, J.P., S. Miller, O'Brien and Cozier, JJ., concur.

New York Official Reports

Unreported Disposition
79 Misc.3d 1230(A), 191 N.Y.S.3d 918 (Table), 2023 WL 4673602 (N.Y.Sup.), 2023 N.Y. Slip Op. 50750(U)

***1** In the Matter of John M., an Incapacitated Person.

Supreme Court, New York County
Index No. 500018/22
Decided on June 22, 2023

CITE TITLE AS: Matter of John M.

ABSTRACT

Incapacitated and Intellectually or Developmentally Disabled Persons
Guardian for Personal Needs or Property Management
Evidence demonstrated incapacitated person did not have capacity to enter into marriage

Marriage
Annulment
Evidence demonstrated incapacitated person did not have capacity to enter into marriage

John M., Matter of, 2023 NY Slip Op 50750(U). Incapacitated and Intellectually or Developmentally Disabled Persons—Guardian for Personal Needs or Property Management—Evidence demonstrated incapacitated person did not have capacity to enter into marriage. Marriage—Annulment—Evidence demonstrated incapacitated person did not have capacity to enter into marriage. (Sup Ct, NY County, June 22, 2023, Perry, J.)

OPINION OF THE COURT

Phaedra F. Perry, J.

Petitioner Rebecca L., Guardian of the Property of her father John M. (I.P. and/or John M.), seeks to annul the marriage between John M. and Helen E., alleging that John M. lacked the capacity to enter the marriage. In addition to the testimony of Rebecca L., Charles M. Barbuti, Esq., Guardian of the Person of John M. (Mr. Barbuti), and Helen E. taken at the annulment hearing on May 18, 2023 and continued on June 2, 2023 (Annulment Hearing), the Court having considered the following in reaching the instant Decision and Order:

CPLR 2219(a) Papers Considered:

1. Verified Petition dated May 14, 2022, for the appointment of a Guardian for John M., Filed May 19, 2022, New York County Clerk

2. Order to Show Cause issued May 26, 2022, for the appointment of a Guardian for John M.

3. Order issued May 26, 2022, appointing Charles Barbuti, Esq., as Temporary Guardian to John M.

4. Court Evaluator's Report dated July 15, 2022

5. Decision and Order dated July 22, 2022, Filed August 2, 2022, New York County Clerk

6. Transcript of the July 19, 2022, Guardianship hearing (NYSCEF Doc. No. 22)

7. Order and Judgment Appointing Guardian of the Person and Property dated September 9, 2022 (NYSCEF Doc. No. 3)

8. Order to Show Cause -- Action to Annul A Marriage (NYSCEF Doc. No. 28)

9. Verified Petition dated January 26, 2023, and Exhibits, including State of New Jersey Certificate of Marriage & NYS, City of New York, City Clerk, Marriage License (NYSCEF Doc. No. 19)

10. Sheila T. Murphy, Esq., Affidavit in Support of Order to Show Cause, dated January 31, 2023 (NYSCEF Doc. No. 20)

11. Affidavit of Personal Service of OSC and Petition upon Helen E. dated April 5, 2023, (NYSCEF Doc. No. 30)

12. Leo L. Rosales, Esq., Affirmation in Opposition to the OSC To Annul A Marriage, dated May 1, 2023 (NYSCEF Doc. No. 36)

13. Helen E. Affidavit in Opposition to the OSC To Annul A Marriage, dated May 1, 2023 (NYSCEF Doc. No. 36)

14. Sheila T. Murphy, Esq., Reply Affirmation/Order to Show Cause, dated May 11, 2023 (NYSCEF Doc. No. 40)

15. Todd A. Fishlin, Esq., Reply Affirmation, dated May 11, 2013 (NYSCEF Doc. No. 41)

16. Certified Copy of Marriage License Not to be Processed for John M. and Helen E., Petitioner's Ex. 1

17. Marriage License Appointment Confirmation email from the City Clerk's Office sent to John M. at jcmed42@gmail.com on November 29, 2021, Petitioner's Ex. 4

18. Text message conversations between Helen E. and John M.'s son David M., on December 15, 2021, and April 3-5, 2022, Helen E. Ex. 1

19. Three photographs of John M. and Helen E. together, Helen E. Ex. 2

20. Affirmation of Immigration Attorney Felix Vinluan, Esq., dated May 18, 2023, in connection with the following 3 Videos:

a. Video 1 of John M. at Felix Vinluan, Esq., office in connection to the Helen E.'s immigration application, Helen E. Ex. 3

b. Video 2 of John M. at Felix Vinluan, Esq., office in connection to the Helen E.'s immigration application, Helen E. Ex. 4

c. Video 3 of John M. at Felix Vinluan, Esq., office in connection to the Helen E.'s immigration application, Helen E. Ex. 5

21. Transcript of the May 12, 2023 Annulment Hearing

Background:

This Court is familiar with the background leading up to the instant annulment action due to having issued an Order to Show Cause on May 26, 2022, appointing Mr. Barbuti as personal needs guardian and Petitioner, Rebecca L., as guardian over the property of John M., and having conducted the underlying Mental Hygiene Law (MHL) Art. 81.11 hearing on July 19, 2022, which lead to the finding that John M. was an incapacitated person.

The Petitioner, Rebecca L., the daughter of John M., commenced the guardianship proceeding on May 19, 2022, alleging in her Verified Petition that John M. suffered from cognitive impairment and was unable to manage his activities of daily living. John M. has five children who reside in different states but maintain phone contact and in-person visits with him. Rebecca L. resides in Virginia.

Prior to the July 19, 2022, Guardianship Hearing, this Court appointed Mr. Barbuti as Temporary Guardian, Katherine Huang, Esq. as Court Evaluator (Ms. Huang), and Todd Fishlin, Esq. as the attorney for John M. (Mr. Fishlin).

At the Guardianship Hearing, John M. was present with his counsel Mr. Fishlin. In addition, John M.'s children Rebecca L., Sarah B., Charlie M., David M., Emmy V. and brother Jim M.; Henry D., friend of John M.; the Temporary Guardian, and the Court Evaluator were also present. Rebecca L., Jim M., Ms. Huang, Mr. Barbuti, and Helen E. testified. Although John M. did not testify at the hearing, the Court was able to observe him throughout.

The Petitioner testified that she noticed memory issues and received calls from family ***2** and friends beginning in 2019 alleging the same. In 2020, John M. moved to a senior living community, Evergreen Woods, in North Branford, Connecticut. He was diagnosed with mild cognitive impairment at the Adler Center in February 2021. A series of events, that included wandering away from Evergreen Woods, falling, locking himself out of his residence, getting lost while taking walks, and singing the French national anthem loudly at 9:00 p.m. at the door of a fellow resident led the facility to require a full-time aide for John M. to continue to reside at Evergreen Woods.

Sometime in September 2021, John M. moved back to his apartment in New York City. Several times, John M. left the stove on in the apartment. On one occasion the apartment filled with smoke and the fire department was called. With respect to his financial matters, John M. had stopped paying his Co-op maintenance, Con Edison, the internet/cable provider, and did not file his 2021 tax returns. In addition, he fell victim to a computer scam costing him $18,000.00.

Subsequent to John M. returning to his New York residence, the Petitioner and her family became aware of Helen E. whom John M. described as a "lady friend". She was the home health aide from Evergreen Woods assigned to John M., who began a romantic relationship with John M., and later moved into his residence. The family alleged, *inter alia,* that Helen E. began to isolate John M. from his family by not allowing John M. to answer the phone when they called, and telling John M. that his children were after his money. In addition, certain funds were unaccounted for in John M.'s bank account. The family also became aware that Helen E. had made several attempts to obtain a marriage license.

Notwithstanding the importance of the hearing, Helen E. appeared very late, without providing a reason, and right before this Court issued its on-the-record ruling. The Court asked Helen E. if she wished to address the Court regarding the guardianship proceeding, the allegations or any other matter of concern. Helen E. was sworn in and testified at length about John M.'s generosity but did not raise any concerns or ask any questions regarding the proceeding or any other matters. She stated:

> So I fell in love with John because we have the same qualities. And I marry him because we love each other faithfully and honestly. But they invalid [sic] our wedding. I don't know any reason. And then I marry him, because I went [sic] to see my parents.

My dad is dying now, so I want to go to my country.

Based on her representation at the Guardianship Hearing, it was not clear to this Court that she and John M. were married, and she did not mention anything about the marriage in New Jersey.

Thereafter, this Court made a finding and ruling on the record that John M. was an incapacitated person as defined by MHL § 81.01(b), based upon clear and convincing evidence that he was likely to suffer harm because he was unable to provide for his personal and property management needs and could not adequately understand and appreciate the nature and consequences of such inability.

This Court issued the Order and Judgment Appointing a Guardian of the Person and Guardian of the Property with Short Form Commission on September 9, 2022.

Thereafter, once Mr. Barbuti discovered a New Jersey marriage certificate, the instant proceeding to annul the marriage was filed.

Hearing and Discussion:

This Court began the annulment hearing on May 18, 2023 (Annulment Hearing), ***3** continued and concluded the hearing on June 2, 2023. The Verified Petition of Rebecca L. states "Ms. Helen E. a home health aide, has attempted on several occasions to marry my father. It now appears that she succeeded in marrying him on or about June 23, 2022."

Indeed, as demonstrated at the Annulment Hearing, as early as December 2021, Helen E. had an appointment with John M. at the Manhattan City Clerk's Office to obtain a marriage license. Petitioner's Ex. 1, May 3, 2022, Marriage License marked "Do Not Issue -- Not To Be Processed", reveals that when Helen E. and John M. went to the appointment, John M. did not have copies of his divorce decrees, so they were unable to obtain a license. Petitioner alleges that Helen E. took John M. to Boston, Massachusetts to obtain a copy of a divorce decree and made another appointment in New York City for a marriage license. That second application was denied as the clerk questioned John M. and deemed him not to be mentally competent. (Petitioner's Ex. 1.) A third application was made with the assistance of a third party and a license to marry was issued. (*Id.*) Petitioner testified at the Guardianship Hearing and alleged in the underlying petition that a marriage ceremony was held within John M.'s apartment on May 4, 2022. (*Id.*). Petitioner testified that she knew nothing about her father's wedding to Helen E. until after the fact. The issuance of a marriage certificate following this third marriage attempt was denied:

> DO NOT ISSUE
>
> NOT TO BE
>
> PROCESSED
>
> Couple surreptitiously obtained marriage license after two denials. Couple was able to unlawfully obtain marriage license with the assistance of third party. Groom was married two previous times and failed to produce a copy of one of the divorce decree. During the Interview groom was questioned and he was deemed not mentally competent. Groom's daughter confirmed his diagnosis of Alzheimer's.

> Consequently marriage record was not processed per general counsel.

Petitioner's Ex. 1, Marriage License Issued 05/03/2022.

Thereafter Helen M. obtained a marriage license in Jersey City, New Jersey - was married there to John M. on June 23, 2022; which license was filed on June 29, 2022; and resulted in a Certificate of Marriage being issued by the State of New Jersey on July 18, 2022. Exhibit B to Verified Petition to Annul A Marriage.

In the Affirmation of Felix Vinluan, Esq. (Mr. Vinluan), he stated, "Sometime second week of July 2022, a former client of mine [ ] dropped by my Woodside office and introduced a woman named Helen [E.] who was looking for a lawyer to assist her in preparing her immigration sponsorship papers as she allegedly had just married a U.S. citizen and that this U.S. citizen-spouse was willing to sponsor her." On July 30, 2022, eleven days after this Court, with Helen E. present, determined that John M. was incapacitated and needed a guardian of his person and property, Helen E. engaged Mr. Vinluan to file the U.S. citizenship application and proceeded to take John M. to see him. Mr. Vinluan testified at the Annulment Hearing that Helen E. and John M. came into his office on July 30, 2022. Helen E. retained him in connection to her application to file for U.S. citizenship and John M. was to be her sponsor.

MHL § 81.29 [d] states, "[i]f the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend or revoke any contract made by the incapacitated person *prior* to the appointment of the guardian if the court finds that the ***4** previously executed contract was made while the person was incapacitated". MHL § 81.29[d] (*emphasis added*). Further, "[m]arriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential." DRL § 10.

Helen E. argues that John M. was fully capable of entering into a marriage at the time of his nuptials and was not incapacitated. Additionally, she argues that there is no medical evidence to support a finding of incapacity. She also alleges that the Petition is motivated by animosity towards her by the family members. She claims that at the time of her New Jersey marriage on June 23, 2022, she did not know that the Court had appointed a Temporary Guardian for John M., nor did she know the nature of the guardianship proceeding.

John M. lacked the power to enter into the marriage on June 23, 2022, because the power to enter into contracts was specifically given to the Temporary Guardian of the Person and Property on May 26, 2022. (MHL § 81.23(a)[1]; *see also* *Matter of Loew*, 211 AD3d 77 (1st Dept. 2022), "[M]arriage is a civil contract between two wedded individuals, and among the powers of an article 81 guardian is the power to manage the IP's property, including contracts.")

Helen E. testified at the Annulment Hearing that she did not know about the underlying Guardianship Hearing. This Court does not credit that testimony. The underlying Guardianship Hearing was scheduled for July 19, 2022, and Helen E. met the Temporary Guardian on June 8, 2022, when he came to the residence to meet John M. and later found Helen E. hiding in the closet. Mr. Barbuti testified that prior to the hearing, he provided Helen E. with the number to call into the hearing, which she eventually did. Moreover, she testified that she also met Mr. Fishlin, Esq. at the apartment one time and met the Court Evaluator, Ms. Huang prior to the Guardianship Hearing. When asked on cross-examination if she ever wondered why a court evaluator, an attorney, and a temporary guardian all came to the apartment to visit with John M, (all of whom she met before the July 19, 2022, hearing), she replied no, she never wondered why. Notwithstanding, Helen E. appeared and testified at the July 19, 2022, Guardianship Hearing and was present when this Court issued its finding.

At the Annulment Hearing, this Court was further persuaded as to John M.'s incapacity at the time of the marriage based on Helen E.'s Exhibits 3 and 4: videos purporting to show John M. and Helen E. at Mr. Vinluan's office. Helen E. called Mr. Vinluan as a witness and he testified that he took three short video recordings of John M. on July 30, 2022, to assure himself that John M. was not being coerced. As demonstrated in Helen E.'s Ex. 3, when asked by Mr. Vinluan about his marriage to her, John M. could not advise of the date of the wedding, where they were married, or of Helen E.'s last name. Indeed, John M. had to be told the correct answers for these questions. It was apparent to this Court that he was confused and struggling to recall the answers. It should be noted that this video was made only five weeks after the June 23, 2022, New Jersey marriage. In Helen E.'s Ex. 4, John M. is shown signing the petition to sponsor Helen E.'s citizenship. Mr. Vinluan asks him if he were sponsoring Helen

E. so that she can have legal status in the United States and whether he was being forced to do it. John M. appeared confused and responded, "say what you just said." It was clear to the Court that John M., a Yale Law School graduate and former practicing attorney, was struggling to understand the questions posed to him by Mr. Vinluan.

Helen E. testified that John M. left Evergreen Woods, where he resided and where she was employed, and moved back to New York City in September 2021. She claims he surprised her in December 2021, when he called to invite her to visit him at his residence in Manhattan. ***5** She stated that after that initial visit, the relationship developed "little by little." She claims that John M. would call her to profess his love, and that he knew about and offered to help her with her immigration issues.

She testified that she never noticed that John M. suffered any cognitive impairment. During cross-examination, Petitioner's counsel reminded Helen E, that she was hired as an aide to assist John M. at Evergreen Woods after a series of events led the staff to determine that John M. needed to receive 24-hour supervision to maintain his residence there. When asked what information was given to her by the agency regarding her duties, she testified that she was told to walk with him, wash his clothes and clean his room. She also testified that John M. had no physical limitations that she had to assist him with. When asked why she was there to assist him, she answered, for companionship. On cross-examination by Mr. Fishlin, he asked why John M. was at Evergreen Woods and why he needed an aide 24/7, if he was physically and mentally fit. Helen E. answered that she did not know, that his children wanted him there, and he was calling a friend in New York for help to move back. Mr. Fishlin asked her that if John M. was able to leave on his own, why did he need help. She answered that she did not know, and his children were lazy.

Helen E. testified that John M. wanted to assist her with her immigration issues and that she had been denied a marriage license only once in New York County, and that she didn't ask the reason for the denial. When asked by Mr. Fishlin whether she found it strange when they went to obtain a license in New York County that John M. could not remember how many times he was married, Helen E. answered no.

Mr. Fishlin asked Helen E. why a confirmation email from City Clerk's Office was sent on November 29, 2021, to John M. confirming an appointment for a marriage license on December 21, 2021, when she had previously testified (as well as stated in her Affidavit) that their relationship didn't begin until December 2021. She testified she did not know anything about the confirmation email.

This Court does not find any of Helen E.'s testimony at all credible. Her answers were intentionally evasive, non-responsive, and contradictory.

The record is replete with evidence indicating that John M. suffered from cognitive impairment and that Helen E. acted to benefit herself despite John M.'s impairment and to his detriment. The record also demonstrates that Helen E. unduly influenced him into consenting to this marriage. It would be unconscionable to permit Helen E. to benefit from this marriage despite having knowledge of John M.'s cognitive impairment, having knowledge of the underlying guardianship proceeding and the appointment of a Temporary Guardian, and after taking John M. to different States on her quest to obtain a marriage license and marriage certificate for the purpose of filing a U.S. Citizenship application. Indeed, the record contains ample evidence that John M. was not capable of consenting to any of Helen E.'s actions by reason of his want of understanding.

Conclusion:

Contrary to Helen E.'s contentions, the Petitioner proved by clear and convincing evidence that John M. was unable to enter into a marriage with Helen E. and was indeed incapacitated when he married Helen M. "Where an article 81 guardian has been appointed for an IP and the individual is found to have been incapable of understanding the nature, effect, and consequences of the marriage, annulment of the marriage is an available remedy for the guardian ***6** to pursue." *Matter of Edgar V.L.*, 214 AD3d 501 (1st Dept 2023)

Pursuant to Domestic Relations Law 236 § [B][5], if the annulment of a marriage is granted, the court "shall determine the respective rights of the parties in their separate or marital property and shall provide for the disposition thereof in the final judgment." However, "[a] marriage revoked under Mental Hygiene Law § 81.29(d), unlike an annulled marriage is *void ab initio*." *Matter of Kaminester*, 26 Misc 3d 227 at 235 (Sur Ct, New York County 2009) (*citations omitted*). *See also, id.* at 236, citing *Matter of Kaminester v. Foldes*, 51 AD3d 528 (1 Dept 2008), upholding lower court order which voided a marriage *ab initio*. Further, because the marriage is void *ab initio*, pursuant to Domestic Relations

Law 236 [B][5], and in consideration of the necessity to protect John M. from harm, Helen E. is not entitled to a spousal share of John M.'s estate and can claim no legal interest as a spouse. (*See Matter of Kaminester*, 26 Misc 3d 227 at 237).

Accordingly, it is

ORDERED, that the marriage of John M. and Helen E. be, and it is declared, null and void and of no effect *ab initio*, and that each of the parties is restored to *status quo ante*; and it is further

ORDERED, that Helen E. shall not utilize the surname of John M. as a marriage name or for any other purpose; and it is further

ORDERED, that this ruling is without prejudice to any actions brought on behalf of John M. for the recovery from Helen E. of monies misappropriated from his accounts through financial exploitation, fraud, overreaching or any other form of impropriety by Helen E.; and it is further

ORDERED, that Todd Fishlin Esq., as counsel for John M., is directed to serve a copy of this Decision and Order with Notice of Entry upon the parties herein within 20 days of entry hereof, and to file an Affirmation of Service with the County Clerk.

ENTER:

HON. PHAEDRA F. PERRY, A.J.S.C.

New York Official Reports

74 Misc.3d 255, 159 N.Y.S.3d 625, 2021 N.Y. Slip Op. 21342

**1 In the Matter of Nancy Nunziata, Commissioner of the Nassau County Department of Social Services, Petitioner, for the Appointment of a Guardian of Nancy K., an Alleged Incapacitated Person, Respondent; William McEnaney, Cross-Petitioner.

Supreme Court, Nassau County
850023-I-2021
December 15, 2021

CITE TITLE AS: Matter of Nunziata (Nancy K.)

HEADNOTES

Incapacitated and Intellectually or Developmentally Disabled Persons
Guardian for Personal Needs or Property Management
Setting Aside Advance Directives

(1) In a Mental Hygiene Law article 81 proceeding, the advance directives naming the alleged incapacitated person's (AIP) husband, who allegedly took advantage of the AIP's diminished mental capacity by entering into the marriage in order to control her finances, as her agent were set aside on the ground that the AIP was so affected by dementia at the time she executed the directives that she was incompetent to comprehend and understand their nature and significance. The credible testimonial evidence at trial revealed that the idea to prepare and execute a power of attorney and a health care proxy did not originate with the AIP, nor did she make any effort to effectuate those documents, because she was incapable of doing so. Instead, the husband manipulated a scenario to give him unlimited power to act as the AIP's attorney and health care agent, without revealing to the attorney drafting the advance directives that the AIP had been diagnosed with cognitive impairments which had degenerated further over a three year period, had been diagnosed with dementia and possibly Alzheimer's disease, and had great difficulty answering questions. He also failed to reveal that he was managing all of the AIP's financial obligations, and that the AIP was no longer capable of operating a motor vehicle because of her diminished capacity. In addition, there was insufficient credible evidence that the AIP made any affirmative statements, outside the scope of any attorney-client privileged communications, that she was lucid, alert, and aware of the significance of the advance directives she signed.

Incapacitated and Intellectually or Developmentally Disabled Persons
Guardian for Personal Needs or Property Management
Marriage Declared Null and Void—Capacity to Consent

(2) In a Mental Hygiene Law article 81 proceeding, the marriage between the alleged incapacitated person (AIP) and cross-petitioner husband, who allegedly took advantage of the AIP's diminished mental capacity by entering into the marriage in order to control her finances, was declared null and void on the ground that the AIP was "incapable of consenting to a marriage for want of understanding" (Domestic Relations Law § 7 [2]) since she was not able, at the time of the marriage, to comprehend the nature, effect and consequences of the decision to marry. Three years before there was any evidence that the AIP was afflicted with dementia, and six years before she entered into the marriage contract, she executed a will which left only $25,000 to cross-petitioner. Coupled with the fact that it took 20 years for the AIP and cross-petitioner to get married, it was logical to conclude that the AIP never ***256** wanted to marry cross-petitioner, that she never made a commitment to him to be married, and that the marriage was wrongfully procured. The AIP's inability to make normal, logical decisions about her personal, social and financial affairs created an opportunity for cross-petitioner to isolate her from her longtime close friends and her siblings, and to completely manage her operational finances. Moreover, cross-petitioner could not plausibly deny awareness of the AIP's lack of capacity to consent to the marriage based upon his firsthand knowledge of her behavior and progressive cognitive decline, the treating physicians' exams, tests and reports of her cognitive impairment, and his action of prohibiting her from operating a motor vehicle after she got lost.

RESEARCH REFERENCES

Am Jur 2d Guardian and Ward §§ 24, 43; Am Jur 2d Marriage §§ 20–21, 24, 26; Am Jur 2d Physicians, Surgeons, and Other Healers § 159.

Carmody-Wait 2d Proceedings for Appointment of Guardian for Personal Needs and Property Management §§ 109:9–109:11, 109:95, 109:97; Carmody-Wait 2d Annulment of Marriage §§ 113:18–113:19; Carmody-Wait 2d Guardians and Guardianship § 155:124.

McKinney's, Domestic Relations Law § 7 (2); Mental Hygiene Law art 81.

NY Jur 2d Domestic Relations §§ 2458–2459; NY Jur 2d Infants and Other Persons Under Legal Disability §§ 389, 392–393, 452.

ANNOTATION REFERENCE

Mental condition which will justify the appointment of guardian, committee, or conservator of the estate for an incompetent or spendthrift. 9 ALR3d 774.

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Query: "mental capacity" /p directive! or agent

APPEARANCES OF COUNSEL

Nassau County Department of Social Services, Uniondale (*David Zachary Carl* of counsel), for petitioner.
Rosenthal Law LLC, Garden City (*Elisa Strassler Rosenthal* of counsel), and *Seltzer Sussman Heitner LLP*, Jericho (*Brian R. Heitner* of counsel), court-appointed counsel for Nancy K., respondent.
Edward Francis Cunningham, Garden City, Court Evaluator.
***257** *The Weinstein Group, P.C.*, Syosset (*Lloyd Jeffrey Weinstein* of counsel), Temporary Guardian.
Novick & Associates, P.C., Huntington (*Donald Novick*, *Kimberly Arlen Schechter* and *Albert Vincent Messina* of counsel), for cross-petitioner.

OPINION OF THE COURT

Gary F. Knobel, J.

"I fear I am not in my perfect mind" (William Shakespeare, King Lear act 4, sc 7).

"Dementia robs its victims of their reason and judgment bit by bit" (*Matter of Doar [L.S.]*, 39 Misc 3d 1242[A], 2013 NY Slip Op 50988[U], *2 [Sup Ct, Kings County 2013, Barros, J.]). However, the affliction of dementia can lead to the " 'often well hidden problem' " of

> "[e]lder abuse, including the [emotional, physical and] financial exploitation of elderly individuals who have become mentally incapacitated . . . (Bailly, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.14, 2010 Pocket Part, at 36), in part because the perpetrator of such conduct is in many cases a member of the victim's family" (*Campbell v Thomas*, 73 AD3d 103, 104-105 [2d Dept 2010]). [1]

This guardianship case highlights the predation and exploitation which can occur when a person in a position of trust is given the opportunity to take advantage of an individual who is suffering from diminished mental capacity and slowly sliding ***258** into the abyss of dementia (*see Huggins v Randolph*, 45 Misc 3d 521, 527 [Civ Ct, Kings County 2014]).

The 13-day trial of this hard-fought guardianship proceeding, conducted via Microsoft Teams, was commenced by the Commissioner of the Nassau County Department of Social Services pursuant to article 81 of the Mental Hygiene Law and presented to this court the unusual issues of (1) whether to set aside the advance directives signed on October 8, 2019, by Nancy K., the alleged incapacitated person (AIP), who was first diagnosed with cognitive impairment on February 19, 2016, and dementia on May 1, 2017, (2) whether to void ab initio the November 6, 2020 marriage between Nancy K. and the cross-petitioner, William McEnaney, on the ground that Nancy K. lacked the capacity to enter into the marriage contract, and (3) whether the clear and convincing, or the preponderance of the evidence, burden of proof standard should be applied by this court in determining both issues.

It is important to note in this context that on June 20, 2014, three years before there was any subjective or objective evidence that Nancy K. was afflicted with dementia, and six years before she entered into a marriage contract, she executed a will (and there was no evidence at trial of another will) which left only $25,000 to William McEnaney.

Petitioner County of Nassau, through its Commissioner, believed it had to intervene on behalf of Nancy K. to protect her from harm and to seek the appointment of a guardian or guardians, other than the cross-petitioner husband, on Nancy K.'s behalf to oversee her personal needs and manage her property interests. The petitioner framed these issues within the context of allegations of elder abuse by the cross-petitioner in the forms of neglect (e.g., frequently bringing Nancy K. to Baldwin Park and allowing her to wander by herself around a park surrounded by sea water), and financial exploitation (in the guise inter alia of a predatory marriage which was entered into to control Nancy K.'s liquid assets of over two million dollars plus real property). ****2**

Upon the presentation by the petitioner of the order to show cause commencing this proceeding, and after reviewing the serious allegations in the 50-plus page petition, this court suspended the advance directives purportedly executed by Nancy K., and made the following appointments from the Part 36 fiduciary list: a temporary guardian (Lloyd Weinstein, Esq.) pursuant to Mental Hygiene Law § 81.23; counsel (Elisa ***259** Rosenthal, Esq.) for the alleged incapacitated person pursuant to Mental Hygiene Law § 81.10 (c); and a court evaluator (Edward Cunningham, Esq.) pursuant to Mental Hygiene Law § 81.09 (a). This court also appointed a geriatric care manager (Yvonne Murphy) on behalf of Nancy K., and trial counsel (Brian Heitner, Esq.) to be cocounsel with Ms. Rosenthal on behalf of Nancy K.

The cross-petition, literally filed on the eve of trial, seeks to dismiss the petition and permit the cross-petitioner to be appointed permanent guardian of the personal needs and property management for the AIP. Cross-petitioner alternatively seeks, if the court determines that an independent person, a non-family member on the Part 36 fiduciary list, should be appointed the guardian of the person and property of the AIP, that the temporary guardian, Lloyd Weinstein, Esq., be removed and not be appointed a permanent guardian, and that either the court appoint an independent guardian or appoint cross-petitioner as guardian of the person and property of the AIP, with the power to handle her property management affairs and determine her medical and personal care.

Cross-petitioner husband claimed and attempted to prove at trial a picture of domestic bliss, that nothing untoward ever happened, and that he should be appointed the guardian of his wife.

Nancy K., the alleged incapacitated person, was never physically present in the virtual courtroom during the trial, nor did she testify in this proceeding.

This court has issued two unreported decisions and six reported decisions during this proceeding; on March 31, this court (Knobel, J.) directed that the trial would encompass four phases: (1) whether Nancy K. should have a guardian appointed for her pursuant to Mental Hygiene Law § 81.02, (2) whether the advance directives signed by Nancy K. on October 8, 2019, and the marriage contract entered into by Nancy K. on November 6, 2020, should be set aside on the ground of lack of capacity, (3) whether the advance directives obviate the need for a guardian if the court finds that Nancy K. had capacity at the time they were executed, and (4) whether Nancy K. should have a family member or independent guardian appointed for her if the court finds that Nancy K. requires a guardian for her personal needs and property management.

However, the cross-petitioner, through his attorney, conceded during trial that Nancy K. is presently incapacitated and in ***260** need of a guardian. The petitioner, including the court appointees, also agreed that Nancy K. is presently an incapacitated person and in need of a guardian; the petitioner, counsel for Nancy K. and the court evaluator uniformly conclude that cross-petitioner William McEnaney should not and cannot be Nancy K.'s guardian.

Thus the main issues which remain to be determined by this court are whether Nancy K. had capacity when the power of attorney and living will were executed, whether Nancy K. had capacity when she and the cross-petitioner were married by the City Manager of Long Beach on November 6, 2020, and whether the cross-petitioner or an independent fiduciary qualified to be a guardian should be the guardian, or a guardian, for the personal needs and property management of Nancy K.

The objective medical evidence adduced at trial demonstrated that Nancy K. began to suffer a cognitive decline and impairment within four months after her mother passed away in ****3** November 2015. Nancy K.'s primary care physician, Dr. Zupnick, noted on February 15, 2016, that "according to her friend she has been having memory lapses since her mother died in October." Four days later Dr. Kristin Waldron, a neurologist, assessed Nancy K. as having a mild cognitive impairment, which she upgraded one month later to "cognitive impairment." Dr. Waldron performed a mini-

mental status exam (MMSE) on Nancy K. on December 29, 2016, and her score was 27 out of 30; on May 1, Dr. Waldron noted that "dementia caregiver education and support was provided." Dr. Poonam Dulai, a neurologist, examined Nancy K. on November 9, 2017, and found that she "[could] not do 3 step calculations; speech is slow with delayed responses . . . clinically suspect primary dementia." He prescribed Namenda, a medication for people who have memory loss, and assessed her cognitive score to be 21 out of 30. Dr. Zupnick continued to note her memory loss in 2018, and on April 30, 2019, he noted that she suffered from "[d]ementia with behavioral disturbance" and that she had "limited decision making ability." Finally, on July 3, 2019, Dr. Zupnick assessed Nancy K. as possessing "Alzheimer's dementia with behavioral disturbances . . . . Counseling included long conversation about social service suggestion that when her companion leaves the house having someone else stay with her because in the past she has wandered off."

Her disorder prevented this court from ascertaining the true nature of the relationship between herself and the cross- ***261** petitioner prior to the time of her descent into the abyss of dementia. The oral testimony indicated that Nancy K. was living by herself in 2001, four years after the death of her husband Larry K., when she hired the cross-petitioner to perform work on her house, and that sometime between 2002 and 2005 she permitted the cross-petitioner to move into the basement level of the house. Superstorm Sandy allegedly wrecked havoc on the house and the property on October 29, 2012. Years later, however, the photographic evidence taken by the temporary guardian on March 1, 2020, revealed squalor conditions in the basement. The cross-petitioner testified that he asked Nancy K. to marry him two days before Superstorm Sandy whipped through Baldwin Harbor. His proposal was not acted upon by Nancy and the cross-petitioner.

Two years later, on June 20, 2014, Nancy K. executed a will leaving the cross-petitioner, and another friend, a bequest of $25,000. The oral testimony adduced at trial revealed that Nancy K. would financially help friends in need.

The documentary evidence revealed that Nancy K.'s financial investments over the years has resulted in her accumulating assets of over $2,000,000.

Adult Protective Services' (APS) first investigation of Nancy K. and the cross-petitioner occurred in the fall of 2017 pursuant to a complaint filed by a friend of Nancy K.'s, Sister Dorothy, a nun from the parish where Nancy K. attended church. Sister Dorothy complained that Nancy K. wanted the cross-petitioner removed from her residence, that the cross-petitioner was taking advantage of Nancy and managing her finances, and that Nancy K. had gotten lost when she drove her car to get ice cream from Baldwin and eventually arrived in Northport, a distance, which the court takes judicial notice of, of approximately 32 miles; her car then became flooded in a flash flood storm. This court heard extensive oral testimony from Nancy K.'s friends and relatives (who do not reside locally in Nassau County) who expressed their extreme concern in 2017 about Nancy K.'s cognitive deficits and her treatment by the cross-petitioner—that he did not permit Nancy K. to operate her motor vehicle after the "lost in the flood" incident, that he isolated her from her friends, that her cell phone did not get replaced, that she stopped attending daily mass and church events, and that he took control of her life and ****4** finances. Nevertheless, the investigation by Adult Protective Services was terminated and closed in 2018 without any action taken.

***262** The impetus to commencing the proceeding at bar began pursuant to a complaint made on June 18, 2019, by a Baldwin Harbor Parks Department employee, Lisa Seminera, who testified at trial that the cross-petitioner would frequently bring Nancy into the park during the summer of 2018 and the winter of 2019, and leave her by herself for many hours without a companion to watch her while she wandered around the park and he went to work. [2] According to Ms. Seminera, the park employees became Nancy K.'s sitter. Consequently, APS began its second investigation into whether Nancy K. was at risk of harm.

Social worker Shirley Rembert testified that after conducting an MMSE with Nancy K., Nancy did not know the day of the week or the month of the year and received a score of 22/30, in the range of a cognitive deficit. However, both Ms. Rembert and her supervisor, Muriel Jeanty Petiote, testified that the result of that MMSE was flawed; Rembert testified that the cross-petitioner was constantly disrupting the test. Rembert further testified that she visited Nancy K. monthly, but that Nancy K. did not participate in the interviews and that the cross-petitioner would inquire about what it would take for APS to close this case. Rembert testified that she informed the cross-petitioner that she needed proof from a medical doctor that Nancy K. did not have a cognitive impairment, which was never supplied. Ms. Petiote visited Nancy K. on February 20, 2020, to conduct another MMSE; Petiote testified that any interference or coaching by the cross-petitioner would be considered an incorrect answer. Consequently, Nancy

received a score of 7/30, which indicated significant cognitive impairment.

Despite the cross-petitioner's acute awareness of Nancy K.'s cognitive impairments, or maybe because of them, he arranged with a neighbor, Alex von Kiel, Esq., for Nancy to execute on October 8, 2019, a power of attorney and a health care proxy naming the cross-petitioner as Nancy K.'s agent. Von Kiel testified that even though he was aware of Nancy K.'s cognitive issues, he proceeded anyway to have her execute the advance directives. Interestingly, the cross-petitioner did not execute advance directives at that time even though he purportedly had serious health scares prior to October 8, 2019. Moreover, although this court prevented testimonial evidence based upon ***263** the attorney-client privilege (*see* 72 Misc 3d 529 [Sup Ct, Nassau County 2021, Knobel, J.]), significantly there was no testimonial evidence adduced at trial by the witnesses to the execution of the power of attorney which clearly demonstrated any independent thought and intention by Nancy K. that she wanted to execute that document, that she was aware of the significance of the power of attorney and that she understood what rights she was relinquishing. The court notes that it invalidated the health care proxy pursuant to the order of this court dated April 15, 2021 (71 Misc 3d 1217[A], 2021 NY Slip Op 50401 [U] [Sup Ct, Nassau County 2021, Knobel, J.]).

There was extensive documentary and oral testimony adduced at trial which demonstrated that the cross-petitioner was struggling financially, that he had six judgments filed against him, including federal and state tax judgments, and that he used Nancy K.'s assets to pay for his personal expenses. Other than the cross-petitioner's testimony regarding the payment of Nancy K.'s expenses and cross-petitioner's expenses, there was no documentary evidence or other proof proffered that Nancy K. affirmatively acquiesced to having the cross-petitioner ****5** take over the financial management of her day-to-day, month-to-month expenses. Instead, there was documentary proof submitted that Nancy K. would endorse checks with her maiden name, B. Kevin Richberg, the manager of the Bank of America branch in Baldwin, testified that Nancy K. was not aware of who he was in 2019. The cross-petitioner testified that when the cross-petitioner and Nancy K. went to the branch on March 20, 2020, at the beginning of the COVID-19 pandemic, to access Nancy K.'s safe deposit box, it was purportedly empty. Chuck Shields, Nancy K.'s former accountant and the named executor in her will, testified that the safe deposit box was opened to contain the 2014 will, and that Nancy K. asked for the key back from Shields, who was originally entrusted with the key.

On November 6, 2020, the cross-petitioner arranged for he and Nancy K. to be married in a simple ceremony performed by the Long Beach City Manager, Donna Gayden. None of Nancy K.'s friends or relatives were informed about the wedding prior to its occurrence; however, the cross-petitioner's mother and siblings were in attendance. Ms. Gayden testified that when she inquired why Nancy K. had to be held up by the cross-petitioner, she was falsely informed that Nancy K. was recovering from COVID-19.

***264** The cross-petitioner, through his testimony, the testimony of his family and friends, and the submission into evidence of many pictures of Nancy K. with the cross-petitioner and his friends and family, maintained that he and Nancy K. had a romantic relationship, and that most people assumed they were either happily married or a couple living together. Except the evidence revealed that the cross-petitioner was a gregarious person who overshadowed Nancy K. for at least the last five years. He contended that he had no idea about the extent of Nancy K.'s assets, that Nancy K. did not want to see her friends and family, and that Nancy K. was aware of his management of her daily finances.

The temporary guardian and the geriatric care manager witnessed the extent of Nancy K.'s dementia when they observed upon their first visit to Nancy K.'s residence on March 2, 2021, that Nancy K. was oblivious to their presence and did not interact with them.

The temporary guardian, Lloyd Weinstein, Esq., was appointed by this court in the order to show cause dated February 19, 2021 (Knobel, J.). The temporary guardian submitted a detailed initial report after his first meeting with Nancy K. in her home in Baldwin Harbor on March 2, 2021, four months after the cross-petitioner married her. He observed that Nancy K. had no interest in his presence in the home, did not respond to questions, and did not communicate with him. He also observed that the cross-petitioner was pushed away when he attempted to kiss Nancy K., and that Nancy K. and the cross-petitioner slept separately on different floors of the house.

Attached as exhibits B, C and D to the amended report of the temporary guardian are photographs depicting the condition of the interior of the home. The temporary guardian described the condition of the home as “filthy, strangled with antiquated

papers in precarious stacks, bank, utility and other statements, invoices and other documents in stacks all over the house. There are open construction projects, clothes and cleaners and debris everywhere."

The temporary guardian further provided summaries of interviews with several individuals in Nancy K.'s life, including an interview with cross-petitioner, William McEnaney. The temporary guardian stated that the cross-petitioner was extremely defensive of his behavior and wanted to know if he could "work this out."

The temporary guardian also interviewed Donna Gayden, the Long Beach City Manager who performed the wedding ***265** ceremony. Significantly, Gayden remembered asking Nancy K. if ****6** she "was ok," which was only the second time in Gayden's career that Gayden felt that she had to ask that question since the cross-petitioner spent most of the ceremony holding up Nancy K. Gayden was informed that Nancy K. was recovering from COVID-19, which was a falsehood. When Gayden was asked if anything stood out from the ceremony that she could remember, Gayden stated that the cross-petitioner offered Gayden cash, which she allegedly declined.

The geriatric care manager, Yvonne Murphy, was appointed by the court on March 17, 2021 (Knobel, J.). The geriatric care manager was directed by order dated March 23, 2021 (Knobel, J.), to visit protensional facilities and ascertain whether they are safe places of abode for Nancy K., which she did, along with the temporary guardian. The geriatric care manager and the temporary guardian have worked together to address emergency situations which have arisen since their appointments; they have submitted numerous emails and informal letters updating all parties of Nancy K.'s health and welfare.

Edward Cunningham, Esq., was appointed to be the court evaluator, in the order to show cause dated February 19, 2021 (Knobel, J.), to investigate the claims made in the petition and report to the court. Cunningham conducted several interviews; Cunningham attempted to speak to Nancy K., but she would not speak to him. According to the court evaluator, Nancy K. did not seem to have any idea what the court evaluator was asking, and she did not have any coherent responses to anything Cunningham said. When the court evaluator visited on March 2, 2021, he noted that the "house was a mess with clothing laying on chairs and tables all over the place. The beds were unmade and the bathrooms not clean." He was accompanied by the temporary guardian and Nancy K.'s counsel. The court evaluator spoke with the cross-petitioner privately, noting that the cross-petitioner was very nervous and talkative. The cross-petitioner explained to Cunningham how he and Nancy K. met about 20 years ago, and started a business doing home repairs together. He said Nancy K. "hasn't been right" since her mother died in 2015. He further told the court evaluator that Nancy K. began to walk by herself in the park nearby, that she made friends with some of the people who worked there, and that he would drop her off and pick her up from the park, which was surrounded by waterways. The cross-petitioner denied that he was informed that Nancy was in danger in the ***266** park. The cross-petitioner stated to the court evaluator that his finances and Nancy K.'s finances were separate, and that he knew nothing about her finances.

The court evaluator reported that everyone he spoke to during his investigation did not believe that Nancy K. had the capacity to consent to the marriage. The court evaluator spoke with Robert and Virginia B., who are the brother and sister-in-law of Nancy K., who told the court evaluator that the cross-petitioner was controlling access to Nancy K., who they have not seen in five years. The B.s were surprised that Nancy had been married; they knew nothing about the wedding before it took place and were not invited to the wedding.

Elizabeth Tarrant, sister of Nancy K., was also interviewed by the court evaluator, and she said she noticed Nancy's decline in 2016. She stated that she tries to call Nancy K. but her phone calls go unanswered, and when Nancy K. did pick up the telephone, the cross-petitioner would be in the background telling Nancy what to say. Elizabeth told the court evaluator that she did not believe the marriage was legitimate.

Muriel Jeanty Petiote and Shirley Rembert, the investigative case workers for Adult Protective Services, were interviewed by the court evaluator; they also testified extensively at trial and were very credible. ****7**

The court evaluator's recommendations to the court were that Nancy K. is incapacitated as defined by Mental Hygiene Law § 81.02 and that an independent guardian be appointed from the Part 36 fiduciary list for Nancy K.'s personal needs and property management.

The cross-petitioner did not proffer any medical testimony or evidence to refute the medical evidence submitted at trial. Counsel for Nancy K. produced an expert witness, Dr. James

Lynch, a psychiatrist, who testified that, based upon his review of Nancy K.'s medical records, Nancy K. did not have the capacity to enter into any contracts, including marriage, by the end of 2017.

"[O]ur law considers marriage in no other light than as a civil contract" (*di Lorenzo v di Lorenzo*, 174 NY 467, 472 [1903]). Domestic Relations Law § 10 states that "[m]arriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential." Thus "[a] marriage is void from the time its nullity is declared by a court of competent jurisdiction ***267** if either party thereto . . . [i]s incapable of consenting to a marriage for want of understanding" (Domestic Relations Law § 7 [2]).

Revocation of contractual transactions is an available remedy under Mental Hygiene Law § 81.29 (d), which authorizes the court (in relevant part) to

> "modify, amend, or revoke . . . any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated."

Marriage constitutes a contract within the meaning of Mental Hygiene Law § 81.29 (d) (*see Matter of Dot E.W.*, 172 Misc 2d 684, 693-694 [1997, Prudenti, J.]; *see Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [2008]).

However, Mental Hygiene Law § 81.29 (d) does not state which burden of proof—clear and convincing evidence, the highest evidentiary standard in a civil matter, or preponderance of the evidence—should be applied by the court in modifying, amending or revoking any contract or conveyance. Moreover, the Appellate Division, Second Department, in appellate and trial decisions, has made affirmative, yet contrary, declarations regarding the standard of proof to void the marriage contract and any other transaction.

In 2015, in *Matter of Berk* (133 AD3d 850, 851 [2d Dept 2015]), the Appellate Division, in evaluating the Surrogate's Court's probate proceeding determination of the issue of whether the petitioner knew that the decedent was mentally incapacitated and incapable of consenting to the marriage, specifically disagreed with the Surrogate's Court's application of the clear and convincing burden of proof, and instead held that the burden of proof was upon the decedent's representatives to establish by a preponderance of the evidence that the decedent was mentally incapacitated and incapable of consenting to the marriage (*Matter of Berk*, 133 AD3d 850, 851-852 [2d Dept 2015]).

By contrast, in *Matter of Nurse* (160 AD3d 745 [2d Dept 2018]), the Appellate Division affirmed, without specifically addressing in its decision, the trial court's determination in an ***268** article 81 proceeding that the "petitioners had proven by clear and convincing evidence that [the incapacitated person] was incompetent at the time the deed was executed" (*Matter of Nurse*, 160 AD3d 745, 746 [2d Dept 2018]). Similarly, in both *Matter of Kaminester v Foldes* (51 AD3d 528, 529 [1st Dept 2008]) and *Matter of Rose S.* (293 AD2d 619, 620 [2d Dept 2002]), the movants presented medical evidence that the alleged incapacitated person did not have the requisite ****8** mental capacity to marry or execute the document in question, yet the First and Second Departments did not take the opportunity to clarify the standard of proof. These cases refer to the clear and convincing standard without adopting it or declaring that it is the movant's burden of proof standard. Although the *Rose* Court did not address the movant's standard of proof ("[i]n light of the presumption of competency, the burden of proving mental incompetence is upon the party asserting it") (*id.* [citations omitted]), both *Rose* and *Kaminester* held that "where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity" (*Matter of Rose S.*, 293 AD2d 619, 620 [2d Dept 2002]; *Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [1st Dept 2008]).

> "As a general rule, a party's competence is presumed, and in order to set aside a transfer of property on the ground of lack of capacity, it must be established that the party did not understand the nature of the transaction at the time of the conveyance as a result of his or her mental disability" (*Matter of Nurse*, 160 AD3d 745, 747 [2d Dept 2018], quoting *Buckley*

v Ritchie Knop, Inc., 40 AD3d 794, 795 [2d Dept 2007]).

Persons suffering from diseases such as dementia or Alzheimer's are not presumed incompetent (*see Henik v Darconte*, 189 AD3d 797, 798 [2d Dept 2020]).

> "Instead, it must be demonstrated that the individual was incompetent at the specific time of the challenged transaction, i.e., that he or she was ' "so affected as to render him [or her] wholly and absolutely incompetent to comprehend and understand the nature of the transaction" ' (*Feiden v Feiden*, 151 AD2d at 890, quoting *Aldrich v Bailey*, 132 NY 85, 89 [1892]; *see* *Matter of Nealon*, 57 AD3d at 1327; ***269** *Buckley v Ritchie Knop, Inc.*, 40 AD3d at 795; *Crawn v Sayah*, 31 AD3d at 369)" (*Matter of Nurse*, 160 AD3d 745, 747 [2d Dept 2018]).

Findings of Fact and Conclusions of Law

(1) This court finds that the totality of the documentary and testimonial evidence adduced at trial established that the petitioner and Nancy K.'s attorneys on behalf of Nancy K. proved by clear and convincing evidence (subsuming the lower preponderance of evidence standard) that Nancy K. lacked the mental capacity to execute advance directives on October 8, 2019, and enter into a marriage one year later with the cross-petitioner on November 6, 2020. Consequently, under either standard of proof, the marriage contract and the advance directives must be set aside (*see* Mental Hygiene Law § 81.29 [d]).

This court further finds that the cross-petitioner's testimony and the testimony of his brother Michael McEnaney were not credible, as well as the witnesses who testified about the execution of the advance directives. The credible testimonial evidence at trial revealed that the idea to prepare and execute a power of attorney and a health care proxy in October 2019 did not originate with Nancy K., nor did she make any effort to effectuate these documents; she was incapable of doing so. Instead, the cross-petitioner manipulated a scenario to give him unlimited power to act as Nancy K.'s attorney and health care agent, without revealing to the attorney drafting the advance directives that inter alia Nancy K. had been diagnosed with cognitive impairments which had degenerated further over a three year period, Nancy K. had been diagnosed with dementia and possibly Alzheimer's disease, Nancy K. had great difficulty answering questions, and could not answer several questions, on an MMSE, the cross-petitioner was managing all of Nancy K.'s financial obligations, and Nancy K. was no longer capable of operating a motor vehicle ****9** because of her diminished capacity. In addition, there was insufficient credible evidence that Nancy K. made any affirmative statements, outside the scope of any attorney-client privileged communications (*see* 72 Misc 3d 529 [Sup Ct, Nassau County 2021]), that she was lucid, alert, and aware of the significance of the advance directives she was about to sign and did sign. Furthermore, the cross-petitioner failed to present evidence to refute the conclusions of the petitioner's and Nancy K.'s medical expert that Nancy K. was not competent to enter into any contracts by the end of ***270** 2017, two years before the advance directives were signed by Nancy K. (*see Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [1st Dept 2008]).

Accordingly, this court finds that the petitioner and counsel on behalf of Nancy K. established by clear and convincing evidence that Nancy K. was so affected by dementia on October 8, 2019, that she was "wholly and absolutely incompetent to comprehend and understand the nature" and significance of the advance directives, and consequently the power of attorney and health care proxy signed by Nancy K. on October 8, 2019, are deemed and declared to be null and void on the ground of incompetence (*Matter of Nurse*, 160 AD3d 745, 747 [2d Dept 2018]; *Matter of Rose S.*, 293 AD2d 619, 620 [2d Dept 2002]).

(2) Turning to the issue of whether the "marriage" entered into between Nancy K. and cross-petitioner William McEnaney on November 6, 2020, should be declared to be void ab initio, the overwhelming circumstantial evidence adduced at trial, such as Nancy K.'s will dated June 14, 2014, and the fact that it took 20 years for them to get married, leads to the only logical inferences and conclusions which can be drawn: that Nancy K. never wanted to marry the cross-petitioner, that she never made a commitment to him to be married, and that the marriage was wrongfully procured. Nancy K. was diagnosed in 2016 with an irreversible, degenerative, cognitive disease. Her inability to make normal, logical decisions about her personal, social and financial affairs created an opportunity for the cross-petitioner to isolate Nancy K. from her longtime close friends and her siblings, and to completely manage her operational finances on a daily, weekly and monthly basis. Moreover, the cross-petitioner could not plausibly deny awareness of Nancy K.'s lack of capacity to consent to the marriage based upon his firsthand knowledge of inter alia

Nancy K.'s behavior and progressive cognitive decline, the treating physicians' exams, tests and reports of her cognitive impairment between 2015 and November 6, 2020, and his action of prohibiting Nancy K. from operating a motor vehicle after she got lost in 2017.

Consequently, it strains credulity to believe that Nancy K., who was incapable of being interviewed by the temporary guardian on March 2, 2021, was mentally competent to marry the cross-petitioner four months earlier on November 6, 2020. Plaintiff's expert psychiatrist testified that based upon his review of Nancy K.'s medical records she was not capable of understanding the nature, consequences, and effect of marriage. ***271** However, the cross-petitioner failed to meet his required precedential burden of proof to present evidence which was sufficient to refute the conclusions of the petitioner's and counsel for Nancy K.'s medical expert (*see Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [1st Dept 2008]; *Matter of Rose S.*, 293 AD2d 619, 620 [2d Dept 2002]).

Accordingly, this court finds that the petitioner and counsel for Nancy K. have sufficiently demonstrated by clear and convincing evidence that the marriage which occurred on November 6, 2020, between Nancy K. and cross-petitioner William McEnaney, is deemed void ab initio, null and void, on the ground that Nancy K. was "incapable of consenting to a marriage for want of understanding" (Domestic Relations Law § 7 [2]) since she was not able, at the time ****10** of the marriage, to comprehend the nature, effect and consequences of the decision to marry (*see* Mental Hygiene Law § 81.29 [d]; *Matter of Dandridge*, 120 AD3d 1411 [2d Dept 2014]; *Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [1st Dept 2008]; *Campbell v Thomas*, 36 AD3d 576, 577 [2d Dept 2007]; *Matter of Joseph S.*, 25 AD3d 804, 806 [2d Dept 2006]; *Levine v Dumbra*, 198 AD2d 477, 477-478 [2d Dept 1993]; *Matter of H.R.*, 21 Misc 3d 1136[A], 2008 NY Slip Op 52404[U] [Sup Ct, Nassau County 2008, Iannacci, J.]; *Matter of Dot E.W.*, 172 Misc 2d 684, 693 [Sup Ct, Suffolk County 1997, Prudenti, J.]).

The cross-petitioner's egregious conduct also requires this court, as a matter of equity, to intervene to protect Nancy K., a vulnerable person, and to prevent the unjust enrichment of the cross-petitioner since it was his wrongful conduct which put himself in a position to obtain financial gain by his attempts to have total financial control of Nancy K.'s finances through a power of attorney and marriage, which would also provide him with the right of election in contesting Nancy K.'s 2014 will (*see Riggs v Palmer*, 115 NY 506 [1889]; *Campbell v Thomas*, 73 AD3d 103, 116-119 [2d Dept 2010]).

This court's paramount concern throughout this proceeding has always been to ascertain what is in the best interest of Nancy K., and now the court must formally consider whether Nancy K. is likely to suffer harm because she is unable to provide for her personal needs and manage her property, and whether she adequately understands and appreciates the nature and consequences of her functional limitations (*see* Mental Hygiene Law § 81.02 [b] [1], [2]).

> "In order for a court to exercise its authority to appoint ***272** a personal needs guardian or a property management guardian, it must make a two-pronged determination (*see* Mental Hygiene Law § 81.02 [a]; *Matter of Linda H.A. [Belluci]*, 174 AD3d 704 [2019]; *Matter of Agam S.B.-L. [Janna W.]*, 169 AD3d 1028, 1030 [2019]). First, the court must determine that 'the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person' (Mental Hygiene Law § 81.02 [a] [1]). Second, the court must determine either 'that the person agrees to the appointment, or that the person is incapacitated' (Mental Hygiene Law § 81.02 [a] [2]). With respect to this second element, '[t]he determination of incapacity . . . shall consist of a determination that a person is likely to suffer harm because' (1) 'the person is unable to provide for [his or her] personal needs and/or property management' and (2) 'the person cannot adequately understand and appreciate the nature and consequences of such inability' (Mental Hygiene Law § 81.02 [b]; *see Matter of Carole L.*, 136 AD3d 917, 918-919 [2016]). In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person (*see* Mental Hygiene Law § 81.02 [c]). Significantly, any guardian appointed shall be granted 'only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention' (Mental Hygiene Law § 81.02 [a] [2])" (*Matter of Aurelia S. [Banks]*, 186 AD3d 715,

716 [2d Dept 2020]; *Matter of Carolyn S. [Gaylor]*, 192 AD3d 1114, 1115-1116 [2d Dept 2021]).

The evidence clearly established that Nancy K. has cognitive limitations as a result of dementia, which impairs her ability to manage her own personal needs and property, and that she cannot fully understand the consequence of such inability. Consequently, she ****11** would suffer harm if a guardian is not appointed on her behalf. Viewing the record in its entirety, and this court having heard and reviewed the testimony and evidence together with the report and testimony of the court ***273** evaluator, the temporary guardian and petitioner's witnesses, this court finds that the petitioner established by clear and convincing evidence that Nancy K. is an incapacitated person as defined under section 81.02 of the Mental Hygiene Law in that she is not able to provide for her own personal needs and property management. This court further finds that the evidence adduced at trial requires that an independent personal needs guardian and an independent property management guardian from the Part 36 fiduciary list, rather than a family member, must be appointed on behalf of Nancy K. (*see Matter of Linda H.A. [Belluci]*, 174 AD3d 704, 704-706 [2d Dept 2019]; *see also Matter of Carolyn S. [Gaylor]*, 192 AD3d 1114, 1115-1116 [2d Dept 2021]; *Matter of Doar [L.S.]*, 39 Misc 3d 1242[A], 2013 NY Slip Op 50988[U] [Sup Ct, Kings County 2013, Barros, J.]).

This court has observed that the temporary guardian has discharged his duties satisfactorily during his tenure as guardian under difficult circumstances, and consequently, this court finds that the most appropriate and suitable individual to serve in the capacity of permanent property management guardian is the temporary guardian, Lloyd J. Weinstein, Esq., Fiduciary No. 105429, The Weinstein Group, PC, 6800 Jericho Turnpike, Suite 112W, Syosset, New York 11791, telephone: (516) 802-5330, email: LJW@THEWEINSTEINGROUP.NET. Mr. Weinstein shall prepare and file a final account from the time of his appointment to the entry of this order and judgment. John Newman, Esq., a court examiner in Nassau County, Fiduciary No. 112251, 1776 E. Jericho Turnpike, Suite 2, Huntington, New York 11743, telephone: 631-486-7802, email: jnewesq @gmail.com, is appointed as counsel to assist Mr. Weinstein in preparing the final account.

This court also finds, in view of the fact that the geriatric care manager has been working well with the temporary guardian to provide Nancy K. with her personal needs and to take care of emergency situations which have arisen since their appointments, that Yvonne Murphy shall continue in her capacity as geriatric care manager.

This court further finds that the most appropriate individual to serve as personal needs guardian for Nancy K. is Judith Powell, Esq., Fiduciary No. 401983, 29 Jericho Turnpike, Jericho, New York 11753-1053, telephone: (516) 222-1111, email: JLP@ANEWYORKLAWYER.COM.

The foregoing appointments are to take effect immediately and shall be for an indefinite duration upon the filing of a ***274** designation. The property guardian is directed to obtain a bond in the sum of two million dollars.

The judgment to be submitted by the petitioner shall provide for the guardians to have all those powers requested in the moving papers, as authorized under sections 81.21 and 81.22 of the Mental Hygiene Law, and to make all decisions that are in her best interest and welfare, and that are consistent with her functional limitations.

However, with respect to financial matters, the property guardian shall have the following specific powers until the petitioner's judgment is submitted, reviewed and signed by this court:

a. enter into contracts subject to court approval;

b. sell, subject to court approval, real or personal property owned by Nancy K.;

c. marshal assets;

d. pay the funeral expenses of the incapacitated person;

e. pay bills as may be reasonably necessary to maintain the incapacitated person; ****12**

f. retain counsel with prior court permission and approval, and defend or maintain any judicial action or proceeding to a conclusion.

The personal needs guardian shall have the following powers until the judgment by the petitioner is submitted, reviewed and signed by this court:

a. determine who shall provide medical care, medical evaluations, medical treatment, personal care and assistance to Nancy K.;

b. make decisions regarding Nancy K.'s living and social environment;

c. relocate Nancy K. to a different facility if necessary, subject to court approval.

In addition to the foregoing findings, the judgment to be submitted by the petitioner shall provide for reasonable compensation to the guardians and the geriatric care manager, which shall be fixed in further orders of the court. The proposed judgment shall also provide for compensation to be paid from the guardianship account to any court appointees who have provided professional services since their last submission of a fee award; those appointees shall serve and file an affidavit or affirmation pertaining to the services rendered and performed ***275** in this article 81 proceeding, up to and through the issuance of the commission to the guardians.

This court has reviewed and scrutinized all of the fee requests by the court appointees in this proceeding for an award of reasonable compensation to them from the guardianship account. After thorough review this court has reduced the hourly amount requested by the court appointees, not because they did not deserve the fee requested, but as an effort to preserve Nancy K.'s assets. The court awards in this decision, order and judgment reasonable compensation to each court appointee, payable after this order has been uploaded into the New York State Courts Electronic Filing System (NYSCEF), for the reasons stated below.

> "Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9 [1974]).

The Supreme Court has broad discretion in determining, in a guardianship proceeding pursuant to article 81 of the Mental Hygiene Law, the reasonable amount to award to court appointees; however, it must provide a clear and concise explanation for its award in a written decision, with reference to the above-listed factors (*see Matter of Zofia L. [Jolanta S.—Bogdan L.]*, 136 AD3d 818, 821 [2d Dept 2016]; *Matter of Alice D. [Lupoli]*, 113 AD3d 609 [2d Dept 2014]; *Matter of Marion C.W. [Lisa K.—Maguire]*, 83 AD3d 1089, 1090 [2d Dept 2011]; *Matter of Theodore T. [Charles T.]*, 78 AD3d 955, 957 [2d Dept 2010]; *Matter of Catherine K.*, 22 AD3d 850 [2d Dept 2005]).

Edward F. Cunningham, Esq., the court evaluator, is awarded the reasonable sum of $19,168.50, inclusive of disbursements, for 58.98 hours of professional services rendered (at $325 per hour) for investigating the claims in the petition, interviewing potential witnesses, reviewing documents (including financial statements), preparing and issuing a thorough report and attending 13 sessions of the trial and numerous conferences. The time and labor involved was ***276** extensive, given the contentiousness between the petitioner and cross-petitioner, and the unusual issues involved in this proceeding. Mr. Cunningham, a former agent for the Federal Bureau of Investigation, was admitted to the practice of law by the Appellate Division, Second Department, in March 1978. The Appellate Division, Second Department, has also ****13** designated him to be a court examiner in guardianship proceedings in Nassau County.

Mr. Cunningham is authorized to practice before the Veterans Administration and the Court of Appeals for Veterans Claims. He is also admitted to practice law in the State of Florida. He completed the Certified Training Course in article 81 of the Mental Hygiene Law given by the New York State Bar Association in 2004 and has served as court evaluator, guardian, counsel to the AIP, counsel to the guardian and court examiner. He is a member of the Elder Law Section, Estate and Trust Law Section and Real Property Law Section of both the New York State Bar Association and Nassau County Bar Association. Mr. Cunningham's report and recommendations assisted the court in making decisions which prevented harm to Nancy K.

Elisa S. Rosenthal, Esq., appointed counsel to Nancy K., is an outstanding, rising guardianship attorney who is an active participant in several committees and organizations devoted to elder law and the general practice of law, including the Nassau County Bar Association's Committee on Elder Law, Social Services and Health Advocacy, and the Surrogate's Court Estates and Trusts Committee. Ms. Rosenthal is the immediate past Chair of the General Practice Section of the New York State Bar Association and currently serves on

the House of Delegates. Ms. Rosenthal has served as court evaluator, guardian ad litem and referee in other proceedings. On the eve of the trial, cross-petitioner filed his cross-petition, which immediately shifted this proceeding into a highly litigious and argumentative proceeding. Cross-petitioner's counsel consisted of a team of attorneys who assisted in all phases of litigation. At that time, this court appointed Brian Heitner, Esq., to assist Ms. Rosenthal as trial counsel with the litigation. Ms. Rosenthal was primarily focused on the investigative aspects, legal research, preparation of legal briefs and ongoing collaboration with cocounsel. She was responsible for opposing and arguing six different motions filed by cross-petitioner, as well as filing a motion on behalf of Nancy K. to declare the health care proxy ***277** signed by Nancy K. invalid. Each motion required extensive legal research and preparation. The court notes that, besides the filing of extensive motions, there were also informal letter applications and emails which required full attention and responses from Ms. Rosenthal. Attorneys who have similar experience as Ms. Rosenthal within the guardianship bar charge between $450 to $650 per hour for their services. Under the totality of the circumstances, the court awards Elisa S. Rosenthal, Esq., $64,400, inclusive of disbursements as reasonable compensation (at $350 per hour) for 184 hours of legal services rendered in this proceeding.

Brian R. Heitner, Esq., a partner in the well-known Long Island law firm Seltzer Sussman Heitner LLP, is a distinguished trial and litigation attorney, specializing in guardianship and estate law. He has been appointed by many judges to serve as counsel to alleged incapacitated persons or guardians in numerous guardianship cases. Mr. Heitner has been practicing for more than 28 years and is certified by the Office of Court Administration as a court evaluator, counsel for an alleged incapacitated person and guardian, and has served in each of those capacities in various counties. Mr. Heitner has lectured to members of the legal profession, including attorneys, judges and court personnel, and laypeople on estate, guardianship and elder law issues and has been a presenter, panelist, and moderator for article 81 guardianship training programs which were personally designed, developed, and produced by Mr. Heitner. This case encompassed a total of 13 days of trial and testimony from approximately 20 witnesses. Mr. Heitner's involvement and representation of Nancy K. in this proceeding to protect her civil rights and interests was of great benefit to her since, if he was not involved in that capacity, great harm could have befallen her. Mr. Heitner's billing rate for ****14** private clients is $495 per hour, which is commensurate with leading attorneys in the guardianship bar, but significantly below the amount charged by talented trial attorneys with the same experience as Mr. Heitner. Consequently, the court awards Mr. Heitner $53,550 ($425 per hour) for 126 hours of legal services and $3,146.21 in disbursements.

Yvonne Murphy, MA, appointed geriatric care manager, is awarded the reasonable sum of $35,250 ($150 per hour) for 235 hours of services which is comparable to the fees charged by other court-appointed geriatric care managers. She holds a Master's degree in social work and a second Master's degree ***278** from John J. College in forensic psychology. Ms. Murphy's area of expertise is eldercare, guardianship, geriatric case management and social work. She has an extensive and diverse knowledge base in geriatric care where she takes seniors from independence to supportive care with a safety net in place. Ms. Murphy is a frequent lecturer on Medicaid and guardianship topics and has a wealth of knowledge on all the above. Her initial and ongoing effort and work in this matter was essential as it was critical to find Nancy K. a safe new environment where her health could be restored and protected, and she could be properly cared for emotionally and physically. Ms. Murphy attended care plan meetings for the purposes of planning a safe environment, attended court as scheduled, processed documents, reviewed social needs as well as interacted with family members. She was involved in assessing Nancy K.'s medical treatment and care and made sure Nancy K. was in the best environment available. Ms. Murphy continues to update the court with Nancy K.'s condition.

Lloyd J. Weinstein, Esq., temporary personal needs and property management guardian, is an attorney who has been appointed as a guardian, court evaluator and counsel to the incapacitated person by multiple Supreme Court Justices in various counties. Mr. Weinstein was tasked with the appointment as guardian in a highly disputed proceeding. Mr. Weinstein faced daily challenges and obstructive behavior from the cross-petitioner while conducting his guardianship duties. Mr. Weinstein continues to update the court about Nancy K.'s health and safety. From the date of his appointment through the submission of his affirmation dated June 14, 2021, Mr. Weinstein expended 244.90 hours of services. Mr. Weinstein explains that when he required the assistance of his legal staff, he billed at a lower rate of $150 per hour. The court thoroughly reviewed the printout from Mr. Weinstein's billing program and carefully assessed the hours and time allotted. The court awards Mr. Weinstein $5,568.75 in legal fees ($375 per hour) for 14.85 hours of

legal services performed while executing his guardianship obligations and duties and $67,230 for services rendered as guardian ($300 per hour) for 224.1 hours. The court also awards Mr. Weinstein $901.50 ($150 per hour) for 6.01 hours of services rendered by his staff in connection with this matter and $389.79 in disbursements. In sum, this court awards Lloyd J. Weinstein, Esq., $73,700.35 for professional services rendered in this proceeding through May 29, 2021.

***279** The amounts awarded above may be paid immediately by the temporary guardian/property guardian from the guardian account.

Accordingly, it is ordered and adjudged that the petition for an order appointing a guardian for Nancy K. is granted; and it is further ordered and adjudged that Nancy K. is found to be an incapacitated person; and it is further ordered and adjudged that the marriage entered into by Nancy K. and William McEnaney on November 6, 2020, is declared null and void and void ab initio on the ground that ****15** Nancy K. lacked capacity to enter into the marriage; and it is further ordered and adjudged that the power of attorney and health care proxy signed by Nancy K. on October 8, 2019, naming the cross-petitioner as agent, are revoked and vacated on the ground that Nancy K. lacked capacity when she signed those documents; and it is further ordered and adjudged that Lloyd J. Weinstein, Esq., is appointed permanent property guardian for Nancy K., and is to obtain an initial bond in the sum of two million dollars; and it is further ordered and adjudged that Judith Powell, Esq., is appointed permanent personal needs guardian for Nancy K.; and it is further ordered and adjudged that Yvonne Murphy is appointed geriatric care manager for Nancy K.; and it is further ordered and adjudged that John Newman, Esq., is appointed as counsel to the property guardian to assist Lloyd Weinstein in preparing the final account for his role as temporary guardian; and it is further ordered and adjudged that the property guardian, Lloyd J. Weinstein, Esq., shall have all of the powers listed in Mental Hygiene Law § 81.21, as well as the authority to (a) enter into contracts subject to court approval; (b) sell, subject to court approval, real or personal property owned by Nancy K.; (c) marshal assets; (d) pay the funeral expenses of the incapacitated person; (e) pay bills as may be reasonably necessary to maintain Nancy K.; and (f) retain counsel with prior court permission and approval, and defend or maintain any judicial action or proceeding to a conclusion; and it is further ordered and adjudged that the personal needs guardian, Judith Powell, Esq., shall have all of the powers listed in Mental Hygiene Law § 81.22, as well as the authority to (a) determine who shall provide medical care, medical evaluations, medical treatment, and personal care and assistance to Nancy K.; (b) make decisions regarding Nancy K.'s living and social environment; and (c) relocate Nancy K. to a different facility if necessary, subject to court approval; and it ***280** is further ordered and adjudged that Edward F. Cunningham, Esq., is awarded the sum of $19,168.50, for 58.98 hours of professional service rendered as court evaluator from February 23, 2021, to May 28, 2021; and it is further ordered and adjudged that Elisa S. Rosenthal, Esq., is awarded the sum of $64,400 for 184 hours of legal services provided as counsel to Nancy K. from February 23, 2021, to June 24, 2021; and it is further ordered and adjudged that Brian Heitner, Esq., is awarded the sum of $53,550 for 126 hours of legal services provided as trial counsel for Nancy K. from March 23, 2021, to June 23, 2021, plus disbursements in the sum of $3,146.21; and it is further ordered and adjudged that Lloyd J. Weinstein, Esq., is awarded the sum of $73,700.35 for 244.90 hours of professional services rendered as temporary guardian for Nancy K. from February 23, 2021, to May 29, 2021, plus $389.79 in disbursements; and it is further ordered and adjudged that Yvonne Murphy is awarded the sum of $35,250 for 235 hours of professional services as geriatric care manager for Nancy K. from March 17, 2021, to June 3, 2021; and it is further ordered and adjudged that the cross-petition is denied and the cross-petition is dismissed as having no merit; and it is further ordered and adjudged that the cross-petitioner is directed to permanently vacate the home of Nancy K. *on or before January 31, 2022*; and it is further ordered and adjudged that the cross-petitioner is hereby restrained pursuant to Mental Hygiene Law § 81.23 (b) from removing, destroying, moving, selling or disposing of Nancy K.'s personal property, including any motor vehicle she may have title to; and it is further ordered and adjudged that pursuant to Mental Hygiene Law § 81.23 (b) the cross-petitioner is enjoined (a) from removing, interfering, damaging, destroying, and relocating any items in Nancy K.'s home which are owned by her, whether such items are affixed to the residence or are removable, (b) from damaging any existing system in Nancy K.'s home, including the plumbing, heating, electrical and mechanical systems, including all appliances, and (c) from damaging the landscape and structure of Nancy K.'s home, including but not limited to the floors, walls, ceiling and roof of Nancy K.'s home; and it is further ordered and adjudged that the cross-petitioner shall be responsible for the legal fees he incurred, but in view of the financial disparity of the parties, he shall not be responsible for the fees and expenses of this proceeding awarded to the court appointees, which shall instead be paid from the ***281**

guardianship account; and it is further ordered that petitioner shall serve via NYSCEF and by mail a copy of this order with notice of entry on all counsel.

Footnotes

1 "The '[a]buse of elders takes many different forms.' (*See* Lawrence Robinson, Joanna Saisan & Jeanne Segal, Elder Abuse & Neglect: Warning Signs, Risk Factors, Prevention, and Reporting Abuse, http://www.helpguide.org/mental/elder_abuse_physical_emotional_sexual_neglect.htm [last updated Feb. 2014].) It can be physical (using force to injure or impair an elder); financial (forcing an elder to sign a power of attorney); neglectful (neglecting the needs and wishes of an elder); and emotional (causing an elder to feel ashamed or belittled). (*See* New York State Office of Children and Family Services, Adult Protective Services, Definitions of Adult Abuse, http://www.ocfs.state.ny.us/main/psa/adultabuse.asp.) Additionally, it is widely held that '[e]lder abuse tends to take place where the senior lives . . . .' " (*Huggins v Randolph*, 45 Misc 3d 521, 527-528 and nn 21, 22 [Civ Ct, Kings County 2014] [footnote callouts omitted].)

2 "Cast me not aside when I grow old; as my strength fails, do not forsake me." (Psalms 71:9.)

73 A.D.3d 103, 897 N.Y.S.2d
460, 2010 N.Y. Slip Op. 02082

**1 Christopher Campbell et al., Respondents

v

Nidia Colon Thomas, Appellant, et al., Defendants.

Supreme Court, Appellate Division,
Second Department, New York
March 16, 2010

CITE TITLE AS: Campbell v Thomas

SUMMARY

Appeal from an order of the Supreme Court, Putnam County (Andrew P. O'Rourke, J.), dated January 31, 2008. The order denied a motion by defendant Nidia Colon Thomas to modify or vacate a prior order of that court, dated June 21, 2007, which, upon remittitur from the Appellate Division (36 AD3d 576), had, among other things, directed the entry of judgment in favor of the Estate of Howard Nolan Thomas and against defendant in the sum of $101,997, and declared that she "shall have no legal rights and can claim no legal interest as a spouse of Howard N. Thomas."

HEADNOTES

Wills
Elective Share of Surviving Spouse
Spouse Who Took Unfair Advantage of Terminally Ill Person Lacking Capacity to Marry Not Entitled to Right of Election

(1) Defendant, who surreptitiously married decedent at a time when decedent was terminally ill, suffering from dementia and lacked the capacity to enter into a marriage, was not entitled to an elective share of decedent's estate notwithstanding that the marriage was voided more than five years after it occurred. Where a marriage to which one of the parties is incapable of consenting due to mental incapacity is not annulled until after the death of the nonconsenting party, a strict reading of existing statutes requires that the other party be treated as a surviving spouse and afforded a right of election against the decedent's estate, without regard to whether the marital relationship itself came about through an exercise of overreaching or undue influence by the surviving party (*see* EPTL 5-1.2). However, Supreme Court is a court of equity as well as law, and equitable principles dictate that a court will not permit a party to profit from his or her own wrongdoing. Defendant, one of decedent's caretakers, was aware of his infirmity and waited until the primary caretaker went on vacation to marry decedent, whereupon she quickly revised financial documents to make herself the sole beneficiary; additionally, she falsely stated in two affidavits that decedent himself effected the change of beneficiary forms. Accordingly, there was ample support for the inference that defendant took unfair advantage of decedent's condition for her own pecuniary gain at the expense of decedent's heirs. By her wrongful conduct, defendant forfeited any rights that would flow from the now-voided marital relationship. Moreover, even in the absence of express statutory warrant, courts must not allow themselves to be made an instrument of wrong.

Equity
Unjust Enrichment
Modification of Beneficiaries of Decedent

(2) In an action to prevent defendant from asserting any claims against decedent's estate as his spouse, upon the ground that defendant had surreptitiously **104 married decedent at a time when decedent was terminally ill, suffering from dementia and lacked the capacity to enter into a marriage, an order directing a retirement system to limit the beneficiaries of decedent's retirement account to three male heirs was modified to include defendant as a beneficiary, since, prior to the now-voided marriage, defendant had been one of the beneficiaries of that account. Thus, the share in the account that defendant already possessed was not a product of her wrongful conduct. Accordingly, the parties should be restored to the status quo ante.

RESEARCH REFERENCES

Am Jur 2d, Descent and Distribution §§ 110, 125; Am Jur 2d, Wills §§ 1411–1413.

Carmody-Wait 2d, Ascertaining and Liquidating Assets § 158:7; Carmody-Wait 2d, Election By Surviving Spouse §§ 163:11, 163:15, 163:16, 163:21; Carmody-Wait 2d, Payment of Shares §§ 169:98, 169:99.

McKinney's, EPTL 5–1.2.

NY Jur 2d, Decedents' Estates §§ 68, 150, 153, 247, 248, 1908; NY Jur 2d, Domestic Relations §§ 55, 65; NY Jur 2d, Equity §§ 69, 100.

ANNOTATION REFERENCE

Construction, application, and effect of statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will. 48 ALR4th 972.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: elective /2 share /s estate & marri! /s capacity & unjust! /2 enrich!

APPEARANCES OF COUNSEL

Warren Wynshaw, P.C., Fishkill, for appellant.
Christopher Campbell, Alameda, California, respondent pro se.

OPINION OF THE COURT

Prudenti, P.J.

Elder abuse, including the financial exploitation of elderly individuals who have become mentally incapacitated, is an "often well hidden problem" (Bailly, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.14, 2010 Pocket Part, at 36), in part because the perpetrator of such conduct is in many cases a member of the ***105** victim's family.[1] With "the demographics promis[ing] a greater percentage of older Americans in the next thirty years" (*Matter of Astor*, 13 Misc 3d 1203 [A], 2006 NY Slip Op 51677[U], *5 [Sup Ct, NY County 2006]), this problem has begun to receive increasing attention.[2] New York, however, does not yet have a statute specifically addressing a situation in ****2** which a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage by secretly marrying him or her for the purpose of obtaining a portion of his or her estate at the expense of his or her intended heirs. When a marriage to which one of the parties is incapable of consenting due to mental incapacity is not annulled until after the death of the nonconsenting party, a strict reading of the existing statutes requires that the other party be treated as a surviving spouse and afforded a right of election against the decedent's estate, without regard to whether the marital relationship itself came about through an exercise of overreaching or undue influence by the surviving party. On this appeal, we have occasion to consider whether the surviving party may nonetheless be denied the right of election, based on the equitable principle that a court will not permit a party to profit from his or her own wrongdoing.

In early 2000 Howard Nolan Thomas was diagnosed with terminal prostate cancer and severe dementia, which was apparently attributable to Alzheimer's disease. In February 2001 Nancy Thomas, Howard's daughter and primary caretaker, went away on a one-week vacation, and left Howard, who was then 72 years old, in the care of the defendant Nidia Colon Thomas, who was then 58 years old. Nancy and two of Howard's other children, the plaintiffs Christopher Campbell and Keith Thomas, ***106** later learned that, during Nancy's vacation, Nidia had married Howard, and had subsequently transferred his assets into her name. Specifically, Nidia caused the ownership of an account at the defendant Citibank worth $150,000 to be changed from Howard individually to Nidia and Howard jointly, and caused herself to be named as the sole beneficiary of Howard's account with the defendant New York City Teachers' Retirement System (hereinafter TRS), valued at $147,000.[3] Howard died in August 2001.

In November 2001 Christopher, Nancy,[4] and Keith commenced this action against Nidia in the Supreme Court, seeking, inter alia, a judgment declaring Nidia's marriage to Howard, as well as the changes to the bank account ownership and the TRS account beneficiaries, to be null and void. They contended that Howard lacked the legal capacity to enter into the marriage or execute the changes to his accounts due to his severe dementia, the effects of the medications he was taking at the time, and the progression of his cancer. The plaintiffs later amended their complaint to add causes of action alleging undue influence, conversion, and fraud.

Meanwhile, in November 2001, Christopher filed a petition for probate and letters of administration C.T.A. in the Surrogate's Court. In December 2002 Howard's will, which was dated March 24, 1976, and provided that if his first

wife predeceased him, his estate was to be divided equally among his children, was admitted to probate. In January 2003 Christopher was issued letters of administration C.T.A.. In May 2003 Nidia filed a right of election, which Christopher challenged. Since the Surrogate's Court and the parties agreed that the determination of the right-of-election issue would depend upon the outcome of the dispute in the Supreme Court as to the validity of Nidia's marriage to Howard, the Surrogate's Court stayed the proceedings before it, pending the resolution of the action in the Supreme Court.

In the Supreme Court, the plaintiffs moved for summary judgment, in effect, on their causes of action seeking a judgment declaring the marriage and the changes to the bank account ownership and the TRS account beneficiaries to be null and void. They submitted, inter alia, affidavits from Christopher, ***107** Nancy, and Nancy's son Peter, all of whom attested to the deterioration of Howard's mental condition.

According to Nancy, during the last three years of Howard's life, his dementia had caused him to become "paranoid, extremely forgetful, and prone to temper outbursts." As she explained it, he "experienc[ed] great confusion as to who various individuals were," and called almost all females "Nancy." Nancy asserted that, when she took Howard out of the house, he required constant monitoring, since he tended to "wander off or just remain standing in one spot with a fixed stare." As recounted by Nancy, during two different hospital stays, Howard could not feed ****3** himself, was "combative and aggressive," had to be sedated and restrained, and "would pull out his IV tubes and catheter." In her affidavit, Nancy explained that, late in 2000, Howard's primary care physician advised her that "there was nothing more that could be done for [Howard,] and it was simply a matter of time until the [prostate cancer] took its course." Nancy stated that she then conveyed this information to Nidia. According to Nancy, when Nancy found out about the marriage in March 2001 and confronted Howard about it, Howard had no awareness of the marriage, and adamantly denied that it had occurred, stating: "What are you talking about? . . . I'm not married . . . Are you crazy?" Nancy further asserted that Howard kept his will in a safe at his home, and had shown her the will in the fall of 2000, but that when Howard died, Nidia claimed that she was unable to locate the will, despite having looked in the safe. The will, however, was later produced by Nidia's attorney.

Peter averred that, despite having a close and loving bond with his grandfather throughout his childhood, he began to notice bizarre behavior on Howard's part in 1999. During his hospitalization, Howard became "belligerent and aggressive" and "threatened to kill [Peter]," and then failed to recall behaving in that manner when confronted with it later. Peter stated that, beginning in 2000, Howard "required constant supervision," and "would soil himself," requiring Nancy or Peter to clean him, "because he had lost the ability to understand that he needed to be clean." As Peter recalled, on one occasion in 2000, Howard walked out of Nancy's house, where he was living temporarily, and was found several blocks away in a confused state of mind. As further recounted by Peter, after Howard "ran away" on one or more additional occasions, Nancy decided that Howard should move back into his own home, where she would ***108** continue to care for him, with the assistance of others, including Nidia.

In addition to describing Howard's diminished mental abilities, Christopher alleged in his affidavit that, approximately one month prior to Howard's death, Nidia sold a portion of a parcel of land owned by Howard for the sum of $90,000, and deposited the proceeds of the sale into the now-joint Citibank account. As of the date of Christopher's affidavit, the balance of the Citibank account was 54 cents.

The plaintiffs also submitted medical records as well as affidavits, one from Howard's primary care physician, who treated him for the last 13 years of his life, and one from a neurologist. Both physicians, who examined Howard in the fall of 2000, confirmed that he suffered from "severe dementia" and asserted that his condition made it inadvisable for him to be left unsupervised, "even for a minute." Both physicians recommended that Howard be placed in a nursing home, and they both would have supported an application for the appointment of a legal guardian for Howard. As explained by the physicians, and corroborated by the medical records, Howard was taking numerous prescribed medications, including psychotropic medication. As one of the physicians described it, Howard "was confused and had lost the mental capacity to provide for himself or understand his legal and financial affairs," and his mental condition continued to deteriorate after October 2000.

In addition, the plaintiffs submitted Nidia's affidavit in opposition to their prior motion for a temporary restraining order, in which Nidia made the following statement:

> "The plaintiffs claim that I tricked [Howard] into transferring the TRS Account into my name. The fact is that I did not know that he had transferred the account until

three months after [his] death. He had taken the steps to make the transfer without my knowledge or my help."

In opposition to the plaintiffs' motion, and in support of her cross motion for summary judgment, in effect, declaring that the marriage and transfers of the accounts are valid, Nidia submitted her own affidavit, in which she averred that she and Howard met in 1975 after Howard's first wife died. Nidia explained that Howard was a school principal, while she was a school safety officer. According to Nidia, she and Howard had a 25-year relationship, during which Howard asked her to marry ***109** him on four occasions: in 1979, in 1980, in 1981, and in 2001. Nidia claimed that she accepted the last proposal, even though she knew that Howard's children were against it. According to Nidia, "while [Howard] did have moments of forgetfulness, he did seem to have the requisite mental capacity to enter into the marriage vows." Nidia's relationship with Howard was not exclusive; she admitted during her deposition that she was aware during Howard's lifetime that he was dating other women. According to Christopher's affidavit, Howard jointly ****4** owned property with one such woman.

Nidia also submitted affidavits from the pastor who performed the wedding ceremony in a church and the two witnesses to the marriage, each of whom asserted that Howard "knew that he was marrying Nidia Colon." The pastor, however, testified at a deposition that, had he known about Howard's medical condition, as described by the physicians in their affidavits submitted in support of the plaintiffs' summary judgment motion, he would not have performed the wedding ceremony.

In their reply papers, the plaintiffs referred to Nidia's assertion in her prior affidavit that Howard changed the beneficiary of his retirement account without her knowledge or assistance —an assertion which Nidia repeated in her affidavit opposing the plaintiffs' motion for summary judgment. The plaintiffs pointed out that, in deposition testimony which they had also submitted in support of their motion, Nidia had admitted that the handwriting on the change-of-beneficiary form was hers, thus exposing the representations made in her affidavits as untruthful.

In an order dated October 1, 2004 the Supreme Court denied both the plaintiffs' motion and Nidia's cross motion, concluding that there were triable issues of fact as to whether Howard was capable of consenting to the marriage. On the plaintiffs' appeal, this Court concluded that the plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that Howard "lacked the capacity to understand his actions before his marriage, and that his mental state only diminished thereafter" (*Campbell v Thomas*, 36 AD3d 576, 576 [2007]), and that the evidence submitted by Nidia in opposition failed to raise a triable issue of fact. Accordingly, this Court reversed the Supreme Court's order insofar as appealed from, granted the plaintiffs' motion for summary judgment, and remitted the matter to the Supreme Court "for the entry of a judgment declaring null and void (1) the marriage between the ***110** defendant Nidia Colon Thomas and the decedent Howard Nolan Thomas, (2) a change in beneficiary in Howard Nolan Thomas' Teacher's Retirement System of the City of New York account, and (3) a change in the ownership of Howard Nolan Thomas' Citibank accounts" (*id.*).

Subsequently, the Supreme Court issued an order, dated June 21, 2007, in which it made certain "findings consistent with the ruling of the Appellate Division." The Supreme Court found that Nidia had admitted that "she had the 'beneficial use' of, at a minimum, $101,997.00 from [Howard's] Citibank account," and, in effect, directed the entry of a judgment in favor of Howard's estate and against Nidia in the amount of $101,997. The order also, in effect, directed the entry of a judgment declaring that Nidia "shall have no legal rights and can claim no legal interest as a spouse of [Howard]." In addition, the order provided, among other things, that Nidia was to provide a complete accounting to the plaintiffs of all the property, money, and interests she obtained from Howard; that the TRS was to make Keith, Peter, and Christopher the sole beneficiaries of Howard's retirement account; that Citibank was to provide a complete accounting to Howard's estate of all of certain bank accounts in which Howard had an interest, and those accounts would be placed in the sole name of Howard's estate; and that Howard's estate was to be "given ownership of all property in the name of Howard N. Thomas as of October 1, 2000," and the estate was to distribute those funds to Keith, Peter, and Christopher in one-third shares.

Subsequently, Nidia moved in the Supreme Court to modify or vacate the order dated June 21, 2007. In an order dated January 31, 2008 the Supreme Court denied Nidia's motion, and Nidia now appeals.

On appeal, Nidia contends that the Supreme Court's order dated June 21, 2007 improperly directed the entry of a judgment declaring that she "shall have no legal rights

and can claim no legal interest as a spouse of Howard N. Thomas." Nidia argues that, under the applicable statutes, she is considered a surviving spouse even if the marriage is subsequently annulled or voided, and is, therefore, entitled to an elective share of Howard's estate.

This Court concluded that the marriage between Nidia and Howard was null and void on the ground that Howard was "incapable of consenting to a marriage for want of understanding" (Domestic Relations Law § 7 [2]). The Domestic Relations ***111** Law deems such a marriage to be voidable, meaning that the marriage "is void from the time its nullity is declared by a court of competent jurisdiction" (Domestic Relations Law § 7). This status is distinct from that of certain other marriages—incestuous marriages (Domestic Relations Law § 5) and bigamous marriages (Domestic Relations Law § 6)—which the law deems to be absolutely void. The distinction, however, is not that void marriages are nonexistent from the beginning, while voidable marriages are valid until declared invalid. That is the distinction between annulment and divorce. Rather, as ****5** a general rule, both void and voidable marriages are void ab initio, the difference between them being that the parties to a void marriage (and everyone else) are free to treat the marriage as a nullity without the involvement of a court, while a voidable marriage may be treated as a nullity only if a court has made the requisite pronouncement (*see* *Sleicher v Sleicher*, 251 NY 366, 369 [1929] ["A marriage procured by fraud is voidable, not void. Even so, annulment when decreed, puts an end to it from the beginning. It is not dissolved as upon divorce. It is effaced as if it had never been" (citations omitted)]; *Matter of Moncrief*, 235 NY 390 [1923]; *Jones v Brinsmade*, 183 NY 258 [1905]; *Matter of Skagen v New York City Employees' Retirement Sys.*, 108 Misc 2d 448, 450 [1981]; *Metcalfe v Cutler*, 52 NYS2d 71, 73 [1944], *affd* 269 App Div 655 [1945]).

In *Matter of Moncrief*, where a child's parents were married on the day after she was born, but the marriage was later annulled on the ground of duress, the Court of Appeals held that, despite a statute providing that a child whose parents are later married was deemed legitimate, the child could not be considered legitimate because her parents' marriage was a nullity. The Court explained that, at common law, whether a marriage was void or voidable, the courts were empowered to declare it void, and "[s]uch a decree rendered the marriage void from the beginning" (235 NY at 393). Although a statute enacted in 1830 provided that certain marriages were absolutely void and certain other marriages were void "from the time their nullity shall be declared by a court of competent authority," the Court concluded that the Legislature did not intend to alter the well-established rule that, when a Court annulled a voidable marriage, the marriage was void ab initio (*id.* at 394 [internal quotation marks omitted]). The Court reasoned that

> "[c]onsent is essential to the contract. No consent, no marriage. The court finds no consent. It, therefore, ***112** nullifies the marriage. It declares there was no marriage. From that moment the marriage is void. As we have seen a void marriage is void for all purposes from its inception. All that was meant was that no longer might husband and wife upon their own responsibility determine that they were free from the contract. Such a determination required the concurrence of the court. Only when that was obtained did the marriage become void. But when it was obtained the marriage was nullified and all the consequences of a void marriage then followed" (*id.*; *see Jones v Brinsmade*, 183 NY 258, 262 [1905] ["when a voidable marriage has been set aside by a decree of nullity, the parties are regarded as having never been married"]; *Matter of Skagen v New York City Employees' Retirement Sys.*, 108 Misc 2d at 450 [Domestic Relations Law § 7 "would be a superfluous statute if its sole meaning were to establish that the marriage is void only from the time of a declaration by the court to that effect. The same is true of the effect of any court decree. . . . Once annulled[,] . . . [a] marriage is deemed erased as if it never took place. In that respect it is very much unlike a divorce, which serves to legally terminate a marriage deemed to have validly existed"]).

In *Sleicher v Sleicher* (251 NY 366, 368 [1929]), the Court of Appeals applied the principle set forth in *Matter of Moncrief*, and concluded that, when a wife's second marriage was annulled on the ground of fraud, her right to alimony from her first husband, which, pursuant to their separation agreement, was to continue "so long as she remains unmarried," was revived. Taken to its logical conclusion, the rule applied by the Court would have required the first husband to make all alimony payments, including retroactive payments for the period during which the wife apparently was married to the second husband, since the second marriage, once annulled, had no legal existence and thus could not terminate the first husband's alimony obligation. The Court, however, limited its holding to the period following the annulment of the second marriage, reasoning that, although the first husband "must now comply with the mandate of the

judgment of divorce and provide for his former wife as for one who has not remarried," this did not mean "that he must provide for her during the years when the voidable remarriage was in force and unavoided" (*id.* at 369).

***113** The Court of Appeals later confronted the same scenario in *Gaines v Jacobsen* (308 NY 218 [1954]). In that case, the Court held that the annulment of the second marriage did not revive the ****6** first husband's support obligation, noting that, at the time of the *Sleicher* decision, a wife was not entitled to alimony upon the annulment of a marriage, which would have left the wife in that case without any means of support if the first husband's alimony obligation had not been revived. The *Gaines* Court observed that the Legislature had since enacted Civil Practice Act § 1140-a (now Domestic Relations Law § 236), which allowed for spousal maintenance upon the annulment of a marriage, and concluded that the new enactment "alters the situation before us so materially that it calls for a different result in this case" (308 NY at 223). The *Gaines* decision then proceeded to question the "doctrinal basis" of *Sleicher*, in light of the enactment of Civil Practice Act § 1140-a. The Court explained that

> "[t]he fiction that annulment effaces a marriage 'as if it had never been' is sometimes given effect and sometimes ignored, as the 'purposes of justice' are deemed to require. The courts and the legislature have, accordingly, attached to annulled marriages, for certain purposes, the same significance that a valid marriage would have, when a more desirable result is thereby achieved. Thus, although a distinction is sometimes made between void and voidable marriages, the annulled marriage has been given sufficient vitality to constitute valid consideration for a gift in contemplation of the marriage; to make a remarriage by one of the parties during its continuance bigamous; and, by statute in this state, to legitimatize any children born of the union.
>
> "By writing section 1140-a into the law, the legislature has chosen, without regard to whether the marriage is void or voidable, to attach to annulled marriages sufficient validity and significance to support an award of alimony, in other words, to serve, the same as any valid marriage would, as the foundation of a continuing duty to support the wife after the marriage is terminated" (308 NY at 225 [citations omitted]).

The Court of Appeals subsequently held that the *Sleicher* rule should no longer be applied to revive a support obligation upon ***114** the annulment of a second marriage in any case, even where the remarried spouse was not statutorily entitled to support from his or her second spouse (*see Denberg v Frischman*, 17 NY2d 778 [1966], *affg* 24 AD2d 100 [1965]). Yet, despite this exception to the general rule that an annulled marriage is treated as void ab initio, and the other exceptions described in *Gaines*, it does not appear that the Court of Appeals has overruled *Matter of Moncrief* or the earlier decisions on which it relied.

We turn, then, to the question of whether this Court's determination that Nidia's marriage to Howard was null and void renders the marriage void ab initio for purposes of the right of election Nidia has asserted. The Domestic Relations Law provides that

> "[a]n action to annul a marriage on the ground that one of the parties thereto was a mentally ill person may be maintained at any time during the continuance of the mental illness, or, after the death of the mentally ill person in that condition, and during the life of the other party to the marriage, by any relative of the mentally ill person who has an interest to avoid the marriage" (Domestic Relations Law § 140 [c]).

The most readily apparent interest a relative of a deceased spouse is likely to have in avoiding a marriage is preventing the living spouse from sharing in the deceased spouse's estate.[5] ****7** Yet, the Estates, Powers and Trusts Law provides that a husband or wife is considered a "surviving spouse" with a right of election against the deceased spouse's estate under EPTL 5-1.1-A

> "unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that: ***115** (1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage . . . was in effect when the deceased spouse died [or that] (2) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof [or that certain other circumstances, not relevant in this case, existed]" (EPTL 5-1.2 [a]).

This provision appears to render the right of family members to obtain a post-death annulment largely illusory. This effect was illustrated in *Bennett v Thomas* (38 AD2d 682 [1971]),

where, although the Appellate Division affirmed the denial of a motion to dismiss a complaint seeking to annul the marriage of the plaintiffs' deceased mother, the court cited EPTL 5-1.2 (a) and pointed out that "the outcome of this postdeath annulment action will not affect the defendant's right of election as a surviving spouse. His right to elect against his wife's estate became fixed and unalterable upon the wife's death" (38 AD2d at 682-683). Notwithstanding this potentially incongruous result, the language of the statute is inescapably plain. As applied in cases involving post-death annulments, EPTL 5-1.2 (a) appears to be among those statutory provisions in which, as the Court of Appeals discussed in *Gaines v Jacobsen*, the Legislature has "attached to annulled marriages, for certain purposes, the same significance that a valid marriage would have" (308 NY at 225).

In this case, the marriage was not declared a nullity until this Court issued its decision and order in January 2007, more than five years after Howard's death. Thus, under EPTL 5-1.2, Nidia technically had a legal right to an elective share as a surviving spouse.

That determination, however, does not end this Court's inquiry. The literal terms of a statute should not be rigidly applied if to do so " 'would be to ordain the statute as an instrument for the protection of fraud' " (*Citizens Util. Co. v American Locomotive Co.*, 11 NY2d 409, 420 [1962], quoting *Southern Cal. Enters. v D.N. & E. Walter & Co.*, 78 Cal App 2d 750, 752, 178 P2d 785, 786 [1947]). Mechanically applying EPTL 5-1.2 to honor the right of election of a surviving spouse whose very status as a spouse was procured through overreaching or undue influence would "seemingly invite[ ] a plethora of surreptitious 'deathbed marriages' as a means of obtaining one third of a ***116** decedent's estate immune from challenge" (*Matter of Berk*, 20 Misc 3d 691, 697 [2008]).

(1) The Supreme Court, being a court of equity as well as law (*see* NY Const, art VI, § 7 [a]; *McCain v Koch*, 70 NY2d 109, 116 [1987]), was empowered to grant relief consistent with the equitable principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" (*Riggs v Palmer*, 115 NY 506, 511 [1889]; *see Matter of Covert*, 97 NY2d 68, 74 [2001]; *In re Lonergan's Estate*, 63 NYS2d 307 [1946]; *see also Barker v Kallash*, 63 NY2d 19, 25 [1984]; *Carr v Hoy*, 2 NY2d 185, 187 [1957]). Pursuant to this doctrine, which has been applied in both civil and criminal cases, the wrongdoer is deemed to have forfeited the benefit that would flow from his or her wrongdoing (*see Giles v California*, 554 US —, —, 128 S Ct 2678, 2683 [2008] [discussing common-law doctrine of "forfeiture by wrongdoing," under which a criminal defendant forfeits the right to confront witnesses by engaging in conduct designed to prevent a witness from testifying]; *Diaz v United States*, 223 US 442, 458 [1912], quoting *Falk v United States*, 15 App DC 446, 460 [1899] [" 'The question is one of broad public policy. . . . Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong' "]; *New York Mut. Life Ins. Co. v Armstrong*, 117 US 591, 600 [1886] [person who purchased life insurance policy "forfeited all rights under it when, to secure its immediate payment, he murdered the assured" (quoted in *Riggs v Palmer*, 115 NY at 512)]; *People v Sanchez*, 65 NY2d 436 [1985] [criminal defendant who deliberately leaves courtroom during trial forfeits the right to be present at ****8** trial]; *Matter of Coty, Inc. v Anchor Constr., Inc.*, 2003 NY Slip Op 50013[U], *27 [Sup Ct, NY County 2003], *affd* 7 AD3d 438 [2004] ["for example, if one party destroys evidence, wrongfully resists disclosure, intentionally absents itself, or prevents a witness from testifying, it cannot profit from its own misconduct"]).

This "fundamental equitable principle" (*Simon & Schuster, Inc. v Members of N.Y. State Crime Victims Bd.*, 502 US 105, 119 [1991], quoting *Matter of Children of Bedford v Petromelis*, 77 NY2d 713, 727 [1991]) has been invoked to deny an individual who murders a family member the right to inherit from the victim of the murder (*see Riggs v Palmer*, 115 NY at 513), the right to succeed to the survivorship interest he would have otherwise had as a joint tenant of the victim (*see Matter of Covert* ***117** , 97 NY2d at 76), and the right to an elective share of the victim's estate (*see In re Lonergan's Estate*, 63 NYS2d 307, 308 [1946]). The rule, however, is not limited to murderers, and has been employed under a variety of circumstances, for example, to prevent a party from enforcing an illegal contract (*see Stone v Freeman*, 298 NY

268 [1948]), to preclude recovery in tort by a plaintiff whose injuries directly resulted from his or her serious violation of the law (*see* *Manning v Brown*, 91 NY2d 116 [1997]), to deny a wife's request to redate a judgment of divorce terminating her husband's prior marriage where the wife knew that her own marriage to the husband was bigamous (*see* *Martin v Martin*, 205 AD2d 506 [1994]), and to find that a landowner's commencement of construction of a shopping center did not create a vested right to the issuance of building permits, where the landowner knowingly performed the work in violation of a restrictive covenant (*see* *Matter of G. M. Land Corp. v Foley*, 20 AD2d 645 [1964]).

In determining whether Nidia engaged in wrongdoing from which she now seeks to profit by taking a share of Howard's estate, we begin with the decision on the prior appeal in this matter, in which this Court determined that Howard lacked the mental capacity to enter into the marriage. The record that was before the Supreme Court in this matter establishes that Nidia was aware of this lack of capacity. As Nidia well knew, Howard's dementia had advanced to the point that he often had difficulty recognizing family members, had lost the ability to understand his legal and financial affairs or even to attend to his own basic hygiene, and could not be left alone for any period of time. Nidia had also been informed that, due to the progression of his prostate cancer, Howard was not expected to live much longer. With knowledge of these facts, Nidia waited until Nancy, Howard's primary caretaker, left for a vacation, and then married Howard, without informing Nancy or any other member of Howard's family until after the fact. Nidia not only quickly arranged to have her name added to Howard's bank account, but also secretly made herself the sole beneficiary on Howard's retirement account. Nidia then attempted to cover up the latter fact by falsely stating in two affidavits that Howard made her the sole beneficiary without her knowledge or assistance, when, in fact, she herself had filled out the change-of-beneficiary form.

Taken together, the foregoing facts provide ample support for an inference that Nidia was aware of Howard's lack of capacity to consent to the marriage, and took unfair advantage of his ***118** condition for her own pecuniary gain, at the expense of Howard's intended heirs. Thus, Nidia procured the marriage itself through overreaching and undue influence. Nidia should not be permitted to benefit from that conduct any more than should a person who engages in overreaching and undue influence by having himself or herself named in the will of a person he or she knows to be mentally incapacitated (*see* *Riggs v Palmer*, 115 NY at 512; *see generally* *Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Burke*, 82 AD2d 260 [1981]). By her conduct, Nidia has forfeited any rights that would flow from the marital relationship, including the statutory right she would otherwise have to an elective share of Howard's estate.

We recognize that Nidia's conduct was not as egregious as, for example, the conduct of the defendant in *Riggs v Palmer* (115 NY 506, 509 [1889]), who, having been named in his grandfather's will, murdered his grandfather in an effort to obtain "speedy enjoyment" of his inheritance and to prevent the grandfather from excluding him from the will (*see also* *In re Lonergan's Estate*, 63 NYS2d 307 [1946] [surviving spouse who had murdered his wife had no right to spousal election against her estate]). Yet, while the wrongdoers in *Riggs* and *Lonergan* were already in a position to benefit from their victims' estates, in the present case, it was the wrongful conduct itself that put Nidia in a position to obtain benefits that were available by virtue of being Howard's spouse. Thus, while the measures taken by Nidia were certainly not as extreme as those taken in *Riggs* and *Lonergan*, the causal link between the wrongdoing and the benefits she sought was actually more direct in this case (*cf.* *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960] [for recovery to be denied on the basis of wrongdoing, "[t]here must at least be a direct connection between the illegal transaction and ****9** the obligation sued upon"]). Moreover, the facts that Nidia had known Howard for 25 years, had a close relationship with him, and had been legitimately named as one of the beneficiaries of his retirement account do not diminish Nidia's culpability. If anything, those facts—which Nidia has in common with a large percentage of perpetrators of elder abuse (*see supra* footnote 1)—indicate that Nidia was in a position of trust, which she abused, and that she could not plausibly deny awareness of Howard's mental incapacity.

Thus, Nidia wrongfully altered Howard's testamentary plan in her favor, just as surely as if she had exploited his incapacity to induce him to add her to his will and bequeath her one third ***119** of his estate. Under such circumstances, equity will intervene to prevent the unjust enrichment of the wrongdoer.

We find this result to be compelled not only by the need to protect vulnerable incapacitated individuals and their rightful heirs from overreaching and undue influence, but to protect the integrity of the courts themselves. It is "an old, old principle" that a court, "even in the absence of express

statutory warrant," must not " 'allow itself to be made the instrument of wrong, no less on account of its detestation of every thing conducive to wrong than on account of that regard which it should entertain for its own character and dignity' " (*Matter of Hogan v Supreme Ct. of State of N.Y.*, 295 NY 92, 96 [1946], quoting *Baldwin v City of New York*, 42 Barb 549, 550 [1864], *affd* 45 Barb 359 [1865]; *cf.* *Carr v Hoy*, 2 NY2d at 187, quoting *Stone v Freeman*, 298 NY at 271 ["a party to an illegal contract cannot ask a court of law to help him carry out his illegal object" because " 'no court should be required to serve as paymaster of the wages of crime' "]). In this case, the record reveals that Nidia secretly entered into a marriage with a person whom she knew to be incapable of consenting to marriage, with the intent to collect, as a surviving spouse, a portion of his estate. A crucial step in the completion of that plan was Nidia's assertion of a right of election in the Surrogate's Court. Of course, the powers of the judiciary are not unlimited, and courts are not capable of righting or preventing every wrong. The courts, however, can, and must, prevent themselves and their processes from being affirmatively employed in the execution of a wrongful scheme.

The equitable doctrine pursuant to which we find that Nidia has forfeited her right of election does not displace legislative authority, but complements it. Our decision does not reflect an effort to avoid a result intended by the Legislature. Rather, for the following reasons, it is clear to us that the Legislature did not contemplate the circumstances presented by this case when it enacted EPTL 5-1.2.

For purposes of determining a surviving spouse's right to an elective share, the Legislature has, in general, chosen to treat marriages annulled after the death of one of the spouses as being valid until the annulment, rather than void ab initio. Thus, where there has been no pre-death annulment, EPTL 5-1.2 does not, by its terms, disqualify the surviving spouse from asserting a right of election where the deceased spouse's consent was lacking due to, e.g., fraud or want of understanding. In most cases, the statute will produce an acceptable result. In some ***120** cases where the deceased spouse lacked the capacity to marry, the surviving spouse may have been unaware of the incapacity, and thus innocent of any wrongdoing, and it is, therefore, reasonable to permit the surviving spouse to elect against the decedent's estate. In cases of fraud or temporary incapacity, even where the surviving spouse has engaged in wrongdoing, it is possible for the deceased spouse to ratify, or condone, the marriage at any time before his or her death (*see* Domestic Relations Law § 140 [e] ["a marriage shall not be annulled . . . on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud"]; Domestic Relations Law § 140 [c] [action to annul marriage on mental illness grounds may be "maintained by the mentally ill person at any time after restoration to a sound mind; but in that case, the marriage should not be annulled if it appears that the parties freely cohabited as husband and wife after the mentally ill person was restored to a sound mind"]; *Aghnides v Aghnides*, 308 NY 530, 533 [1955]; *Avnery v Avnery*, 50 AD2d 806, 808 [1975]). In such cases, the surviving spouse may be deemed worthy of an elective share despite his or her initial wrongdoing.

In this case, however, the marriage was wrongfully procured by Nidia, and since, as Nidia had every reason to know, Howard's mental condition would become progressively worse until his death, this was not a situation in which the marriage, though initially nonconsensual, could be ratified later by the nonconsenting spouse. Indeed, Howard's condition was such that he not only lacked any awareness that the marriage had occurred, but vehemently denied that it had when he was confronted with it. Nidia's conduct in this case —marrying Howard so close to the end of his life, ****10** with knowledge that Howard was mentally incapacitated and would never regain his mental capacity, and concealing the marriage from Howard's family—was unmistakably designed to preserve the nonconsensual marriage until Howard's death, thus ensuring that Nidia would be regarded by the law as a surviving spouse.

When it enacted EPTL 5-1.2 in 1966, the Legislature was focused on preventing an individual from disinheriting his or her spouse (*see* 3d Rep of Temp St Commn on Estates, 1964 NY Legis Doc No. 19, at 23; Jessica Baquet, Notes, ***121** *Aiding Avarice: The Inequitable Results of Limited Grounds for Spousal Disqualification Under EPTL § 5-1.2*, 23 St. John's J Legal Comment 843, 847-857 [2008]). We are confident that the Legislature did not intend the statute to provide refuge for a person seeking to profit by means of a nonconsensual marriage. And our holding that the statutory right of election may be forfeited is limited to just such a situation, that is, where an individual, knowing that a mentally incapacitated person is incapable of consenting to a marriage, deliberately takes unfair advantage of the incapacity by marrying that person for the purpose of obtaining pecuniary

benefits that become available by virtue of being that person's spouse, at the expense of that person's intended beneficiaries.

Although we exercise our equitable power to award appropriate relief in this case, we nonetheless call upon the Legislature to reexamine the relevant provisions of the EPTL and the Domestic Relations Law and to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm and unjustly enrich themselves at the expense of such victims and their rightful heirs.

For the foregoing reasons, we conclude that the Supreme Court, in its order dated June 21, 2007, properly directed the entry of a judgment declaring that Nidia "shall have no legal rights and can claim no legal interest as a spouse of [Howard]" (*see Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [2008], quoting *People ex rel. Doe v Beaudoin*, 102 AD2d 359, 363 [1984] ["Supreme Court and Surrogate's Court have concurrent jurisdiction in matters involving a decedent's estate," and "a Supreme Court Justice is vested with inherent plenary power (NY Const, art VI, § 7) to fashion any remedy necessary for the proper administration of justice"]; *Gaentner v Benkovich*, 18 AD3d 424, 427-428 [2005]). Therefore, in the order appealed from, the Supreme Court properly denied that branch of Nidia's motion which was to modify or vacate that provision of the order dated June 21, 2007.

The Supreme Court also properly denied that branch of Nidia's motion which was to modify or vacate the provision of the order dated June 21, 2007, which directed that Howard's estate was to be "given ownership of all property in the name of Howard N. Thomas as of October 1, 2000," and that the estate was to distribute those funds to Keith, Peter, and Christopher in one third shares. In light of Nidia's lack of any legal right or interest as a spouse of Howard, she does not have standing to challenge the Supreme Court's directive regarding the distribution of Howard's estate.

(2) ***122** There is one aspect of the order dated June 21, 2007 that requires modification. That order directed the TRS to make Keith, Peter, and Christopher the only beneficiaries of Howard's retirement account. Prior to Nidia's marriage to Howard, however, Nidia had been one of the beneficiaries of that account. Thus, the share in the account that Nidia already possessed was not a product of her wrongful conduct (*see Matter of Covert*, 97 NY2d at 74 ["we have never applied the doctrine (that one shall not profit from his or her own wrongdoing) to cause a wrongdoer's forfeiture of a vested property interest"]). Accordingly, rather than awarding the entire proceeds of the TRS account to Keith, Peter, and Christopher, the parties should be restored to the status quo ante by means of a direction to the TRS to restore the designation of the beneficiaries of the account to that which existed prior to the change made thereto in 2001. We note that any funds paid to or held by Nidia are subject to any valid claims by, and any enforcement proceedings brought by, Howard's estate.

Nidia's remaining contentions are without merit.

Accordingly, the order dated January 31, 2008 is modified, on the law, by deleting the provision thereof denying that branch of Nidia's motion which was to vacate the provision of the order dated June 21, 2007, directing the New York City Teachers' Retirement System to "recognize and make Keith Howard Thomas, Peter Thomas, and Christopher L. Campbell the sole beneficiaries under Howard N. Thomas' TRS Pension Number R-7817910 (or any other account of Howard N. Thomas) with each beneficiary receiving a ⅓ share," and substituting therefor a provision granting that branch of the motion and directing the New York City Teachers' Retirement System to restore ****11** the designation of the beneficiaries of Howard N. Thomas's Teachers' Retirement System of the City of New York account to that which existed prior to the change made thereto in 2001. We otherwise affirm the order.

Miller, Chambers and Román, JJ., concur.

Ordered that the order dated January 31, 2008 is modified, on the law, by deleting the provision thereof denying that branch of the motion of the defendant Nidia Colon Thomas which was to vacate the provision of the order dated June 21, 2007 directing the New York City Teachers' Retirement System to "recognize and make Keith Howard Thomas, Peter Thomas, and Christopher L. Campbell the sole beneficiaries under Howard N. Thomas' TRS Pension Number R-7817910 (or any other account ***123** of Howard N. Thomas) with each beneficiary receiving a ⅓ share," and substituting therefor a provision granting that branch of the motion and directing the New York City Teachers' Retirement System to restore the designation of the beneficiaries of Howard N. Thomas's Teachers' Retirement System of the City of New York account to that which existed prior to the change made thereto in 2001; as so modified, the order is affirmed, with costs to the respondent Christopher Campbell.

FOOTNOTES

Footnotes

1 The results of one study indicate that in approximately 65% of substantiated cases of elder abuse, the alleged offender was an “adult child,” “other family member,” or “spouse/intimate partner” of the victim (National Center on Elder Abuse, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, at 20 [Feb. 2006] [available at http://www.ncea.aoa.gov/Main_Site/pdf/2-14-06%20FINAL%2060+REPORT .pdf]).

2 *See e.g*. L 2004, ch 642 (adding chapter 35-A [Elder Law] to the Consolidated Laws of New York, including Elder Law § 219, which created the Elderly Abuse Education and Outreach Program); L 2008, ch 184 (enacting Executive Law § 214-c, which requires the Division of State Police to implement policies and procedures to be followed by officers who encounter elder abuse, including financial exploitation); *see generally* Jessica Baquet, Note, *Aiding Avarice: The Inequitable Results of Limited Grounds for Spousal Disqualification Under EPTL § 5-1.2*, 23 St. John's J Legal Comment 843 (2008).

3 Nidia previously had been one of five beneficiaries of the TRS account, along with Christopher, Keith, Nancy, and Nancy's son, Peter Thomas.

4 Nancy died during the litigation, and the administrator of her estate, her son Peter, was substituted for her.

5 *See* *Matter of Haney*, 14 AD2d 121, 125 (1961) (Civil Practice Act § 1139, the predecessor of Domestic Relations Law § 140 [e], provided for post-death cause of action for annulment where consent of deceased spouse was obtained by fraud, but not where consent of surviving spouse was obtained by fraud, because “[i]f the perpetrator of the fraud died first, there would be no opportunity for him to share in the estate of the person whom he had fraudulently induced to marry him”); *Campbell v Campbell*, 239 App Div 682, 683 (1934), *affd* 264 NY 616 (1934) (“It was the apparent purpose of the Legislature not only to protect the defrauded party by giving a right to annul, but also to protect any property rights of his or her relatives which may have been affected. If this were not so, it is difficult to comprehend why a relative of a defrauded party after his or her death, and ‘during the life-time of the other party,’ is permitted to bring an action for an annulment”).

New York Official Reports

Unreported Disposition
39 Misc.3d 1242(A), 975 N.Y.S.2d 365 (Table), 2013 WL 3155787 (N.Y.Sup.), 2013 N.Y. Slip Op. 50988(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** In the Matter of the Application of Robert Doar as the Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Guardian for the Personal Needs and Property Management of

v.

L.S. An Alleged Incapacitated Person.

100140-12
Supreme Court, Kings County
Decided on June 21, 2013

CITE TITLE AS: Matter of Doar (L.S.)

ABSTRACT

Incapacitated and Mentally Disabled Persons
Guardian for Personal Needs or Property Management
Exploited and Neglected Alleged Incapacitated Person—Appointment of Community Guardian Rather than Spouse Where Sham Marriage Occurred.

Doar, Matter of (L.S.), 2013 NY Slip Op 50988(U). Incapacitated and Mentally Disabled Persons—Guardian for Personal Needs or Property Management—Exploited and Neglected Alleged Incapacitated Person—Appointment of Community Guardian Rather than Spouse Where Sham Marriage Occurred. (Sup Ct, Kings County, June 21, 2013, Barros, J.)

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OPINION OF THE COURT

Betsy Barros, J.

Papers considered in review of the motion:

Papers	***Numbered***
Notice of Motion, OSC, Petitions, affs. & exhibits.....	1,2,3
Cross- Petition, affs. & exhibits.....	4

By: Honorable Betsy Barros, JSC

This guardianship case highlights the predation and exploitation that face the aged and incapacitated. In the case at bar, the predator, through seduction and feigned concern for him gained the incapacitated person's total co-operation in her scheme to convert of all his assets to herself. His doctors at the VA hospital, suspicious of his recent marriage and aware of his dementia failed to report their concerns, his banking institutions failed to act in a timely manner so as to thwart her scheme, and his appointed agent failed to intercede effectively. Law enforcement has done nothing to protect the incapacitated person or to restore his funds. The only shelter afforded this victim came in the context of this civil

proceeding, an intervention that unfortunately came much too late.

Dementia robs its victims of their reason and judgment bit by bit. This case is but one version of the all-too familiar tale of an elderly individual, afflicted with dementia who becomes so impaired that he is lulled into a trusting relationship and a false sense of security by a predator.

GENESIS OF THE CASE

Petitioner, Adult Protective Services(“APS ” or Petitioner“), by order to show cause, by petition, verified on June 11, 2012, and by supporting Doctor's Affirmation dated May 9, 2012 seeks the appointment of a guardian for the respondent, an 83 year-old alleged incapacitated person (”AIP“). APS's investigation and filing of the matter was prompted by reports of financial exploitation of the AIP by Vanessa Taylor Spier (”Vanessa TS“ or ”Cross-Petitioner“), the AIP's 46 year-old wife, who had been his former home aide and whom he married one year ago.[1] Vanessa TS cross- petitioned, requesting dismissal of said petition, or in the alternative to be appointed the AIP's personal and property guardian.

PENDENTE LITE ORDERS NECESSARY TO PROTECT THE AIP

During the pendency of the case, this court issued several *pendente lite* orders designed to ensure the AIP's physical safety, prevent further dissipation of his assets, allow a thorough investigation of the matter, and pay for the AIP's home care, to wit: 1. On June 22, 2012, an order restraining the Cross- Petitioner from accessing any funds belonging to the AIP or in which the AIP had an equitable interest; 2. On August 17, 2012, an order appointing a geriatric care manager because the AIP was neglected and to ascertain if he could be safely maintained in his four-story walk up; 3. On September 21, 2012, an order appointing a Temporary Guardian to protect the AIP's person and property since Vanessa T.S. was not adequately providing for him and to contract for home care;[2] 4. On September 21, 2012, an order that Vanessa TS admit the ***3** Court Evaluator into the AIP's apartment[3] so that the investigation and report could be completed; 5. On September 25, 2012, an order restraining Morgan Stanley from allowing Vanessa TS to withdraw any funds;. 6. On November 30, 2012, an order for emergency spousal support against Cross- Petitioner pursuant to Family Court Act §442 .[4]

THE HEARING

The hearing was conducted over two days and testimony was adduced from Fred Moskowitz, the court appointed geriatric care manager, Eric Nelson Esq., the Court Evaluator, Dr. Ralph Speken, a psychiatrist employed by HRA, Brian McKenna, the AIP's friend (”Brian“), and Vanessa TS. The AIP was present throughout the proceedings, but did not testify. Extensive medical and financial records dating back several years were submitted into evidence.

TESTIMONY OF BRIAN MCKENNA

Mr. Brian McKenna , the AIP's friend of twenty years and his former attorney-in-fact, testified about the AIP's character, finances, and post-retirement history.[5] After retirement, the AIP maintained an active social life, according to Brian and had a circle of neighborhood friends. He was bright, generous, and gregarious. The AIP was fastidious about his appearance and the maintenance of his apartment. (Hr'g Tr. pp. 125,143-144, April 8, 2013) He managed his own affairs, scheduled and maintained regular doctor and dental appointments, and had saved sufficient funds for his retirement. (Hr'g Tr., p. 151, April 8, 2013). In 2008 the AIP's had some $350,000.00 held in a Morgan Stanley Account.[6] (Hr'g Tr., p.151, April 8, 2013). ***4**

Employed by the local hospital, Long Island College Hospital, and now living in Pennsylvania, Brian met the AIP when Brian resided in the AIP's neighborhood. Brian testified that they became friends in part because they shared a common history. Both of them had grown up orphaned. As he became increasingly physically and cognitively compromised, the AIP paid Brian nominal sums to do some light cleaning, to accompany him to medical appointments, and to pay bills. As part of this informal arrangement, Brian, the younger man, looked after the AIP and his affairs, which included checking on the AIP at his residence. He was available to the AIP during various crises. Specifically, Brian recalled a time when he found the AIP stuck in his bathtub, neck deep in water after having suffered a fall and another time when the AIP wandered disoriented into the local hospital clad in his underwear.(Hr'g Tr., pp122-124, April 8, 2013). After the AIP developed problems ambulating Brian assisted him with shopping. In time, the AIP gradually began requiring greater assistance with his activities of daily living (”ADLS“).

Apart from the compensation received for the services rendered, Brian acknowledged having received a one time loan of $700.00, which was repaid, and some small gifts over the years.(Hr'g Tr., pp. 202-203, April 8, 2013) Brian and the AIP used the AIP's ATM card to make withdrawals for some of the AIP's monthly expenses. Around 2006 Brain became the "In Trust For" designee on the AIP's Morgan Stanley account. And, prior to a scheduled hospitalization, the AIP designated Brian as his attorney-in-fact. (Hr'g Tr., pp. 116-118, April 8, 2013) The AIP also designated Brian as his health care proxy. (Hr'g Tr., pp. 120-121,191, April 8, 2013) Brian used the Power of Attorney (POA) on a few limited occasions. The only large withdrawal Brian made as POA was sometime after the AIP was discharged from his longest hospital stay. At the AIP's behest, Brian gave Jimmy Wilson, the Cross-Petitioner's boyfriend, $1,000.00 in cash, presumably to pay Jimmy and Vanessa's back rent. Suspicious of said transaction, Brian obtained a receipt from Jimmy.(Hr'g Tr., pp.130, 176-177, April 8, 2013) The only other occasion Brian used the POA was to interface with the AIP's banking institutions regarding a flurry of large withdrawals brought to his attention by Chase.(Hr'g Tr., p.151, April 8, 2013) Brian brought the AIP to the bank where the two conferred with bank employees. When the bank employees and Brian questioned the AIP about the troubling withdrawals, he expressed no knowledge of the transactions. (Hr'g Tr., pp. 152-153, April 8, 2013) Apparently, the AIP was unable to comprehend that he had most likely been the victim of financial exploitation or fraud. (Hr'g Tr., pp. 152-153, April 8, 2013)

Approximately seven years ago, the AIP began experiencing serious health problems which resulted in three hospitalizations. The most serious one requiring a right hip replacement, resulted in an eleven month stay in the VA hospital and a rehabilitation center. [7] ***5**

It was during this long term stay at the VA hospital that the AIP was befriended by the Cross- Petitioner and her boyfriend, Jimmy Wilson, also a long term patient at the rehabilitation center. Upon his discharge in 2008, the AIP was in a weakened state and became increasingly cognitively impaired, [8] and Vanessa TS became his part-time home attendant. Thereafter, she informed Brian that since she would be attending to the AIP's finances and other needs, his services were no longer needed. Vanessa TS changed the AIP's phone number, and to avoid her increasing hostility, Brian limited his visits with the AIP to mornings, a time preceding Vanessa TS' arrival at the AIP's home. (Hr'g Tr., pp.167, 171-172, 174, April 8, 2013)

In November 2009 Vanessa TS became the POD designee on the AIP's accounts. In October 2010 unbeknownst to Brian, the AIP revoked Brian's POA, and Vanessa TS became the AIP's POA (Hr'g Tr., pp.146, April 8, 2013) And, finally, in April 2011, they wed. Neither the AIP nor Vanessa TS ever told Brian that they had married . [9] (Hr'g Tr., pp.173, April 8, 2013)

CROSS-PETITIONER'S TESTIMONY

Vanessa TS testified that she cares deeply about the AIP and that her attachment and affection for the him was inspired by the 80 year old's chivalrous defense of her against Jimmy Wilson, her violent abusive boyfriend. [10] She denied any knowledge of the money Jimmy received from Brian at the AIP's request, and asserted that she changed the AIP's phone number because Brian's calls bothered the AIP. (Hr'g Tr., pp. 436-438, 442, April 12, 2013)

Shortly after she began working for him, the AIP initiated their romance. They were married on April 29, 2011. Despite their marriage, no reliable evidence of co-habitation was introduced.. Asked whether she and the AIP had sex, she responded "I guess you can call it that.", and laughed . (Hr'g Tr., pp. 426, April 12, 2013)

Cross-Petitioner denied orchestrating the AIP's rapid pauperization which commenced soon after they met. She stated that the AIP, independently of her, made all his own financial decisions. She explained that he had moved his investment accounts into savings accounts so that he could do as he pleased with his money whenever he wanted to. (Hr'g Tr., pp. 431-432, April 12, 2013) Admittedly present during the banking withdrawals, the Cross-Petitioner gave no acceptable explanation for why she and the AIP drained his accounts, nor of how the money was spent.(Hr'g Tr.,pp.408-411, April 12, 2013)) She also failed to offer a plan of how she would ***6** provide for her husband now that he was destitute. [11] Instead, she focused on the intrusions this proceeding caused in her life, the inadequacy of AIP's studio apartment, the expense of his home care and whether there were sufficient funds to purchase an apartment. (Hr'g Tr., pp. 439, 447-449, April 12, 2013) She also admitted that she had not filed or given any thought to straightening out the AIP's tax filings, a responsibility which, she acknowledged, Brian had executed. (Hr'g Tr., pp. 433, April 12, 2013)

TESTIMONY OF DR. RALPH SPEKEN

Dr. Speken, an expert in adult psychiatry, employed by APS, rendered compelling testimony regarding the AIP's mental state, his cognitive decline and the impact of the AIP's illness upon his ability to function. In February 2012, Dr. Speken, at APS' direction, conducted an assessment of the AIP's mental capacity. His findings were based on an extensive interview of the AIP and a review of the AIP's VA medical records dating back several years.(Hr'g Tr. pp.227, April 12, 2013)

In the early evening of February 2, 2012, Dr. Speken, accompanied by a female APS case worker, interviewed the AIP in his apartment. The AIP was alone and opened the door clad in only a tee-shirt and dirty underwear. When asked by the case worker to clothe himself, the AIP refused and remained in his underwear throughout the interview, seemingly oblivious to the way he appeared.(Hr'g Tr., pp. 231-232, April 12, 2013, Dr. Speken aff in support of petition, dated May 9, 2012) Although the AIP cooperated with the interview, little reliable or credible information was obtained from the AIP about his history or the adequacy of his current circumstances.

Dr. Speken found the AIP's short term and long term memory significantly impaired, as evidenced by the AIP's inability to recall fundamental milestones in his life, such as details regarding his World War II military service, past family life, work history, or even his present wife's name. (Hr'g Tr.,pp. 240-241, April 12, 2013) Dr. Speken also diagnosed the AIP as delusional, pointing out that the AIP believed himself to be the son of Albert Speer, a notorious Nazi official, merely because the AIP and Albert Speer shared a similar sounding last name and because his Jewish mother's birthplace may have been Germany. (Hr'g Tr., pp. 232, 279-284, April 12, 2013) Dr. Speken further pointed out that during the interview, the AIP engaged in ”Witzelsucht “ -inappropriate humor to cover up memory failure- a behavior characteristic of individuals with frontal lobe disease.(Hr'g Tr.,pp. 240, 243-244, 293-294, April 12, 2013)

Overall, Dr. Speken found the AIP's memory, judgment, and insight impaired and rendered a diagnosis of rapidly advancing Alzheimer's disease. He determined the onset of the disease to have occurred back in 2009. [12] (Hr'g Tr.,pp. 234-235, 243, 290, April 12, 2013; pp. 2-3, Dr. Speken aff in support of petition, dated May 9, 2012) Dr. Speken's findings were supported by a neuropsychological assessment made nearly one year prior to his own ***7** evaluation, which found the AIP's executive functioning ”globally impaired “ and his ability to verbalize, recall, and recognize severely impaired. [13] Both evaluations reveal that the AIP's compromised mental state existed for a number of years prior to this proceeding. [14] (Hr'g Tr., pp. 315, April 12, 2013)

Dr. Speken found the AIP vulnerable and susceptible to exploitation and easily influenced due to his dementia and opined that the AIP did not possess the requisite mental capacity to consent to marriage at the time the marriage purportedly occurred.(Hr'g Tr., pp. 297-98, 302-304, April 12, 2013) He explained that, ”when the executive functioning is impaired, individuals suffering from dementia are vulnerable to permitting someone else's executive functioning to take over for them and therefore....they lack the ability to withstand it.“ (Hr'g Tr., pp.299, April 12, 2013) In sum, Dr. Speken concluded that the AIP is incapable of making an informed judgment on how to handle his estate, whom to trust, and whom to marry . [15]

COURT EVALUATOR

The Court Evaluator gave extensive testimony and provided a well-documented accounting regarding the depletion of the AIP's estate. He also obtained medical records tracking the course of the AIP's medical and mental decline. Moreover, since concerns were raised about the AIP's personal safety, the Court Evaluator was asked to check in on the AIP until proper services were obtained. Shortly after his appointment, the Court Evaluator reported back that the AIP had been found wandering in his apartment building late at night ringing his neighbors' doorbells and that neighbors in his building had raised concerns about his welfare. [16]

According to the Court Evaluator and uncontroverted in the record , the AIP's entire estate totaling between $350,000.00 to $450,000.00 is gone. The Cross-Petitioner's financial exploitation of the AIP commenced no later than 2009. Initially, the Cross-Petitioner confined ***8** her exploitation to the AIP's income and had him pay some of her bills. [17] Over time she accessed his savings and investments accounts at an increasing rate. (Hr'g Tr., pp. 359-361, April 12, 2013) The amounts and frequency of her withdrawals grew commensurate with the degree of the AIP's dementia. After the marriage she took the remainder of the AIP's life's savings, leaving him pauperized and with credit card debt. [18]

The Court Evaluator's investigation revealed Brian reported the Cross-Petitioner'sfinancial exploitation of the AIP to the DA's office and an investigation was commenced. However, once the Cross-Petitioner and AIP married, the DA's office ceased its investigation. (Hr'g Tr., pp. 345-346, April 12, 2013)

OBSERVATIONS OF THE PARTIES

During the hearing the Court had ample opportunity to observe the litigants' demeanor in the court room and draw conclusions and inferences therefrom.

The AIP

The limitations on the AIP's cognitive abilities and physical fragility were readily apparent from the bench as were certain aspects of his overall personality. Although represented by counsel and present throughout the proceedings, the AIP did not testify or meaningfully participate. He ambulated with a walker, required an aide at his side, and tired easily. He dozed off frequently during the proceedings. When alert, he engaged primarily in attempts at humor, blurting out such non-sequiturs as, “I had dementia”, “get the marbles out of your mouth”, and “ I am a different person,” behavior consistent with Dr. Speken's diagnosis of Witzelsucht. Obviously entranced by his wife, he randomly shouted out, “that's my wife!”. At other times, he would struggle out his chair and wander aimlessly about the court room seemingly oblivious of the fact that a trial concerning his welfare was taking place.

The Cross-Petitioner

On the stand, the Cross-Petitioner was evasive, and inconsistent regarding her employment history and her place of residence. Throughout the proceedings, Vanessa TS engaged in overt displays of affection toward the AIP by kissing his lips and by staying close and attentive to him.The court found the Cross-Petitioner's behavior not only inappropriate, but a thinly veiled ploy to keep the AIP under her sway and to create the false impression that she is a loving wife and a responsible caretaker. The Court found Vanessa TS disingenuous, ***9** manipulative and neglectful as a spouse and care-taker and gave her testimony no credit. Her strictly pecuniary interest for insinuating herself into the AIP's life was utterly apparent.

Legal Analysis

It is uncontroverted that the AIP is an incapacitated person within the meaning of Article 81 of the Mental Hygiene Law. (*See,* MHL§§81.01 and §81.02, generally) Cognitively and physically impaired, he requires assistance with all of his ADLs (MHL §81.02 (c) 1 and MHL 81.03 (h)). His impairments imperil his safety and welfare, and he is unaware of his functional limitations.(MHL §81.02 (a) 1 and MHL §81.02 (b) 2. The AIP cannot handle his financial affairs (MHL §81.02 (a) 1) and lacks the capacity and judgment to duly designate a trustworthy individual to assume these responsibilities. (MHL§§ 81.02 (b) 1., and 2.. §81.03 (e))

In 2006, the AIP took affirmative steps to protect himself by appointing his most trusted friend, Brian, as his attorney-in-fact and health care proxy, and placed “In Trust For” designations on his accounts. [19] Ordinarily, these advance directives, in the hands of an appropriate agent, would suffice and a guardian would not be required. (MHL §81.01, §81.02 , §81.03 (e)) However, the POA appointing Brian was purportedly revoked by the AIP, no doubt at the behest of the Cross-Petitioner. [20] Since the AIP no longer has sufficient capacity to designate an agent and no suitable family is available, this court is compelled to appoint a guardian to establish a plan of care for him. [21]

FINDINGS AND CONCLUSIONS

This court finds the AIP to be an incapacitated person as defined by Article 81 of the Mental Hygiene Law and that guardianship is the least restrictive form of intervention and will not appoint the Cross-Petitioner Guardian.

Through a steady course of seduction and isolation, and veiled in the cloak of marriage, Vanessa TS has managed to exploit the AIP with impunity. As a consequence, the AIP in all likelihood, can no longer be safely maintained in the community as he had once envisioned.

Sadly this case is not an isolated incident of financial exploitation of the incapacitated. Often seniors afflicted with dementia, in the twilight phase between capacity and incapacity, are exploited in plain sight with devastating consequences to the victims. The predators are seldom held accountable. ***10**

Efforts to redress elder abuse are still in their infancy. However, similar challenges have been met and tremendous strides made in "difficult to prosecute" cases such as domestic violence, child abuse and sexual offenses. If our community is serious about protecting its most vulnerable adults, new initiatives and coordinated strategies must likewise be developed and implemented. [22]

Accordingly, based on the foregoing; it is hereby

ORDERED AND ADJUDGED that the Petitioner's nominated guardian *Jewish Association of Services for the Aged (JASA)*, with offices at *132 West 31 Street, New York, NY 10001,* and *telephone number: 212-273-5300*, is appointed guardian for both personal and property needs of the AIP; and it is further

ORDERED AND ADJUDGED that the guardian shall investigate the AIP's financial affairs and has authority to bring any appropriate applications on behalf of the AIP including a turnover proceeding and /or a motion to annul or void the marriage between the AIP and the Cross-Petitioner; and it is further

ORDERED AND ADJUDGED that the previously suspended Power of Attorney appointing the Cross-Petitioner and any health care proxy heretofore executed naming Cross-Petitioner as agent are hereby vacated; and it is further

ORDERED AND ADJUDGED pursuant to MHL §81.23 (b) that the Cross-Petitioner is hereby restrained from selling or in any way disposing of the BMW bought with the AIP's funds; and it is further

ORDERED AND ADJUDGED that all previously issued TROs and the order of spousal support shall remain in full force and effect until further order of this court; and it is further

ORDERED AND ADJUDGED that the Cross-Petition is denied in it's entirety; and it is further

ORDERED AND ADJUDGED that all fees and expenses of this proceeding shall be paid by the Cross-Petitioner [23]; and it is further

ORDERED, that Petitioner shall serve a copy of this order on the Cross-Petitioner and her counsel forthwith; and it is further

ORDERED, Petitioner shall settle an order of appointment consistent with the foregoing ***11** decision and order or appear in court on July 18th 2013 in Part 76G at 10:00 am.

This constitutes the decision and order of this court..

Enter:

Dated: June 21, 2013_____

Brooklyn, New YorkBetsy Barros, JSC

FOOTNOTES

Footnotes

1 *See*, Social Services Law § 473 .1(a)

2 At one point, counsel for the Cross-Petitioner said that Cross-Petitioner would file a medicaid home care application, but no medicaid home care was ever obtained. If the Cross- Petitioner did indeed file the medicaid application, it was either incomplete or otherwise unapproved. The Temporary Guardian's efforts to obtain said benefits have since been impeded by their inability to procure original and reliable documentation.

3 APS case records and VA Hospital records indicate that Cross-Petitioner continued to live separate and apart from the AIP even after the marriage.(See, Court Exhibit 1, VA Hospital record at 81., Verified Petition dated June 11, 2012, Hr'g Tr., pp. 199, 205, April 8, 2013). Moreover, various appointees on numerous visits found

no evidence that Cross- Petitioner was living with the AIP. Despite living elsewhere Vanessa TS had access to the AIP's apartment and refused to allow the court evaluator entry.

4 Cross- Petitioner refused to pay spousal support. Once an account held in her name, and funded from the AIP's prior account, was located , orders dated December 5, 2012 and March 23, 2013 were issued directing the bank to pay all due and owing spousal support to the Temporary Guardian. Additionally, Cross-Petitioner's failure to comply with reasonable discovery requests resulted in the issuance of so ordered subpoenas.

5 Brian and Dr. Speken testified that AIP had been married, perhaps twice, before his current marriage and may have one or two children. No evidence of marriage or divorce certificates for said prior marriages was produced. Much about the AIP's past is vague due to the his dementia, but by all accounts he either has no family or has been completely estranged from his family for decades. (Hr'g Tr., pp.155-157, April 8, 2013)

6 Financial documents indicate that the AIP's estate consisting in large part of stocks decreased considerably during the economic downturn in 2008. Brian testified that the AIP may have lost approximately $125,000 when the ”Entera Trust went bust.“ (Hr'g Tr., p 132-134, April 8, 2013).

7 The AIP's recovery from the hip replacement was long and was complicated by pneumonia, a right lung lobectomy, bed sores, and an ulcer. He spent several months in St. Albans Rehabilitation and was transferred back to the hospital due to the above complications. He first went into the VA hospital in March 2007 and was finally discharged from the rehabilitation center in February 2008. During this period he also became incontinent. (Court's exhibit 1, VA Hospital record at 199)

8 For example, the AIP began misplacing items in his once orderly apartment, stopped taking care of his hygiene and became increasingly forgetful and disoriented. (Hr'g Tr., pp.145,163-166,169-170, 200, April 8, 2013) On one occasion, he got lost returning from the grocery store, and on another, in 2011, he wandered into LICH. (Hr'g Tr., pp. 160, April 8, 2013)

9 Cross-Petitioner provided a marriage certificate indicating that she married the AIP on April 29, 2011. The authenticity of said document was not in issue.

10 Cross-Petitioner claims that the AIP assisted her in the prosecution of her boyfriend for a felony offense. However, she denied testifying in the matter and when pressed for details, could not even recall the sentence Jimmy Wilson purportedly received. (Hr'g Tr., p.426, April 12, 2013).

11 The AIP's banking transactions are discussed more fully below.

12 Dr. Speken testified that the dementia process was well advanced in February 2012 and that the AIP's deficits noted in the earlier VA medical records, including the AIP's loss of his sense of smell, together with his delusional thinking, demonstrated within a reasonable degree of medical certainty that the dementia had begun in 2009. (Hr'g Tr., pp. 298-293, April 2013)

13 The VA doctor's evaluated the AIP in June 2011. The report states that the AIP and Vanessa TS were given referrals to the Alzheimer Association. Just two months after getting married, the AIP was unable to recount the circumstances about how he met his wife, and was no longer able to remember his most basic background information. (Court's Exhibit 1, VA Hospital records pp. 78-86)

14 Dr. Speken explained that executive functioning is the ability to make good decisions and that the diagnosis ”globally impaired“ indicates a more serious impairment than does the diagnosis of ”grossly impaired. “(Hr'g Tr., pp. 243-244, April 12, 2013)

15 Although the relief sought in this Article 81 petition does not include dissolution of this marriage, the facts elicited at trial support an application for such relief.

16 After the Petition was filed, the AIP, lost and disoriented, wandered into LICH in the middle of the night, ”wearing a diaper and a sweatshirt jacket,“and sometime in the fall of 2012 the AIP was seen trying to use his key to unlock his neighbor's apartment”.(Hr'g Tr., pp.364, April 12, 2013; Court's exhibit 6, Supplemental Report of Court Evaluator pp.9)

17 The bank informed Brian that the AIP's social security benefits had been diverted from the AIP's bank account. Moreover, Brian testified that Vanessa TS' bills including her rent were being paid by the AIP. (Hr'g Tr., pp.175,177-179,186, April 8, 2013)

18 As noted previously, the AIP's estate was in excess of $350,000 in 2008 after it had lost value in the 2007 -2008 economic down-turn. The BMW cost approximately $45,000.00 and the Cross-Petitioner's daughter's tuition was purportedly $40,000.00, paid in cash. In January 2012, a Sovereign Bank account with approximately $110,000.00 was opened in the AIP's name and was fully depleted by the end of said month. (Court's Exhibit 5, Sovereign Bank Statementspp.2.) In 2012, Cross-Petitioner opened a Chase account solely in her name which had approximately $120,000.00. This is the restrained account currently used to pay the court ordered spousal support.

19 Said ITF or Pay on Death (POD) designations constitute a means to dispose of assets in lieu of a last will and testament.

20 If the POA was in fact a durable power of attorney and the attorney-in-fact believed that the revocation had occurred during a period of incapacity, the attorney-in- fact would have every right and arguably the duty to contest the revocation. However, that did not occur in the case at bar.

21 A second POA designating Cross-Petitioner as agent was discussed but not introduced into evidence. However, its validity is rendered moot by the decision herein. Brian's POA could be deemed in effect since the court is invalidating the revocation, but given the overwhelming work involved in caring for the AIP at this time and the AIP's limited resources, a community guardian would better serve the needs of the AIP.

22 A protocol requiring financial institutions, health care providers, licensed home care providers, banks, hospitals, doctors, and designated agents to report suspected abuse to Adult Protective Services and to law enforcement should be implemented. For example, such as mandatory reporting of suspected financial elder abuse, banking alert systems, adequately staffed and trained police units to investigate elder abuse and new prosecutorial approaches including special laws with enhanced penalties for the exploitation and endangerment of the impaired, would foster greater protection of vulnerable seniors.

23 But for the Cross-Petitioner's actions there would have been no need for this guardianship proceeding. Brian as the POA and health care proxy could have seen to all the AIP's needs including utilizing the AIP's savings for home care, rental of a more suitable apartment or private pay assisted living.

New York Official Reports

Unreported Disposition
66 Misc.3d 1216(A), 120 N.Y.S.3d 708 (Table), 2020 WL 500047 (N.Y.City Civ.Ct.), 2020 N.Y. Slip Op. 50112(U)

***1** Arthur Cornfeld and ALAN FISHER, Petitioners,

v.

Mohammed S. Bhuiyan, Respondent.

Civil Court of the City of New York, New York County
53558/2016
Decided on January 9, 2020

CITE TITLE AS: Cornfeld v Bhuiyan

ABSTRACT

Landlord and Tenant
Rent Regulation

Cornfeld v Bhuiyan, 2020 NY Slip Op 50112(U). Landlord and Tenant—Rent Regulation. Rent Stabilization Code 9 NYCRR 2520.6 (o) ("Family member" defined). (Civ Ct, NY County, Jan. 9, 2020, Stoller, J.)

APPEARANCES OF COUNSEL

For Petitioner: Noelle Picone, Esq.
For Respondent: Lawrence Spivak, Esq.

OPINION OF THE COURT

Jack Stoller, J.

Arthur Cornfeld and Alan Fisher, the petitioners in this proceeding ("Petitioners"), commenced this holdover proceeding against the estate of Avonne Keller ("the prior tenant") and Mohammad S. Bhuiyan, the respondent in this proceeding ("Respondent"), seeking possession of 75 East End Avenue, Apt. 14, New York, New York ("the subject premises") on the ground that the prior tenant illegally sublet the subject premises to Respondent and that Respondent's possession of the subject premises was derivative of the prior tenant. Respondent interposed an answer containing a defense that he was entitled to succeed to the tenancy of the prior tenant. The Court held a trial of this matter on December 17, 2017, February 8, 2018, March 6, 2018, March 13, 2018, December 18, 2019, December 19, 2019, December 23, 2019, and December 31, 2019.

Petitioners' case

Petitioners proved that they are the proper party to commence this proceeding; that the subject premises has been subject to the Rent Stabilization Law; that the prior tenant had been the tenant of the subject premises; that the prior tenant died on September 23, 2015 at the age of 91; that the prior tenant had had a renewal lease in effect from October 1, 2014 through September 30, 2016; that Respondent remained in possession of the subject premises; and that Petitioners properly served a predicate notice prior to commencement of this proceeding. Petitioners thus proved their prima facie case.

Petitioners do not dispute that Respondent resided with the prior tenant for two years prior to the prior tenant's passing. The issue for the Court to determine is whether Respondent has proven that he had a non-traditional family relationship with the prior tenant as defined by 9 N.Y.C.R.R. §2520.6(o)(2).

***2** The Surrogate's Court matter

The prior tenant executed a will on September 8, 2014 ("the Will") leaving her entire estate to Respondent. The prior tenant had previously executed a different will on December 23, 2008 ("the Prior Will"), which left half of the estate to the prior tenant's niece ("the prior tenant's niece") and the other half to other family members and charities. The executor of the Prior Will commenced proceedings in Surrogate's Court, captioned at *Probate Proceeding, Will of Avonne Eyre Keller*, File No. 2015-3847/A (Sur. Ct. NY Co.), and *Petition of Reska*, File No. 2015-3847/C (Sur. Ct. NY Co.), seeking turnover of the prior tenant's assets from Respondent and seeking a determination that the Will is invalid. The Surrogate's Court rendered a decision on July 12, 2019 ("the Surrogate's Court decision") after a trial.

Respondent argued that the Surrogate's Court decision was against the weight of the evidence and that Petitioner financed the litigation for Petitioner's own ends. Both parties introduced into evidence transcripts of trial testimony from the Surrogate's Court trial. However, no party showed that

the Surrogate's Court lacked subject matter jurisdiction over the matter. Without such a showing, the Surrogate's Court decision is impervious to collateral attack in this proceeding, *McLaughlin v. Hernandez*, 16 AD3d 344, 346 (1st Dept. 2005), and the Court cannot find that the Surrogate's Court should have decided the matter differently.

A party may not relitigate an identical issue decided against that party in a prior adjudication, *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 NY3d 208, 226 (2011), particularly when the party had a full and fair opportunity to litigate the issue. *Matter of Dunn*, 24 NY3d 699, 704 (2015). Respondent appeared as a respondent in the Surrogate's Court proceedings and litigated them, not only at trial but in depositions of witnesses, transcripts of which are in evidence of this matter. Accordingly, Respondent had a full and fair opportunity to litigate the issues in the Surrogate's Court matter relevant to this proceeding, and the findings of the Surrogate's Court are preclusive on Respondent. [1]

The Surrogate's Court decision made fact findings, *inter alia*, that the prior tenant and the prior tenant's husband ("the prior tenant's husband") had been married for about sixty years; that they had no biological children; that they maintained relationships with friends and family, including the prior tenant's niece; that Respondent first met the prior tenant and the prior tenant's husband (collectively, "the prior tenants") in 1996 or 1997 while Respondent was working at a vitamin store; that Respondent became an employee of a home health care agency ("the agency") in 2008; that Respondent came to work as a home health aide for the prior tenants on January 15, 2009 through the agency; that the prior tenant's husband initially paid for the services by paying the agency; that the prior tenant's husband terminated his relationship with the agency in June of ***3** 2009; that Respondent came to live in the subject premises around that time; and that the prior tenants paid Respondent directly more than $900,000.00 from July of 2009 through September of 2015 as compensation for Respondent's work.

The Surrogate's Court decision made further fact findings, *inter alia*, that Respondent provided the prior tenants with good care over the years; that the prior tenant introduced Respondent as her beloved son or her adopted son; that the prior tenant's husband died in December of 2013; that the prior tenant then expressed an interest in retitling accounts held jointly between the prior tenants in her name alone; that the prior tenant then expressed an interest in adopting Respondent and to draft a new will to do something nice for Respondent; that Respondent was present when the prior tenant made such an inquiry with her tax preparer ("the Tax Preparer"), who had drafted the Prior Will; that the prior tenant also asked the Tax Preparer to request in writing to Petitioner that Petitioner add Respondent to the prior tenant's lease; that Respondent observes the Muslim faith; that the prior tenant converted to Islam herself on March 7, 2014 with the execution of a document; and that a case manager for the program Meals On Wheels ("the case manager") found that the prior tenant trusted Respondent, that they were close, and that Respondent was like a son to the prior tenant.

The Surrogate's Court decision made further fact findings, *inter alia*, that the prior tenant's health declined to the point where she could not use the bathroom, bathe, dress, or take necessary medication without Respondent's assistance; that the prior tenant experienced a decline of cognitive abilities as of at least 2013; that Respondent answered questions put to the prior tenant on her behalf; that Respondent and the prior tenant consulted with a scholar of Islamic jurisprudence about whether Respondent, as a Muslim, could inherit the prior tenant's estate if she was not Muslim; that the scholar informed them that Respondent could not inherit the prior tenant's estate if she was not Muslim; that, throughout 2014, assets were converted from various accounts into accounts jointly held by the prior tenant and Respondent or accounts where Respondent was named as a beneficiary; that the prior tenant executed powers of attorney authorizing Respondent to act on her behalf; that a case manager found the prior tenant to be confused about amounts of money in her accounts; that the prior tenant and Respondent jointly retained the same attorney to draft the Will; [2] that a bank manager referred Respondent and the prior tenant to Adult Protective Services ("APS") [3] about concerns he had about elder abuse; that APS investigated and found that the allegations of exploitation were unproved; that a cognitive test of the prior tenant for dementia in October of 2014 showed major deficits in areas of executive function and attention; that Respondent wrote a series of post-dated sequential checks drawn on the prior tenant's account, all under $10,000.00, totaling $123,500.00, to help a friend; that the checks were less than $10,000.00, because Respondent wanted avoid reporting requirements that larger withdrawals entail; and that Respondent transferred $5 million from the ***4** prior tenant's accounts to accounts in his name only in the five weeks after the prior tenant died.

The Surrogate's Court held that the prior tenant suffered significant cognitive deficits in the last two years of her life; that the prior tenant was not strong enough to ward off Respondent's purposeful influence; that Respondent isolated the prior tenant; that Respondent had a substantial role in getting the Will drafted and executed; that it was not necessary to exclude all of the prior tenant's relatives from the Will in order for the prior tenant to do something for Respondent; that Respondent instigated the prior tenant's enmity toward her other family members; that the prior tenant was "vulnerable" and "extremely dependent" on Respondent and "susceptible" to Respondent's "manipulation"; and that the Will was therefore a product of undue influence.

Respondent's evidence of a family relationship

The record contains the following written indicia of a non-traditional family relationship between Respondent and the prior tenant: a letter dated September 3, 2014 that the prior tenant wrote, referring to Respondent as her "adoptive son"; a durable power of attorney dated April 3, 2014 appointing Respondent to act for the prior tenant for deposit accounts at Chase Bank; powers of attorney dated May 6, 2014 and September 16, 2014 appointing Respondent to act for the prior tenant for all purposes; a record at Mount Sinai Hospital dated September 5, 2015 referring to Respondent as the prior tenant's son; a document dated February 20, 2014 appointing Respondent as a beneficiary for the prior tenant's insurance; checks evincing that the prior tenant and Respondent had a joint checking account; a health care proxy dated August 1, 2013 that the prior tenant executed giving Respondent the power to make decisions for her; a letter dated April 1, 2013 from the prior tenant saying she wanted to add Respondent as a dependent; a letter dated September 8, 2014 from the prior tenant to a bank asking to open an account for her and Respondent as her "adoptive son"; a letter dated December 20, 2013 that the prior tenant wrote to a friend of hers referring to Respondent as her son; a letter dated September 29, 2014 that the prior tenant wrote to Petitioner, asking Petitioner to add Respondent, as her adoptive son, to her lease; an undated letter that the prior tenant left in a Quran stating that she is grateful to God for sending Respondent to her; a letter dated September 8, 2014 from the prior tenant to Con Edison identifying Respondent as her son; and subsequent Con Edison bills for the subject premises addressed to Respondent. Respondent also was the informant on the prior tenant's death certificate.

Respondent's witnesses

The prior tenant's husband's nurse-practitioner ("the Nurse") testified that Respondent lived with the prior tenants; that the prior tenant's husband constantly referred to Respondent as his son; that Respondent fed the prior tenant's husband, washed the prior tenant's husband, and changed the prior tenant's husband's clothes; that Respondent called the prior tenant's husband "Daddy" and the prior tenant "Mommy"; and that Respondent and the prior tenants made constant eye contact, were always smiling, and had a friendly, warm-looking relationship.

An aide for a neighbor of the prior tenants ("the Neighbor's Aide") testified that she lived in the same building as the subject premises ("the Building") from November of 2002 through September of 2010; that she became acquainted with the prior tenants; that Respondent was living in the subject premises at all times; that Respondent called the prior tenants "Mommy" and "Daddy"; that the prior tenant's husband called Respondent "son"; and that the prior tenants loved Respondent.

The super of the Building ("the super") testified that Respondent starting living in the subject premises with the prior tenants; that he saw Respondent helping the prior tenants; that Respondent called the prior tenant "Mommy"; that the prior tenant dressed like a Muslim woman; and that the prior tenant asked him to remove the prior tenant's niece as an emergency contact.

Respondent testified at the trial, sometimes offering testimony inconsistent with the factfindings of the Surrogate's Court decision. As the Surrogate's Court decision is preclusive on Respondent, as noted above, the Court adopts those findings and only adds herein Respondent's testimony to facts not already determined in the Surrogate's Court decision. Respondent testified that the prior tenants invited him to visit them at the subject premises when they first met; that he took them up on their offer; that they became friends after that; that he visited them about two to three times a year up to 2007; that he only visited the prior tenants once in 2008; that he was once napping in the subject premises when the prior tenant's husband tried to cover him with a blanket and he heard the prior tenant caution the prior tenant's husband against waking Respondent up, a gesture that he felt was tender; that they invited him to move in with them; that he wanted to get an education in health before moving in with them; that he took a course at the agency for five to six months; that he then obtained a license to be a home health aide;

that he asked the agency for an assignment in Manhattan; that the agency assigned him to the subject premises by sheer coincidence; that, in 2012, the prior tenants tried to add him as a dependent when they filed taxes; that, when a Muslim service was offered at the funeral of the prior tenant's husband, the prior tenant's niece protested and said that the prior tenant's husband was a Christian; that the prior tenant planned a hadj in 2016; that the prior tenant wore a hijab in a passport photo that she took for that purpose; that Respondent accompanied the prior tenant to hospital visits; and that the prior tenant asked around at a local mosque for someone who could be Respondent's wife.

Respondent testified on cross-examination that from the 1990s through 2007 he visited the prior tenants once or twice a year; that from January of 2008 through January of 2009 he did not see the prior tenants or speak with them; that he did not know that the prior tenant's husband was hospitalized in 2008; that the prior tenants were in their mid-80s as of 2009; that the agency was his employer in 2008; that he wanted to be assigned to Manhattan so he could be closer to the prior tenants; that he told the prior tenants that they had a son; that he started working directly for the prior tenants in July of 2009, although the work he did for them at that point was the same as when he worked for the prior tenants through the agency before July of 2009; that he has four children; that he does not remember the age of his children; that the prior tenants never asked him about his children and he never told them that he had children; that he has six siblings; that the prior tenants never met his siblings; that he was married; that he did not tell the prior tenants about his wife, even when the prior tenant talked about finding Respondent a wife; that he was separated from her but not legally divorced until after the prior tenant died; that the prior tenant bought a burial plot next to the prior tenant's husband; that he was responsible for the prior tenant's burial arrangements; that he did not have the prior tenant buried next to the prior tenant's husband because the prior tenant changed her mind and wanted to be buried in a Muslim cemetery; that he did not notify the prior tenant's friends and family members when she died; and that none of the prior tenant's family member attended her funeral.

Petitioner introduced into evidence an affidavit that Respondent filed in Surrogate's Court ***5** that stated that the estate of the prior tenant had less than $30,000.00. Respondent testified on cross-examination that he did not think that this was false even though there was $45,000.00 in cash in the subject premises because he thought the $45,000.00 was his money and because he thought that the money in various accounts was his because the accounts were joint accounts with him and the prior tenant.

On cross-examination of Respondent, Petitioner introduced into evidence bank records that showed a substantial number of checks written by the prior tenant payable to Respondent, [4] and checks payable to "Tasnim Enterprises." [5] Respondent testified on cross-examination that the checks that were payable to him were actually for the prior tenant's use, as he would bring cash from the checks to the subject premises; that in July of 2015 he brought checks to the hospital where the prior tenant was hospitalized so that the prior tenant could sign the checks; that "Tasnim Enterprises" was the prior tenant's accountant, headed by a friend of his; and that the prior tenant had the idea to make checks payable to Tasnim Enterprises less than $10,000.00. Petitioner's attorney read into the record Respondent's deposition testimony that contradicted that statement. Respondent testified on cross-examination that one check made payable to him for $6,540.00 was made on September 23, 2015, the day that the prior tenant died, and that, six days later, on September 29, 2015, he transferred $1.8 million from the joint account he had with the prior tenant to his personal account.

Respondent testified on redirect examination that from January of 2008 through January of 2009, he tried to call the prior tenants four, five, or six times; that in 2008 he was busy with home health aide classes, five days a week during business hours; that he opened a store of his seven days a week during 2008; that he did not invite the prior tenant's niece to the prior tenants's funeral because the prior tenant's niece had protested that the prior tenant's husband shouldn't be buried as a Muslim; and that checks payable to him were in his handwriting because the prior tenant didn't feel well and asked him to write out checks for her.

Petitioner's witness

The Tax Preparer testified that Respondent was the prior tenants' health care worker and caretaker; that the prior tenant's husband referred to Respondent as a health care worker or health care aide; that the prior tenants called Respondent by his first name; that Respondent called them "Mr. Keller" and "Mrs. Keller"; and that Respondent called the prior tenant "Mommy" after the prior tenant's husband died. The Tax Preparer testified on cross-examination that he was a ***6** co-executor of the Prior Will; that he would earn a fee of about fifty thousand dollars if he remained executor; that he pled guilty to a felony for filing a false tax return for

himself and his domestic partner; that he went to the subject premises about two to three times per year; that, after the prior tenant's husband died, he spoke with the prior tenant about her obtaining a passport; and that the prior tenant asked him about adopting Respondent. The Tax Preparer testified on redirect examination that he has no pecuniary interest in either this matter or the Surrogate's Court matter, particularly as his felony conviction rendered him ineligible to be an executor to a will.

Discussion

The codification of the holding in the landmark decision *Braschi v. Stahl Assocs. Co.*, 74 NY2d 201 (1989) in the Rent Stabilization Code establishes criteria for finding a non-traditional family relationship: longevity of the relationship; mutual reliance for payment of expenses and necessities; intermingling of finances, shown as a matter of example by joint bank accounts; engaging in family-type activities like attending family functions together; formalizing of legal obligations by means such as naming one another as beneficiaries in wills and/or executions of powers of attorney; holding themselves out as family members to other family members, friends, community members, and religious institutions; reliance on each other for daily family services or functions; and other manifestations of a long-term emotionally-committed relationship. 9 N.Y.C.R.R. §2520.6(o)(2)(i)-(viii).

A casual review of these criteria shows that Respondent easily meets most of them. Respondent and the prior tenant held joint bank accounts, the prior tenant named Respondent in the Will, the prior tenant executed a number of instruments appointing Respondent as her attorney-in-fact, the prior tenant referred to Respondent as her son in a number of documents sent to various entities, and disinterested witnesses, in particular the Neighbor's Aide, testified to a warm relationship between the prior tenants and Respondent, with Respondent referring to the prior tenants and "Mommy" and "Daddy."

However, evaluation of a non-traditional family succession claim is not an exercise of "check[ing] off which factors ... [R]espondent has successfully proven...." *Lamarche v. Miles*, 234 N.Y.L.J. 88 (Civ. Ct. Kings Co. 2005). As 9 N.Y.C.R.R. § 2520.6 (o)(2) specifically states that no single factor shall be solely determinative, "[t]he factors listed in the statute to consider in making the determination, such as sharing expenses and intermingling finances, are merely suggestions and not requirements." *Wiener Mgmt. Co. v. Trockel*, 192 Misc 2d 696, 703 (Civ. Ct. Queens Co. 2002). "[T]he totality of the relationship as evidenced by the dedication, caring and self sacrifice of the parties ... should, in the final analysis, control." *Braschi*, *supra*, 74 NY2d at 213. *See Also Matter of 530 Second Ave. Co., LLC v. Zenker*, 160 AD3d 160, 163 (1st Dept. 2018)(the "totality" of evidence controls a determination of the emotional and financial commitment necessary to prove a non-traditional family relationship).

One of the indicia of a non-traditional family relationship is that the household members attend family functions together. 9 N.Y.C.R.R. §2520.6(o)(2)(iv). Not only did the record contain no evidence of that, but the Surrogate's Court found that Respondent "instigated" the prior tenant's enmity toward the rest of her family. Respondent's isolation of the prior tenant from the rest of her family underscores the problem with a superficial application of the *Braschi* ***7** criteria to the particular facts of this case.

The Surrogate's Court held that the Will was a product of Respondent's undue influence. The Will therefore cannot evince the kind of "emotional and financial commitment and interdependence" that the *Braschi* criteria are intended to show. 9 N.Y.C.R.R. §2520.6(o)(2). The Court draws the inference that the various powers of attorney and establishment of joint bank accounts, all procured in 2013 and 2014, when the Surrogate's Court found that the prior tenant was in a state of cognitive decline, similarly do not show "emotional and financial commitment and interdependence."

The record still contains undisputed expressions of affection of the prior tenant toward Respondent, both in notes that she wrote and according to the credible testimony of disinterested witnesses. The Court considers this evidence in the following context.

The Surrogate's Court decision found, and the evidence adduced herein proves, that Respondent first became seriously involved in the prior tenants' lives in January of 2009, when he worked for the agency, which assigned him to the subject premises in the capacity of a home health aide. Although the prior tenants terminated their relationship with the agency six months later, Respondent testified that he continued to provide the same services to the prior tenants after that termination as before it, and the record amply supports the proposition that the prior tenants compensated Respondent for those services.

A home health aide is a fiduciary of the home health aide's client, particularly when the age and physical condition of the client puts the home health aide in a position of trust regarding the client's care and finances. *Mazza v. Fleet Bank*, 16 AD3d 761, 762 (3rd Dept. 2005). Even assuming *arguendo* that Respondent were to prevail in his dispute with the characterization of him as a "home health aide," the acceptance of responsibility with respect to the aged and infirm who, for substantial consideration availed themselves of the custodial care, resulted in the creation of a fiduciary relationship. *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 45 NY2d 692, 698-99 (1978). Indeed, the relationship between caretakers of the aged and their clients "is totally comparable to the attorney-client, patient-physician, patient-nurse, or cleric-parishioner relationships." *In re Estate of Arnold*, 125 Misc 2d 265, 269-70 (Sur. Ct. Bronx Co.1983). Significantly, the hallmark of a fiduciary relationship is "de facto control and dominance." *Doe v. Roman Catholic Diocese of Rochester*, 12 NY3d 764, 765 (2009), *Marmelstein v. Kehillat*, 11 NY3d 15, 21 (2008). The record herein, in particular the utter dependence of the prior tenant on Respondent, shows such de facto control and dominance, particularly given Respondent's status as a "legatee who is the decedent's sole live-in caregiver and who is otherwise unrelated to decedent...." *Matter of Blaukopf*, 23 Misc 3d 1103(A)(Sur. Ct. Nassau 2009), *aff'd*, 73 AD3d 1040, 1041 (1st Dept. 2010).

A fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary must protect, *Matter of Wallens*, 9 NY3d 117, 122 (2007), *Matter of Billmyer*, 142 AD3d 1000, 1001 (2nd Dept. 2016), thus obligating the fiduciary to put the interests of the beneficiary first, ahead of the fiduciary's self interest, and to refrain from exploiting the relationship for the fiduciary's personal benefit. *Deutsche Bank Nat'l Tr. Co. v. Sidden*, 55 Misc 3d 872, 874 (S. Ct. Queens Co. 2017). As noted above, the Surrogate's Court held that Respondent "manipulat[ed]" the prior tenant, resulting in the Will, leaving the entirety of a multi-million dollar estate to Respondent, a product of undue influence. The Surrogate's Court finding ***8** of undue influence means that Respondent's influence on the prior tenant amounted to a "moral coercion," which restrained the prior tenant's independent action and destroyed her free agency. *Bazigos v. Krukar*, 140 AD3d 811, 813 (2nd Dept. 2016).

The Court cannot consider the prior tenant's feelings outside the context of Respondent's abuse of his fiduciary duties to the prior tenant for his personal benefit. Families come in all incarnations, shapes, and sizes, and "emotional commitment" and "emotional interdependence" can look like a lot of things, but "emotional commitment and interdependence" do not look like fiduciaries "manipulating" clients for their personal benefit, even if an effect of such conduct is the prior tenant's affection for Respondent.

Accordingly, Respondent has not proven by a preponderance of the evidence that he had a relationship with the prior tenant characterized by emotional and financial commitment and interdependence. The Court therefore dismisses Respondent's defenses. The Court awards Petitioner a final judgment of possession. Issuance of the warrant of eviction is permitted forthwith, with execution thereof is stayed through February 10, 2020 for Respondent to vacate. On default, the warrant may execute on service of a marshal's notice.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: January 9, 2020

New York, New York

_____

HON. JACK STOLLER

J.H.C.

FOOTNOTES

Footnotes

1 The parties and the Court contemplated the effect that the Surrogate's Court matter would have on this case. After a conference during the trial, the Court and the parties marked this matter off-calendar to await the outcome of the Surrogate's Court matter, which accounts for the long time in between two trial days of March 13, 2018 and December 18, 2019. Respondent unsuccessfully moved to stay the resumption of this trial on the basis that he is appealing the Surrogate's Court decision. The pendency of the appeal, however, does not affect the preclusive effect of the decision. *Da Silva v. Musso*, 76 NY2d 436, 440 (1990), *Matter of State of NY v. Richard TT.*, 127 AD3d 1528, 1528-29 (3rd Dept. 2015).

2 This attorney also initially represented Respondent in this proceeding.

3 APS is a subset of the Human Resources Administration of the City of New York that is charged with providing service to persons who are unable to, *inter alia*, manage their own resources and/or carry out the activities of daily living because of impairments. *See* Social Services Law §473 *et seq*.

4 There were checks dated August 22, October 30, November 7, and November 13 of 2014 at $5,640.00 each; a check dated November 15, 2014 for $2,000.00; a check dated November 2, 2014 for $3,640.00; checks dated on December 13 and 24 of 2014, and January 8 and 22, February 4 and 20, March 6 and 20, April 3 and 17, May 1 and 14 and two on May 29, June 25, July 6, 10, and 28, two on August 7, August 14, 20, and 27, and September 4, 11, 12, and 23 of 2015, all at $6,540.00 each, and checks dated June 24, two on August 29, and one on August 9 of 2015 all at $9,000.00 each, a total of $234,240.00.

5 There is one check dated March 4, 2015 for $350.00, and checks dated May 2, 8, 15, 22, and 30, June 2, 6, 12, 15, 18, 22, and 27, and one check dated August 10, all of 2015 and all at $9,500.00 each, a total of $123,850.00.

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ELDER JUSTICE
BENCH GUIDE

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ELDER ABUSE GUIDE FOR JUDGES AND COURT PERSONNEL

This guide offers tools for judges and court personnel to identify elder abuse and offers legal remedies and community resources for referrals.

What is Elder Abuse? While there is no global definition, elder abuse can be broadly defined as a single or repeated act, or lack of appropriate actions which cause harm, risk of harm or distress to a person who is 60 years or older and occurs:

a. within any relationship where there is an expectation of trust; and/or
b. within an intimate partner and/or familial relationship; and/or
c. when the targeted act is directed towards an elder person by virtue of age or disabilities.

Elder abuse includes acts of commission or omission, and takes many forms including physical acts, psychological, emotional, or sexual abuse, neglect, and financial exploitation. Red flags of abuse can include when an older adult acts fearful, appears agitated, depressed or confused.

With some limited exceptions, New York is the only state where there is no mandated reporting of elder abuse by professionals.

Adult Protective Services workers who have reason to believe that a criminal offense has been committed, as defined by penal law, must report it to law enforcement pursuant to Social Services Law § 473(5); certain individuals, including, among others, an operator or employee of a residential health care facility, must report abuse in such facility as set forth in Public Health Law § 2803-d(1) and (3); and under Chapter 501 of the Laws of 2012: Protection of People with Special Needs Act, created to safeguard vulnerable persons under the jurisdiction of six state agencies, "custodians" must report crimes perpetrated against "vulnerable persons" as those terms are defined in the Act.

Types of Abuse and Potential Indicators

Types of Elder Abuse, Neglect, and Financial Exploitation	Potential Indicators/How to Recognize
Physical Abuse is the intentional use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.	■ Slap marks, unexplained injury, bruises, welts, cuts, sores, burns, or sudden weight loss ■ Inconsistent explanation of bruises, multiple bruises ■ Under-or over-medicating an older adult ■ Broken glasses or hearing aids
Emotional Abuse is the willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an older adult.	■ Controlling behavior by a caregiver, family member or other ■ Isolation of the older adult from friends, family or faith community ■ Threats to leave the older adult ■ Threats to institutionalize the older adult

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Types of Elder Abuse, Neglect, and Financial Exploitation	Potential Indicators/How to Recognize
Sexual Abuse is non-consensual sexual contact of any kind, including but not limited to, forcing sexual contact, forcing sex with a third party, voyeurism, exhibitionism, sexual threats, unwanted comments, coerced nudity, being forced to view pornography, and sexually explicit photographing.	■ Infections, pain or bleeding in genital areas ■ Unexplained sexually transmitted diseases or HIV ■ Taking advantage of cognitive or physical disabilities for sexual purposes ■ Rough handling or cleaning of the genital areas by caregiver ■ Inappropriate sleeping arrangements ■ Strangers coming in and out of home ■ Injuries to breasts and genitals
Financial Exploitation is the improper use of an older adult's funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.	■ Sudden changes in banking patterns, missing or stolen money, property, bank statements, passbooks or checkbooks ■ Sudden selling or loss of property ■ Sudden changes to wills, financial documents or power of attorney ■ Older adult has no access to finances ■ Many unpaid bills ■ Expensive gifts given to caretaker, family members or others ■ Checks made out to cash in large sums ■ Purchase of gift cards to pay for taxes, utility bills and other expenses ■ Taking advantage of cognitive disabilities for financial gain
Neglect ■ "Active neglect" involves the intentional withholding of caretaking functions and responsibilities. ■ "Passive neglect" involves the unintentional failure of a caregiver to fulfill caretaking functions and responsibilities due to the caretaker's lack of ability, education or resources.	■ Smells of urine and/or feces ■ Lack of basic hygiene—not bathed or dirty clothes ■ Lack of medical aids (walker, wheel chair, hearing aid, glasses, etc.) ■ Malnutrition or poor physical condition ■ Lack of appropriate clothing for comfort or weather conditions ■ Older adult left unattended in public or home ■ Under- or over-medicated ■ Not attending to the care/needs created by cognitive or physical disabilities

What Laws May Apply to Elder Abuse?

Below is a chart referencing criminal and civil statutes which may be relevant to elder abuse cases. This list is not exhaustive, but is intended to assist judges and court staff in identifying statutes that may apply to elder abuse cases.

Criminal Statutes[1]	Definition
Penal Law § 260.31	a. Defines a "vulnerable elderly person" as a person sixty-years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care. b. Defines an "incompetent or physically disabled person" as an individual (regardless of age) who is unable to care for himself or herself because of physical disability, mental disease or defect.
Penal Law § 260.32	Endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the second degree.
Penal Law § 260.34	Endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the first degree.
Penal Law § 260.24	Endangering the welfare of an incompetent or physically disabled person in the second degree.
Penal Law § 260.25	Endangering the welfare of an incompetent or physically disabled person in the first degree.
Penal Law § 120.05(12)	Assault in the second degree is a felony when a defendant causes physical injury to a person sixty-five years or older and the defendant is more than 10 years younger than the victim.
Penal Law § 190.65	Scheme to defraud statute specifically includes elderly or vulnerable adult provision.
Penal Law § 485.05	Hate crime statute includes crime against a person due to age when a person is 60 years or older.

N.Y. Fam. Ct. Act § 812, 828, 842, 842-a, Criminal Procedure Law 530(12) (13)(14)	An order of protection may be issued for an elder abuse case in Family Court where a family offense is committed against a person of the same family or household, or within an intimate relationship. A Criminal Court order of protection may be issued in an elder abuse case on behalf of any victim or witness regardless of relationship.
N.Y. Mental Hyg. Law § 81.02, § 81.23; CPLR Article 12	Article 81 regulates court appointment of guardians. Under § 81.02, the court may appoint a guardian if necessary to provide for the personal needs of an incapacitated individual; Under § 81.23(a), court may order temporary relief including the appointment of a guardian with limited powers and issue an injunction. Pursuant to CPLR § 1201, the court may appoint a guardian ad litem for an adult incapable of adequately prosecuting or defending his or her rights.
N.Y. Gen. Oblig. Law § 5-1510	This section creates a special proceeding for a speedy resolution of power of attorney claims which may attack the validity of the power of attorney, how it was obtained or how it is being exercised if the agent has failed to make available a copy of the power of attorney and/or a record of all receipts, disbursements, and transactions pursuant to Power of Attorney Statute § 5-1505.
General Business Law § 349-C	Deceptive Practices and False Advertising (§ 349) allows for additional civil penalty for consumer frauds against persons 65 and older.

Civil Practice Law and Rules § 3403(a)(4)	**Trial preferences:** While civil cases generally shall be tried in the order in which notes of issue have been filed, a preference may be given in an action based on, among other reasons, a party having reached the age of seventy years.

1. This reference guide includes criminal statutes specifically related to an individual's age, incompetency, and physical disability. Other criminal statutes, such as assault, criminal contempt, harassment, menacing, reckless endangerment, sexual assault, unlawful imprisonment, coercion, criminal mischief, larceny, fraud, identity theft, tampering with a witness, intimidating a victim, animal abuse and strangulation, may also apply to elder abuse cases.

HOW CAN COURTS ENHANCE ELDER JUSTICE?

While not all adults experience significant cognitive or physical decline with age, many will show at least small declines. Others may have more substantial impairments. Courts should make efforts to ensure that all older adults are able to participate in court proceedings to the fullest extent possible.

Courthouse	Courtroom staff
■ Ensure signs in courthouse are in large font and in plain language. ■ Provide forms and instructions in larger, easier to read font.* ■ Have information from Adult Protective Services, NY Connects, local offices for the aging and other services for the aging available. ■ If in court's control, consider providing accessible parking for older adults.	■ If available, allow older litigants to wait in an area removed from other parties. ■ Background noise should be decreased and lighting increased to the extent possible. ■ Let older adults know that assistive listening devices, sign language interpreters, real time computer-aided transcription services (CART) for those who are deaf or hard of hearing, and magnifiers for persons who are visually impaired, may be provided.* ■ Make drinking water available.
Judge	**Judge, court staff and attorneys**
■ Familiarize older litigants with seating arrangements in the courtroom and the roles of court staff. ■ Explain to older litigants how their case will proceed and how long it is expected to take. ■ Seek to accommodate medical needs or fluctuations in capacity and mental alertness when calendaring cases.** ■ Schedule a sufficient number of breaks so that an older litigant can address personal needs.* ■ Consider giving trial preference in civil cases where a litigant is 70 or older or terminally ill (CPLR §3403). ■ Consider using technology, including remote appearances where authorized by law.*	■ Allow time for older person to process information and respond to questions. ■ Speak slowly and clearly. When requested, repeat information. ■ Face older persons when speaking to them. ■ Understand that transportation issues may affecting timeliness for those who travel by Access-a-Ride. *Please also see the New York State Unified Court System's Americans with Disabilities Act and the Courts guide at: http://inside-ucs.org/oca/professional-ct-services/ADA/2017_ADA_Guide.pdf ** See attached What About Cognitive Challenges for Older Litigants?

WHAT ABOUT COGNITIVE CHALLENGES FOR OLDER LITIGANTS?

Judges are often required to evaluate the past, present and/or future capacity of an individual in a variety of contexts including, but not limited to, determining whether: a legal transaction was valid, the appointment of a guardian or guardian ad litem is appropriate, the individual is able testify on his or her own behalf and the individual is a "vulnerable elderly person" under the penal code. Judges should, therefore, know what constitutes normal cognitive aging, as well as understand dementia and how it presents.

Normal brain aging As a result of a normally aging brain, some adults may process information slower, experience declines in verbal fluency or the ability to find words, have to work harder at activities requiring executive function, such as time management, paying attention or changing focus, planning, organizing, remembering details and multitasking. Mild forgetfulness can also be a sign of normal aging.

Mild Cognitive Impairment is the stage between the normal cognitive decline of aging and the more serious decline of dementia. MCI may present with memory, language, thinking and judgment problems that are greater than normal age-related changes but not severe enough to interfere with daily life and usual activities.

Dementia is the term used to describe a group of brain disorders that cause memory loss and a decline in mental function over time.

Alzheimer's Disease is the most prevalent non-reversible form of dementia. Dementia symptoms can vary and include short-term memory loss, difficulty with communication and language, difficulty focusing, problems with reasoning and judgment, disorientation and confusion and visual perception issues.

Some conditions that may mimic dementia:
What may appear to be dementia may be caused by something else that is temporary and/or treatable. Conditions include, but are not limited to, the following:

- Medications which produce side effects such as drowsiness and mental dullness or mixing of medications
- Chronic diseases such as diabetes, arthritis and pain
- Changes in mood, such as depression and anxiety
- Certain infections (urinary tract or upper respiratory)
- Inadequate nutrition and/or hydration
- Vitamin deficiencies, such as B12
- Alcoholism/other substance abuse
- Thyroid problems
- Traumatic brain injury
- Delirium
- Sensory losses, such as hearing or seeing
- Certain mental illnesses

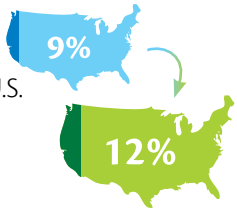
Mistreatment of African American Elders

This Research to Practice Brief synthesizes recent information and research findings related to understanding the mistreatment of African American elders, particularly involving financial exploitation and psychological abuse. General cultural beliefs, views, and norms within the African American community offer both risk and protective factors that influence elder abuse in this population. Socioeconomic variables, such as poverty, institutionalized racism, and structural segregation also place African American elders at risk. While this population can also be referred to as Black or Black American, this brief uses the term "African American."

KEY TAKEAWAYS

- There is limited research on elder abuse and neglect for the African American population.
- Elder abuse in the African American community is influenced by risk factors and protective factors that span from the individual level to the community level.
- Compared to their non-African American counterparts, African Americans are disproportionately impacted by financial exploitation and psychological mistreatment.

Demographics



- In 2014 there were 4 million African Americans aged 65 and older, making up 9% of the older population in the U.S.
- This population is expected to triple to 12 million, comprising 12% of the older population by 2060.

(AoA, 2014)

Background on Elder Abuse in the African American Community

The unique sociohistorical experience and cultural adaption of African Americans during and after slavery shape the ways in which elder abuse is both defined and manifested within the African American community (Tauriac & Scruggs, 2006).

AFRICAN AMERICAN FAMILIES

Common characteristics among many African American families often serve as sources of strength and stability, yet may create a risk of conflict and maltreatment. Such characteristics include:

- Extended family networks
- Flexibility of family roles
- Shared living, inclusive of multi-generational, extended, and fictive kin

(as fully reviewed in Tauriac & Scruggs, 2006)

PERCEPTIONS OF ELDER ABUSE

Several studies have reported that the African American population may be more likely to perceive situations as abusive when compared to other ethnic groups (as fully reviewed in Moon & Benton, 2000).

A study that examined African Americans' perceptions of elder abuse from an adult-child to an elderly parent found that **physical aggression** was the most frequently offered example of abusive behavior, along with **verbal aggression**. Physical forms of maltreatment were also significantly more likely to be depicted as "extremely abusive" by African Americans than were other forms of maltreatment (Tauriac & Scruggs, 2006).

FINANCIAL STRAIN

Financial strain faced by many African American households and elders may place African American elders at greater risk for being abused (as fully reviewed in Tauriac & Scruggs, 2006).

Research Findings on Financial Exploitation and Psychological Mistreatment of African American Elders

Beach, Schulz, Castle, and Rosen (2010) conducted a population-based study on financial exploitation and psychological mistreatment among 210 African American and 693 non-African American adults aged 60 years and older in Pennsylvania. In another study, Peterson and colleagues (2014), surveyed 788 African American and 3,368 non-African American adults aged 60 years and older in New York. The two studies provide complimentary and distinctive findings regarding financial exploitation among African American elders. Key findings from these studies are presented below.

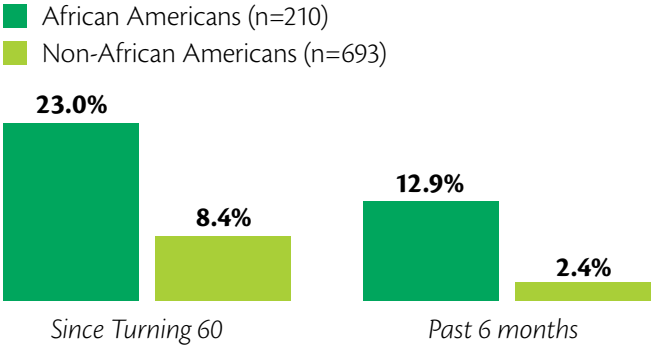
FINANCIAL EXPLOITATION FINDINGS

Definition: Financial exploitation is defined as the improper use of funds, property or resources by another individual (Peterson et al., 2014).

Financial exploitation included an elder signing forms or documents that they did not understand; someone asking an elder to sign anything without explaining what was being signed; someone taking an elder's checks without permission; and an elder suspecting that anyone was tampering with their savings or other assets (Beach et al., 2010). Some key findings include:

- **Financial exploitation disproportionately affects African American older adults when compared to non-African Americans** (Beach et al., 2010). Peterson and colleagues (2014) found similar results when comparing 3,368 non-African American and 788 African American cognitively intact community-dwelling adults ages 60 and older residing in New York state (Peterson et al., 2014).
- The majority of financial exploitation that occurred within the past 6 months was perpetrated by someone other than a family member or trusted other, thus suggesting **African Americans may be more vulnerable to stranger-initiated scams or other financially-related deceptions, than non-African Americans** (Beach et al., 2010).

Financial Exploitation Reported



(Beach et al., 2010)

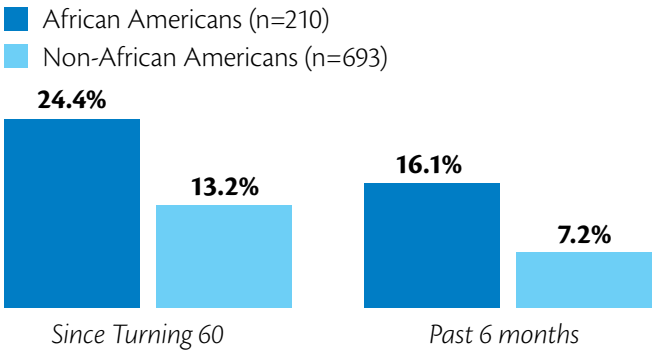
PSYCHOLOGICAL MISTREATMENT FINDINGS

Definition: Psychological mistreatment is the infliction of anguish, pain or distress through verbal or nonverbal acts including, but not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment. Treating an older person like an infant; isolating an elderly person from his/her family, friends, or regular activities; giving an older person the "silent treatment" and enforced social isolation are examples of emotional/psychological abuse (NCEA, 2015).

Beach et al. (2010) measured psychological exploitation using a modified Conflict Tactics Scale. Psychological mistreatment included a family member or trusted individual screaming and yelling, insults, saying something to deliberately hurt, stomping out of the room after an argument, destroying something that belonged to an older adult, threatening to hit or throw something at an older adult, threating to send an older adult to a nursing home, and threatening to abandon or stop taking care of an older adult. Some key findings include:

- Non-African Americans were more likely to report the spouse as a source of screaming and yelling, while African Americans reported **other family members** (non-spouse, non-child) (Beach et al., 2010).
- African Americans reported **less upset with screaming and yelling and threats to hit or throw something** than non-African Americans (Beach et al., 2010).

Psychological Abuse Reported



(Beach et al., 2010)

Factors that Influence Elder Mistreatment in the African American Community

One theoretical model conceptualizes elder abuse in the African American community using the Human Ecological Theory. Using this model, elder abuse in the African American community can be viewed as influenced by multiple systems that include both risk factors and protective factors that are present within subsystems ranging from the individual level to the community level (Horsford et al., 2011).

PROTECTIVE FACTORS

COMMUNITY

A **strong sense of community** provides African American elders and relatives with a unique sense of belonging, social support, and safety that helps them cope with the challenges of aging.

SPIRITUALITY

Spirituality and resilience provide strength, support and comfort to African American caregivers, and in some cases, **religious communities** provide an important source of strength.

FAMILY

Loyalty to family has helped some African American communities overcome legacies of oppression over time and provides a unique source of strength to preserve family unity in the midst of intense contextual challenges.

RESPECT FOR THE ELDERLY

African Americans hold **values of admiration, respect and reverence toward the elderly** as they represent wisdom, honor, resilience and dignity in the community.

HIGH VALUE ON MOTHERHOOD

African Americans tend to place a **high value on motherhood** as mothers are recognized as preservers and the backbone of the family instilling intense feelings of loyalty among children.

RISK FACTORS

- African Americans face alarming rates of health and economic disparities resulting from **systematic racism and structural segregations** in the U.S. due to a legacy of slavery.
- **Internalized racism** may place African American elders at risk for abuse and neglect if elders embrace a cultural heritage that their caregivers are attempting to minimize or negate.
- African Americans may have **few opportunities to secure wealth** for retirement, leading to reliance on social security income, disability income, or financial support from caregivers.
- African American elders may **distrust institutions**, and be reluctant to seek help in the community, particularly if they consider that they or their families are at risk of being discriminated against on the basis of race.
- Recognizing and denouncing abuse or neglect may be particularly painful for African American elders and lead to **denial of abuse** due to the cultural expectations of a strong family unit and respect for the elderly.
- The victim may feel **obligated to maintain a caretaker role**, avoiding becoming a burden for their relatives, not sharing their emotional needs, which could lead to loneliness, isolation, or depression.
- Little research has been done on culturally adapted interventions for African American families at risk of elder abuse, which may lead to **reluctance to seek specialized services** that could support them as they adapt to the demands of caring for an aging relative.
- A lack of external sources of support causes more internal stressors leading to **stressed family networks**.
- Special challenges such as racial discrimination, structural segregation, or anger and hopelessness associated with economic and health disparities may lead to **stress, burden of care, and mental health concerns** for caregivers in the African American community.

African American Family Caregivers

One of the largest studies comparing Caucasian (n=425) and African American (n=295) family caregivers of persons with dementia from four cities (Birmingham, Memphis, Boston, and Philadelphia) found that African American caregivers generally reported better well-being than Caucasian caregivers and lower anxiety scores. The relative lack of psychological distress found in African American caregivers may be due largely to **strengths of internal resources** such as appraisal and religious coping. There are also possible mechanisms through which African American family caregivers cope with caregiving such as prior experience with caregiving roles, expectations that caregiving will occur, cultural support for caregiving, and prior experience with adversity (Haley et al., 2004).

Tips for working in the African American Community

RESEARCH IMPLICATIONS

- Additional research is needed on how elder abuse impacts the health of the African American community.
- Research is needed to identify community and professional resources needed to prevent harmful behaviors from reoccurring in African American families (Horsford et al., 2011). These resources can assist health care providers, social service and law enforcement agencies working with African American elders and their families.
- The Elder Justice Roadmap report is a general resource that identifies and prioritizes actions that direct service providers, educators, and researchers can take to benefit older adults facing abuse, neglect or financial exploitation. The full report can be accessed at https://www.justice.gov/elderjustice/research/resources/Final%20EJRP%20Report+Appendices_7.8.14.pdf.

PRACTICE IMPLICATIONS

- Assist African American families and service providers to remain attentive to the socio-historical experiences of African Americans in the U.S. such as racism and structural exclusion, thus ending the cycle of violence (Horsford et al., 2011).
- Focus on cultural strengths to prevent abuse or neglectful behaviors (Horsford et al., 2011).
- Be cognizant of the lasting effects of historical oppression experienced by African American populations as well as structural racism and exclusion that continue to influence the etiology and maintenance of abuse and neglect (Horsford et al., 2011).
- Engage families from a collaborative stance and explore perceptions of abusive or neglectful behaviors (Horsford et al., 2011).
- Help families to identify healthcare, community, and familiar resources available to prevent harmful behaviors from reoccurring.
- Identify points of entry for service delivery systems located in the communities rather than expecting African Americans to reach out to formal institutions that they may not trust (Horsford et al., 2011).
- Target public awareness campaigns in African American neighborhoods (flyers in shopping areas, public transportation, etc.) (Beach et al., 2010).
- Encourage informal caregivers and family members of African American elders and health care and other professionals who interact with older African Americans to be vigilant for signs of financial exploitation among this population (Beach et al., 2010).

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NCEA
National Center on Elder Abuse

Additional Resources

How to Recognize, Prevent, and Report Financial Exploitation of Vulnerable Elderly Adults
https://ocfs.ny.gov/programs/adult-svcs/aps/financial-exploitation.php

Federal Bureau of Investigation – Elder Fraud Report 2022
https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3ElderFraudReport.pdf

Annual Report to Congress on Department of Justice Activities to Combat Elder Fraud and Abuse – October 18, 2023
https://www.justice.gov/elderjustice/media/1319976/dl?inline=

The New York State Cost of Financial Exploitation Study
https://ocfs.ny.gov/reports/aps/Cost-of-Financial-Exploitation-Study-2016May.pdf

Financial Elder Abuse Surged COVID-19 Lockdowns
https://www.moneymag.com.au/financial-elder-abuse-signs