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

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Probate Proceeding, Estate of

DECISION AFTER TRIAL

File No. 2012-1154

CAROLE PALMIERI,

Deceased.

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WALSH - ACTING SURROGATE.

Before the court is a contested probate proceeding in which petitioner Patricia Palmieri ("petitioner") seeks the admission to probate of an instrument of her mother Carole Palmieri ("decedent") dated October 29, 2009 ("propounded instrument"). Rosemary Bellinger ("objectant"), petitioner's sister, has filed objections to the propounded instrument upon the basis that the instrument was procured through fraud and undue influence perpetrated upon the decedent. A lengthy non-jury trial was conducted, and based upon the credible evidence adduced at the trial, and for the reasons set forth *infra*, the court hereby finds in favor of the objectant and denies probate to the propounded instrument.

BACKGROUND

Decedent died on May 5, 2012, at the age of 85, survived by: petitioner and objectant (Objectant's Exhibit A, hereinafter "Obj. Exh. __"). By petition dated May 18, 2012, petitioner seeks admission to probate of the propounded instrument (Obj. Exh. K-4).

Pursuant to the propounded instrument, petitioner is the residuary beneficiary of

decedent's estate, and objectant is the legatee of a $100,000.00 bequest. Petitioner's son Ryan Dadakis ("Ryan") is the beneficiary of a $100,000.00 bequest; and objectant's children Richard Bellinger ("Ricky" or "Mr. Bellinger") and Kimberly Bellinger ("Kimberly") are each the beneficiaries of a $50,000.00 bequest. The propounded instrument provides that, in the event the petitioner predeceases decedent, her residuary estate is left to Ryan.

Petitioner is the nominated fiduciary of decedent's estate, and petitioner's husband John Dadakis ("Dadakis") is the nominated trustee of any trust created for Ryan's benefit. The propounded instrument contains an *in terrorem* clause. The probate petition values decedent's estate at $500,000.00, consisting of personal property. With the exception of some pre-residuary legacies, two prior instruments executed by decedent in 2007 and 1997 bequeathed her estate in equal shares to petitioner and objectant (Obj. Exhs. C, D).

Prior Procedural History

A prior motion *in limine* pertained to a series of tape recordings made by objectant, that Dadakis admits to having taken, copied several times, and returned to decedent's home where objectant was then living, without objectant's knowledge, authority, or consent. This occurred in the summer of 2009 just prior to decedent's execution of the propounded instrument.

On May 31, 2016 , this court rendered a decision on that motion suppressing the tapes and all derivative materials based upon its finding that the tape recordings could not be authenticated in any manner due to Dadakis's having surreptitiously taken them and petitioner's counsel's failure to disclose discovery materials pursuant to objectant's

counsel's numerous requests. The court found that such failure to produce was not inadvertent on the part of petitioner's counsel (*see Matter of Carole Palmieri*, 51 Misc.3d 1227[A]; NYLJ July 15, 2016, p. 38, Vol. 256). Subsequent to this motion, the matter proceeded to trial without either party filing a dispositive motion.

Trial

A non-jury trial was held in this matter on August 8 -11, 2016; August 15 -17, 2016; August 22 -24, 2016; and August 30, 2016.

The following witnesses were called by objectant to testify: Magdalen Gaynor ("Ms. Gaynor"), the attorney drafstperson of decedent's 1997, 2007 and propounded instruments; Gaetano Spaziani ("Mr. Spaziani"), decedent's nephew; Kathy Carol Maniscalco ("Ms. Maniscalco"), decedent's niece, who was raised by decedent; Jerry Cotrone ("Mr. Cotrone"), a friend of decedent and objectant; objectant; Mr. Bellinger; Sergeant Hufnagle from the North Castle police department; and, Dadakis.

Petitioner called the following witnesses to testify: Rosa Vasquez ("Ms. Vasquez"), the Dadakis's housekeeper; and Paul Mako ("Mr. Mako"), a contractor who knew decedent for 10 years who met decedent through Dadakis.

The court has reviewed the entire record and the facts relevant to the petition and the objections are as follows:

Dadakis[1] testified that he "probably" acted as decedent's attorney during the course

[1] Dadakis is a partner at the law firm of Holland & Knight where he is chair of the trusts and estates department and practices law in the private client area, advises clients with regard to estate planning issues, including wills and personal tax matters,

of knowing his mother-in-law (335).[2] Dadakis testified that he represented decedent when her first husband died, and in a prenuptial agreement she signed when she married her second husband (337)[3]. Sometime prior to 1997, Dadakis was involved with the sale of decedent's house at 12 Reimer Road (461).[4] Dadakis described his relationship with decedent as "very very close" (462), and petitioner's relationship with decedent as "very close" (462).

In 1997, decedent contacted Ms. Gaynor[5] at Dadakis's suggestion, for the purposes of preparing a will and a power of attorney ("the 1997 instrument") (37). Dadakis asked Ms. Gaynor to take care of his mother-in-law, and then decedent called Ms. Gaynor to make an appointment (37). Ms. Gaynor recalled meeting decedent before the drafting of the 1997 instrument when decedent and petitioner operated a furniture store (10).

Ms. Gaynor testified that through the Westchester Country Club ("the Club") she knew Dadakis's parents, Dadakis knew Ms. Gaynor's father; and, Ms. Gaynor's father

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and previously was a partner at the law firm of Schiff Hardin LLP (284 - 285).

[2]References to numbers in parentheses are to the pages of the trial transcript petitioner filed with the court on October 25, 2016.

[3]Decedent's second marriage took place sometime before 1997 inasmuch as in the 1997 will decedent left her husband Gary Kozek $60,000.00 and her residuary estate to her children equally as more fully set forth herein.

[4]At the time of the execution of the 1997 and 2007 wills, decedent was living at 32 Rolling Ridge Road, White Plains, New York.

[5]Ms. Gaynor has been an attorney for 35 years concentrating in the estate planning, administration, and tax area (9).

knew Dadakis's father. In addition, Ms. Gaynor was part of the panel of the Admissions Committee of the Club that interviewed Dadakis and petitioner shortly after their marriage for petitioner's admission to the Club (31).

Ms. Gaynor testified that she knows Dadakis to be a trusts and estates attorney but did not know if he was head of the wealth planning group at a major law firm and did not know whether he was well-known or prominent (17). Ms. Gaynor testified that she and Dadakis attended the same law school, and he "showed her the ropes" in law school. She also testified as to Dadakis that she had "no personal or professional relationship with him, other than [she] know[s] him, and [she] took care of two clients that he sent to [her]" (30).

With regard to the 1997 instrument, Ms. Gaynor wrote a letter to decedent dated February 25, 1997, that summarized her assets, detailed a summary of the will provisions, including that petitioner would receive a specific gift of jewelry and furniture. In addition, the letter explained that the residue would be left to petitioner and objectant outright, and if a daughter predeceased decedent, then that daughter's share would go to that daughter's children. The letter specifically states: "[a]s a result of the gift of jewelry and furniture to [petitioner], she will receive $250,000 more in value than will [objectant]. I wanted to bring this to your attention in case you had not given it thought" (Obj. Exh. Y). The 1997 instrument appoints petitioner as executor and in the event she cannot serve, appoints objectant in petitioner's stead. The 1997 instrument does not contain an *in terrorem* clause (Obj. Exh. Y). On July 2, 1997, the 1997 instrument was executed along with a durable power of attorney designating petitioner as decedent's attorney-in-fact (Obj.

Exh. G).

On January 31, 2005, Dadakis and Ms. Gaynor exchanged emails with regard to what would be decedent's 2007 instrument ("the 2007 instrument"). Ms. Gaynor conceded that Dadakis was involved in the drafting of the 2007 instrument as it pertained to Ryan, and that she had an exchange of emails with Dadakis at decedent's request (25). In that exchange, Dadakis directed Gaynor as follows: if Ryan "were to die before his trust were to terminate, provide him with a general power of appointment (his unified credit would cover all of the federal tax and most of the state tax) and in default of exercise, pay to Ricky and Kimberly" (Obj. Exh. K-7 January 31, 2005).

Thereafter, in a letter to decedent dated February 2, 2005, pertaining to the 2007 instrument, Gaynor revised the 2007 instrument based upon Dadakis's direction stating: "[p]er our conversation and a discussion with [Dadakis] I have revised the draft of your Will to include a trust for any funds that Ryan might receive . . . " (Obj. Exh. K-8).

Ms. Gaynor and Dadakis also had an email exchange regarding decedent's tardiness in signing the 2007 instrument (Obj. Exh. L), and Ms. Gaynor requested that Dadakis use his influence over decedent to get decedent to sign that instrument. According to Ms. Gaynor she had either written to decedent or called her and had not gotten a response regarding the 2007 instrument (27). She wrote to Dadakis because appointments had been canceled, and therefore, Ms. Gaynor "went to the next source, her son-in-law" (27). Specifically, on December 29, 2006, Gaynor wrote:

> Should I close the matter and send a bill to your mother in law? [sic] This has been outstanding since January 2005. I have made appointments and they are cancelled

> [.] sic. Can you use your influence so that I can close the file? Thanks and [b]est wishes for 2007 Meg Gaynor."

Dadakis responded on that date: "I will talk to her over the weekend"; to which Gaynor responded "[t]his has gone on too long and the document should be signed."

Dadakis apparently spoke to decedent about signing the 2007 instrument as he wrote to Ms. Gaynor on March 7, 2007:

> I agree. And my mother-in-law agrees, but she is now house-bound in our house in Bedford. Anyway we could get it signed there, with you and a paralegal coming over? "(Obj. Exh. L).

Some days later, Ms. Gaynor reached out to Dadakis to find out if she should come to his house so that decedent could execute the 2007 instrument. She stated:

> Per my last email do you want me to come? If so give me directions and telephone number so I can make a date Meg [sic] (Obj. Exh. L).

Ms. Gaynor and Dadakis exchanged additional emails regarding the execution of decedent's 2007 instrument, and Ms. Gaynor asked Dadakis questions regarding the appointment of agents for decedent.

On April 3, 2007, Dadakis wrote to Ms. Gaynor stating:

> Hi Meg – I hear my mother-in-law is coming into [sic] sign her Will [sic] today. Patty will be driving her. They need directions to your office. They will be coming from Armonk. Please email them to me . . .

Ms. Gaynor wrote back on April 3, 2007 at 10:58 AM:

> Is Katherine Reda alive? She is listed as alternate health care agent and somehow I think she may have passed away. I figured its easier to ask you in case she is still hale and hearty [sic] Meg [sic]

Documentary evidence introduced at trial contains time entries by Ms. Gaynor

pertaining to the 2007 instrument that reference Dadakis and indicate that she consulted with him regarding the 2007 instrument: "PC to JD re alt. benef.; "send JD email" (Obj. Exh. K-9, K-5).

On April 3, 2007, decedent executed the 2007 instrument (Obj. Exh. D) and a durable power of attorney, which designated petitioner as decedent's attorney-in-fact (Obj. Exh. H). The 2007 instrument leaves all of decedent's tangible personal property to petitioner, and divides the residue equally between petitioner and objectant; and, if either daughter predeceases decedent then such share goes to that daughter's children. The 2007 instrument does not contain an in terrorem clause (Obj. Exh. D).

Ms. Maniscalco's testimony,[6] derived from her conversations with decedent and her observations, revealed that in 2007 decedent visited objectant, for a two week period while objectant was living in Florida (121). Ms. Maniscalco's mother and stepfather were also present for the visit decedent made with objectant in Florida (121).

Thereafter, in 2007 objectant stayed with decedent in New York to take care of decedent, as decedent was not able to eat due to a feeding tube (123). According to Ms. Maniscalco, from 2007 to 2008, decedent needed a companion, someone to cook for her, and to stay with her, and Ms. Maniscalco testified that objectant was there for decedent (127). Objectant also helped decedent with online dating, and bathing; she watched her go up the stairs, grilled for her, cooked for her, dressed her, took her to doctor

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[6]Ms. Maniscalco moved to California in 1977, but was in regular telephone contact with decedent every three days until she died, and would personally visit decedent when she came to New York (116 - 118)

appointments, out for lunch and shopping, and did everything decedent needed done. Ms. Maniscalco added that objectant took excellent care of decedent and was her companion (127 – 130).

For the tax period ending December 31, 2008, Dadakis and petitioner had a joint federal tax liability of approximately $270,000.00 (Obj. Exh. T, X1, X2). Dadakis and petitioner also had a state tax liability for the tax year ending 2008 in the sum of $33,301.82 (320; Obj. Exh. X-2). According to Dadakis, when the 2008 tax liability was due and owing on April 15 of 2009, the taxes were not paid because Dadakis did not have the money (324).

In Winter 2008 through the Summer of 2009, the objectant lived with decedent again. During that time, Ms. Maniscalco spoke to decedent every other day (130, 131). It was Ms. Maniscalco's understanding that objectant was living with decedent because she was looking for a job in New York. Ms. Maniscalco testified that decedent was close to both of her children (155). At some point the relationship between petitioner and objectant soured, and the basis of Ms. Maniscalco's knowledge is her conversations with objectant, who was concerned because she was not invited to holidays and parties after objectant's divorce, which hurt objectant (163). According to Ms. Maniscalco, objectant is a person who sometimes "flies off the handle", says hurtful things when she gets angry, and does most of the talking in any conversation (163, 164). Ms. Maniscalco also testified that there was always acrimony between petitioner and objectant (174).

On March 31, 2009, decedent had a stroke, and Ms. Maniscalco's assessment was

that decedent required intense care (131). Decedent told her in that period that objectant would bathe her everyday, fix her hair, insist that she eat, help her with her writing, dress her, take her out and, like she did on previous occasions, assist her with online dating. Objectant and petitioner took turns taking decedent to Burke rehabilitation (133 – 134).

According to Dadakis, following decedent's stroke on March 31, 2009, decedent could not drive and was not able to pass a driving test, but otherwise recovered and was fully functioning about a month after the stroke (289, 291).

During the time objectant was living with decedent, and in or around April 6, 2009, Mr. Cotrone[7] testified that he received a telephone call from objectant to meet objectant at decedent's house in White Plains, New York. Objectant stated that she wanted to remove some of her personal belongings that were stored in decedent's garage, and objectant told Mr. Cotrone that if something happened to decedent, petitioner would not let objectant in the house to claim her personal belongings, and she was going to try to find a place to live (190). Mr. Cotrone testified that decedent pleaded with objectant not to go looking for another place to live, but to stay with decedent because there was plenty of room for her, objectant, and objectant's son, Ricky, who decedent believed was coming to live with them, and decedent thought it would be nice to have a man in the house (190).

According to Mr. Cotrone, objectant told decedent on that occasion that she thought it best that she find a place to live because they argued about her belief that decedent did

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[7]Mr. Cotrone came to know decedent in the early 1990's because decedent operated a home furnishings store in Greenwich, Connecticut, and he met decedent through objectant (188).

not stick up for her to petitioner, and decedent allowed petitioner to manipulate her (191). Mr. Cotrone testified that decedent then apparently looked at objectant and said "no I do not, and you are in my will" (191). Decedent told objectant there was no reason for her to leave (191).

According to Mr. Cotrone, at the time he saw decedent in spring 2009, decedent told him that petitioner threatened decedent that she would divorce Dadakis, stating: "Jerry she threatens me. She threatens not to come and pick me up, and she threatens me with her marriage" (192). Mr. Cotrone also testified that objectant told decedent that she would visit her at petitioner's home, and decedent stated that petitioner would not allow that (192).[8]

Ms. Maniscalco testified that in or around May 2009, decedent told her that she was very excited because her grandson Ricky was moving in with her and objectant (139).

Ms. Maniscalco also testified that in May 2009 decedent told her that petitioner would call the house in the mornings to make sure decedent was making objectant vacate the house. Decedent, however told Ms. Maniscalco that she did not want objectant to leave as she was waiting for Ricky to come so they could all live together (176). Ms. Maniscalco stated that objectant was hurt and angry by petitioner's phone calls (177).

Ms. Maniscalco further testified that decedent was a very religious person and prayed for hours each day saying novenas, or extensive prayers, to various saints for

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[8]Mr. Cotrone testified that from the mid to late 1990's until April 2009, he did not have contact with decedent but he and objectant had contact every eight or nine months by telephone. At the time he saw decedent at her home in April 2009, decedent was able to carry on a coherent conversation and walked by her own power (202).

petitioner to change her mind about requiring objectant to move out of decedent's home, and decedent believed everything was going to be fine (177, 184). Decedent "hoped [petitioner] would come around" (184). According to the witness, decedent told her:

> Kathy, please tell [objectant] not to leave. Ricky's coming. He's going to move in here with [objectant]. [Objectant] is going to find a job. We're all going to be together. [Petitioner] will turn around. I'm saying novenas that everything will be fine (186).

According to Ms. Maniscalco, objectant was upset at petitioner for calling decedent and telling decedent that objectant should leave decedent's house. Objectant felt she was being used and abused, and she was not going to stay where she was not wanted, but decedent did not want her to leave her house (183). Dadakis testified that he had no recollection of petitioner ever asking decedent to have objectant leave her home (296-298).

Decedent told Ms. Maniscalco that she wanted to stay in her home, which she loved, and her home was her castle (149). According to Ms. Maniscalco, decedent told her she objected to cooking at petitioner's house because they expected and forced her to cook including standing at the sink and washing chicken for hours (151-152), whereas objectant neither expected her to cut carrots, nor wash or cook chicken. Decedent related to her that when she stayed in her own home she could sit in the family room and watch television. Decedent also did not want to go to the Dadakis's house because there was no one home all day (152).

On one occasion when Ms. Maniscalco was visiting decedent in 2009, Dadakis was very upset with decedent because she did not cook a certain chicken dish that his family loved. Decedent told Dadakis she did not want to cook the chicken, and Dadakis was very

upset with her, which upset decedent and Ms. Maniscalco (153). Dadakis's voice was stern during this conversation, and decedent's voice was exasperated (154).

Mr. Bellinger[9] testified that in late spring, early summer 2009, he visited decedent's home at the time objectant was residing there and stayed for approximately one month (229). At that time, Mr. Bellinger also visited petitioner's home (229). When Mr. Bellinger visited, decedent had recently suffered a stroke, and her health was not as strong as it previously was, although he believed the effects were predominantly physical (230). While he was there, objectant would take care of decedent by washing her hair, bathing her, doing her make-up, driving her places, feeding her, cleaning, providing companionship, taking decedent to church, and spending time with decedent (230). According to Mr. Bellinger, both objectant and petitioner shared the responsibility of driving decedent to the doctor.

Mr. Bellinger's purpose in visiting was for him to find a job in New York, and decedent invited him to move into her house with objectant in the event he found a job. Mr. Bellinger was present for decedent's birthday party held at petitioner's home in May 2009. Mr. Bellinger testified regarding a poem objectant wrote for decedent on the occasion of Mother's Day 1989, updated May 4, 2009 for decedent's birthday. The poem was read by objectant at decedent's birthday party in May 2009 (243; Obj.Exh. J). At the party, objectant read the poem and decedent cried, hugged objectant, and thanked her,

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[9] Mr. Bellinger testified against his own interest, inasmuch as he receives a $50,000.00 legacy under the propounded instrument

and they each said their "I love you's" (244). After the party, Mr. Bellinger testified that the relationship between petitioner and objectant took a downturn (248).

According to Mr. Bellinger, there was dissension between petitioner and objectant about objectant living with decedent (232). Decedent told Mr. Bellinger that petitioner did not want objectant living in the house with decedent (232). In addition, Mr. Bellinger testified that decedent told him that petitioner had "threatened [decedent] that if [objectant] was not kicked out of [decedent's] house, that there would be repercussions" in that petitioner told decedent that she would leave Dadakis (234). According to Mr. Bellinger, this threat made decedent fearful because she was deeply concerned about petitioner's son Ryan growing up in a household where petitioner and Dadakis were not married and not living together (235).

On the subject of the decedent's will, Mr. Bellinger testified that decedent repeatedly stated that her will would provide that her assets would be split evenly between petitioner and objectant and that objectant had nothing to worry about (236). Decedent also told Mr. Bellinger at the time he visited in 2009 that she did not like talking about her will because there was no question that her assets would be split evenly between petitioner and objectant (237).

During the time that he was staying in New York in 2009 and while visiting at petitioner's home, Mr. Bellinger testified that he spoke to decedent and she told him that she would leave him and Kimberly $100,000.00 each in her will; but, that in the event that she did not do so, that they need not worry because objectant would take care of them

financially. Concerned about possible tax implications, Mr. Bellinger spoke to petitioner after that conversation telling petitioner that he did not want the money to pass through his mother first. According to Mr. Bellinger, petitioner assured him she was the "executrix for the will, and she could make [decedent] do whatever she wanted and that he need not worry" (239). Petitioner told Mr. Bellinger that he "could get half of the money if [petitioner] wanted, but don't worry about it" (240).[10]

According to Mr. Bellinger, petitioner said on many occasions to him, Dadakis, and decedent that petitioner did not want objectant living in decedent's house; and, petitioner, in a frustrated manner, stated that if decedent did not kick objectant out of her house, then petitioner was "done" with decedent (240). Mr. Bellinger testified that decedent pleaded with petitioner to not force her to kick objectant out of her home, that objectant had no where to live, and objectant should not be kicked out of her home because objectant was taking care of decedent (240).

Mr. Bellinger also testified that objectant repeatedly asked decedent to affirm that there would be an equal split of decedent's assets between objectant and petitioner (249-256). He stated that while he was visiting decedent at her home, objectant and decedent argued primarily about petitioner and about objectant leaving the house because of the petitioner (257). Decedent was upset that objectant and petitioner did not get along (257).

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[10]As detailed *infra*, however, the propounded instrument leaves them only $50,000.00 each (Obj. Exh. K-4). In addition, objectant's email to Mr. Bellinger dated July 27, 2009, discussed *infra*, coincides with this conversation Mr. Bellinger's had with petitioner; and, in the email, objectant believed Mr. Bellinger was vying for a portion of decedent's estate (Pet. Exh. 11).

In late July 2009, decedent moved in with Dadakis and petitioner (286). Dadakis testified that decedent came to live with them because he felt that decedent was more comfortable staying with them, knowing that he and petitioner would take care of her, had a room for her, and were there for her all the time (465). Petitioner, Dadakis, and others would drive decedent because she was unable to drive (465). According to Dadakis before she passed away, decedent was very healthy and could take care of herself irrespective of her COPD (286).

According to Dadakis, in late July 2009, decedent was extremely upset with objectant and decided that objectant's behavior, and objectant's failing to return decedent's car to her that objectant had been driving, resulted in decedent not wanting objectant to live with her. Dadakis testified that on July 24, 2009, decedent asked Dadakis to affix a letter written by decedent to objectant, on the front door and back door of the garage of decedent's home (468; Pet. Exh. 9). Dadakis stated that the document is all in decedent's handwriting (469). The document requests that objectant leave decedent's home inasmuch as decedent did not want her living there any longer (Pet. Exh. 9). The document dated July 24, 2009 also states: "Rosemary, I plan on putting my house on the market as soon as possible. . . " (Pet. Exh. 9).[11]

According to Ms. Maniscalco, decedent told her that she moved because petitioner and Dadakis thought it was time for her to sell her house (135). Ms. Maniscalco testified

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[11]As detailed *infra*, petitioner sold her home approximately two years later in July 2011.

that decedent became resigned to selling her house, because if she did not, petitioner threatened to leave Dadakis, and decedent did not want Ryan, who was then approximately 15 years old, living in a single parent household (136). Decedent was worried because she felt objectant's kids suffered with objectant getting a divorce, and decedent did not want Ryan to suffer in the same manner (138-139). Decedent was approximately 82 years of age in and around this time (Obj. Exh. A).

After decedent had moved in with Dadakis and petitioner, petitioner took decedent's vehicle and moved the car to the Dadakis home. Objectant, however, who had been driving decedent's car, had left some personal property in the car. On July 24, 2009, objectant contacted the North Castle Police Department to retrieve a mobile phone and other property that objectant had left in decedent's car after petitioner took the car to her home. Petitioner's Exhibit B in evidence is an incident report dated July 24, 2009 from the North Castle Police Department which states that the caller "Rose Mary" reports that she needs to get items out of her mother's car, which is currently at her sister's residence at 34 Smith Farm Rd., she requests police assistance due to ongoing problems with her sister" (Petr. Exh. B).

Sergeant Hufnagle testified with regard to the incident that objectant called him relating to the residence of petitioner and Dadakis in July 2009 (277). Hufnagle retrieved the property, which included a plastic bag containing a cell phone, and put it in a bag that was then given to objectant (280; Pet. Exh. 13).

Objectant too testified that the police retrieved her belongings from the car, and put

the belongings in a brown bag, and gave them to her. Inside the bag was a mobile phone from the car that objectant testified the police thought was hers (404). A theft of the mobile phone would later be alleged by petitioner in a family court proceeding discussed *infra* (Obj. Exh. E-1, 401).

On July 25, 2009, the day after the police went to the Dadakis home, Dadakis and Jennifer Esposito, petitioner's friend, went to decedent's house where objectant was staying, unaccompanied by the police, to retrieve petitioner's mobile phone asserting that they believed that objectant had stolen it from the Dadakis's home. Dadakis did not knock on the door but entered with Jennifer Esposito since he had a key (478). Objectant was sleeping on the couch when he walked in, she got up, walked around, ran to the garage, and at that point Dadakis noticed objectant had something in her pocket, so Dadakis physically touched objectant's lower leg with his hand where it appeared she had a mobile phone, and then objectant took the phone out and gave it to him (479).

On July 27, 2009, Mr. Bellinger received an email from objectant (Pet. Exh. 11; 262). Mr. Bellinger testified that he did not read the entirety of the email (262). Mr. Bellinger testified that he told objectant that decedent was considering writing Mr. Bellinger into the contents of her will. Objectant was angry at Mr. Bellinger thinking he was vying for a portion of decedent's estate (266; Petitioner's Exh. 11). At one part of the email, objectant wrote "I know [decedent] doesn't love me, and I accept that" (268). Mr. Bellinger testified that when he spoke to decedent about the will, her reaction was always that it would be an equal split, and decedent did not know why objectant was upset (270).

On cross-examination, objectant was questioned regarding this e-mail she sent to Mr. Bellinger and titled "you sicken me" dated July 27, 2009 (Pet. Exh. 11). Objectant stated that what preceded the email was her belief that petitioner was going to have decedent write objectant's son into the will (422; Petr. Exh. 11). According to objectant, petitioner offered to write Mr. Bellinger in the will, and she said she could make it happen (422). Objectant testified that on the day she wrote the email, she was in anguish, in pain, had nowhere to live or go, could not call the people closest to her, felt hurt, abandoned, panicked and betrayed. Objectant testified that she even felt her son was considering being bribed by petitioner, she felt that no one was there for her, and she said things she did not mean, which is what she does when she gets emotional (430).

Further on July 29, 2009, Dadakis went to Family Court with petitioner to file a family offense petition stating that objectant was harassing petitioner and had threatened to "steal" their 15 year old son Ryan (475; Obj. Exh. E-1). Objectant denied that she ever threatened to "steal" Ryan, stated that she loved Ryan, always got along with him and missed him (Obj. Exh. E-1, 405).

Dadakis testified that before the family offense petition was filed (Obj. Exh. E2), objectant was making threats to petitioner, left voicemail messages with Dadakis, and alleged that she would do emotional things to Ryan to make sure she would "get" both petitioner and Dadakis (301). According to Dadakis, objectant stated that she was going to petitioner's gym where she taught fitness classes to tell everyone who took petitioner's exercise class how "bad" petitioner was, and objectant made statements that he believed

were very vicious to petitioner and Ryan (301).[12] Dadakis had no personal knowledge that objectant threatened to "steal" Ryan as alleged in the family offense petition (302). According to Dadakis, he understood the basis of the family offense petition and order of protection was that objectant entered his home and stole petitioner's mobile phone because petitioner's cell phone ended up in objectant's possession (303).

In the transcript of proceedings held on July 29, 2009 regarding the application for an order of protection against objectant (Obj. Exh. E-5), petitioner specifically inquired of the court as to whether the order of protection would bar objectant from contacting decedent, who was living with petitioner and Dadakis at the time. There was no allegation in that petition, however, that objectant engaged in any harassing or threatening action with regard to decedent.

The transcript reflects that after the Judge stated he would issue a temporary order of protection barring objectant from petitioner's home, child, and work. Petitioner then specifically inquired regarding the decedent, asking the Judge whether there would be an order of protection barring objectant from contacting decedent, with petitioner stating: "[a]nd what about my mother, my mother lives with me as well." To which the Judge responded "[w]ell [objectant] is to stay away from your home, so if that's the same, then

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[12]Objectant testified that she extracted information from petitioner's mobile telephone (410) and read her emails (412). She also accessed petitioner's telephone to obtain the contact numbers of some of petitioner's contacts (413). Objectant called petitioner's friend Jennifer Esposito, and she left Jennifer Esposito very uncomplimentary messages about petitioner (414).

it's – the same." (Obj. Exh., E-5). No request was made for an order of protection in favor of Dadakis although Dadakis was living at the home as well.

Dadakis also testified that although he does not specifically recall anyone mentioning the order of protection to decedent barring objectant from his home at a time when decedent was living there, that it must have been discussed because "we live in a household together, we eat dinner every night, together, so while I have no recollection, clearly, there must have been some knowledge and discussion" (310).

On July 29, 2009, the order of protection was issued against petitioner (Obj. Exh. E-2).

On July 30, 2009, objectant filed a family offense petition against Dadakis and petitioner (Objectant's E-3; E-4). Objectant's family offense petition alleged that Dadakis has come to decedent's residence where she is staying and "quietly prowls around while I am sleeping and goes through my belongings" (Obj. Exh. E-3). Dadakis admitted in submissions on the motion *in limine* that he entered decedent's residence and took tapes without objectant's knowledge or consent (*Matter of Palmieri*, NYLJ July 15, 2016, p. 38, Vol. 256). No order of protection was issued on objectant's petition, although the matter was calendered for an appearance.

At the time the Family Court petition was served upon her, objectant retained an attorney. She testified that she mistakenly signed her own name to a check belonging to her mother's Merrill Lynch account to pay the attorney's fee because she and decedent had Merrill Lynch accounts and the checks looked the same (423-424). Objectant

refunded her mother the money on September 1, 2009 (424).

During the period of time decedent was living with petitioner and Dadakis, decedent was sometimes left alone and other days there were people in the house (291).

According to Dadakis, decedent was a very religious person, and Dadakis would take her to church with him , she prayed for an hour and half every morning, she told him she was praying for both her daughters, and she never told him that she was upset about the acrimony between her daughters (294-295).

Ms. Vasquez, the Dadakis's housekeeper, testified that she observed a beautiful mother-daughter relationship between decedent and petitioner (354). She also observed that decedent loved Ryan very much (354). Ms. Vasquez testified that decedent loved Dadakis as if he were her own son (355). Ms. Vasquez never spoke to decedent about objectant (359). Ms. Vasquez testified that decedent would recite prayers on a daily basis (355 - 356).

In addition, in August 2009, Dadakis testified that he worked with decedent because she was concerned that there were checks drawn from her Merrill Lynch account that she did not remember signing, and so at that point in time, he believes there was an inquiry to Merrill Lynch to have Merrill Lynch send him checks from July 1, 2009 so that he could look at them for decedent (337; Obj. Exh. —1). In fact, Dadakis drafted exhibit M-1, which is a letter addressed to Merrill Lynch signed by decedent regarding her Merrill Lynch account which states "[p]lease provide all information concerning checks which have been drawn on my account since July 1, 2009 to my attorney John D. Dadakis at Schiff Hardin LLP 900

Third Avenue, 23rd Floor New York, NY 10022. Telephone: (212) 745-0860" (Obj. Exh. K - 1). The letter was drafted in August 2009 (338). Dadakis testified that he was the attorney for decedent "for this specific issue" (339).

Ms. Maniscalco also testified that in late July and early August 2009, she visited decedent at petitioner's home. She stated that decedent cooked for a party but had difficulty standing for long periods of time and did not want to cook anymore (142). At the party, Ms. Maniscalco testified that she overhead decedent telling Mr. Spaziani that objectant should not be concerned because decedent's assets were going to be divided equally and according to the witness, that had been decedent's plan "for years over and over" (143). According to Ms. Maniscalco, decedent said it "all the time" that her "principal"[13] would be divided equally between her two children (144). At no point did decedent ever mention an order of protection against objectant to Ms. Maniscalco (180).

In 2009, on more than one occasion, Ms. Maniscalco heard directly from decedent that her principal would be divided equally between petitioner and objectant, and she also heard this same statement made by decedent to Mr. Spaziani (143, 144). These conversations occurred approximately one to two months before the execution of the propounded instrument. In August 2009, decedent mentioned in the presence of Ms. Maniscalco's mother and step-father that she was not going to give the yearly stipends to the children, but she intended to divide her estate equally between petitioner and objectant (182).

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[13]Decedent referred to her estate as her "principal".

On August 3, 2009, objectant was served with a notice to quit the decedent's home. Dadakis testified that decedent retained an attorney to commence a dispossess action against objectant (475; Obj. Exh. I). An eviction proceeding was not commenced against objectant inasmuch as objectant vacated decedent's house on September 1, 2009 (424).

After decedent moved into petitioner's home, Mr. Mako[14] testified that he continued to go to decedent's White Plains home in order to maintain certain things inside the home (485). On one occasion, shortly after decedent moved out, Mr. Mako smelled gas and found that the stove was left on (486). He turned the stove off, opened the windows, and called Dadakis (486). According to Ms. Maniscalco, during her visit with decedent in late summer 2009, at a party at the Dadakis home, Dadakis came into the house and said in decedent's presence that objectant left the stove jets on in decedent's house with Dadakis further stating "it's a good thing that Paulie didn't light a cigarette. When Rosemary left the house, she left the burners on" (145, 146). Ms. Maniscalco testified that this statement angered decedent very much, and she was very upset (145, 146). Objectant denied leaving the stove jets on, and Dadakis denied ever making such a statement to decedent (408).

Mr. Spaziani, who was also present, at the same party in late summer 2009 around the second or third week in August, spoke to decedent whom he hadn't seen in a while, about "family things" (108). Decedent stated that objectant was not at the party, and that

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[14]Mr. Mako is a handyman who came to know decedent through Dadakis and who petitioner called to testify at trial.

there was a little dissension going on between objectant and petitioner (108). Mr. Spaziani testified that decedent was perplexed by the fact that "the girls" [objectant and petitioner] were not getting along, disturbed and saddened by it a little bit, and then made a comment towards the end saying that "whatever I have is going to be between both of them . . . they're both going to have an equal share (109)."[15] On cross-examination by petitioner's counsel, Mr. Spaziani testified that he was not familiar over the years with petitioner's relationship with objectant or petitioner's relationship with decedent (111).

In late September 2009, according to Ms. Gaynor, decedent called her and told her she wanted to make major changes to her will (39). Ms. Gaynor testified that she met alone with decedent, the decedent had been ill, attended rehabilitation, and was feeling much better and back to good health (45).

Ms. Gaynor did not know how decedent, being unable to drive, arrived at her office for the September 24, 2009 appointment (95). Decedent was well dressed and moved about freely without a walker (96). Decedent was not confused during the meeting and spoke coherently. Ms. Gaynor had one page of notes from her meeting with decedent (Objectant's K-1). The name "John" is written on the page with an arrow next to it in red ink. Ms. Gaynor testified that this was the name of a man she thought could date decedent and was meant to be filled in for the blank space where it states "Remind Mr. ___" . The

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[15]The time frame that this occurred, late summer 2009, coincides with the time period in and around the time the family offense petition was filed and order of protection issued barring objectant from petitioner's home where decedent was living at the time, as more fully set forth infra (Obj. Exhs., E-2, E-3, E-5).

original notes reflect that the name John is written in red ink, while the rest of the document is written in blue ink with pencil notations at the top of the page (Obj. Exh. K-1).

During their meeting, decedent told Ms. Gaynor that objectant was not taking her to doctors' appointments and helping her with her recovery. Ms. Gaynor further testified that decedent stated that objectant was verbally abusing her and yelling, and objectant would not leave decedent's house so she had to go to live with petitioner, and for those reasons, she wanted to omit objectant from the will (83).

Ms. Gaynor also testified that decedent was not happy about making the changes, and she was upset (97); that the inclusion of the *in terrorem* clause was at Ms. Gaynor's suggestion, and not decedent's request (54); and that she told decedent she should give objectant a bequest significant enough to make her think twice about contesting the propounded instrument (99). Ms. Gaynor also testified that she does not use *in terrorem* clauses very often (54).

In her September 2009 letter to decedent (Exh. K-5), who was then living at the home of petitioner and Dadakis, which enclosed a draft of the propounded instrument, Ms. Gaynor mentions the "changes you and I discussed last week" without detailing the changes. The September 2009 letter also mentions the contingent beneficiary for Ryan's trust, a power of appointment for Ryan's trust, and if the power of appointment is not exercised, where the funds are to go. Furthermore, with regard to a cash gift to Ryan, it references that it will be distributed to petitioner to hold under the UTMA. Ms. Gaynor also questions decedent concerning Dadakis's and petitioner's wishes regarding the gift writing:

" I assume ***Patty and John would not want to establish a trust for that gift***" (Obj Exh K-5) (emphasis added).

In late summer or fall 2009, decedent, living at the Dadakis' home, showed the propounded instrument to Dadakis who looked it over, as he testified, for "technical purposes" and he told her it was fine (314). Dadakis testified that "he was not acting as decedent's attorney at that point" (336) and that he did not discuss the propounded instrument with Ms. Gaynor before it was signed (316). Dadakis also testified that there was no discussion between him and decedent about the changes from the 2007 will to the propounded instrument (318).

Ms. Gaynor did not know how the decedent being unable to drive arrived at her office on October 29, 2009 (95). At that time, the propounded instrument was executed. The propounded instrument contains an extraordinarily broad *in terrorem* clause that provides a beneficiary would be deemed to have predeceased the testator if they were to challenge a fiduciary's management of estate property. Ms. Gaynor testified that she had no recollection regarding why she included this in the *in terrorem* clause (55-58; Obj. Exh. K-4).

With regard to his and petitioner's finances, Dadakis conceded that in and around the time the execution of the propounded instrument his family had tax problems (325). Dadakis also testified that the financial crash of 2008 impacted his and petitioner's finances in 2009, most likely the last quarter of 2009, and the income of his law firm declined in the last quarter of 2009 (339).

On October 30, 2009, the day after the propounded instrument was executed, the family offense proceeding was settled between counsel for petitioner and objectant, and Dadakis was involved in the settlement (304). Decedent did not appear and was not represented by counsel in the family offense proceeding, although, as set forth in the record, the settlement involved objectant's access to decedent who was then living at the Dadakis's home. No facts are alleged in the family offense petition that objectant had engaged in any harassing behavior towards decedent. Objectant's exhibit E-6 is a letter dated October 30, 2009 written to objectant's counsel on the family offense petition, on which Dadakis was copied. The settlement included an agreement that objectant could contact her mother only through a third party, which contact should not be unreasonably withheld (309; Obj. Exh. E-6).

The family offense proceeding settlement is reflected in a transcript of proceedings held in Family Court, Westchester County, on November 2, 2009 (Obj. Exh. E-5). It reflects that the settlement involved both parties withdrawing their family offense petitions and counsel for objectant stated that:

> [objectant] will have the right to contact her mother who is now residing at the home of John Dadakis and Patty Palmieri. My client has indicated that she will do it through a third party and the contact shall not be unreasonably withheld. She hasn't spoken to her mother in quite some time. She has advised me that currently she does not have the intention because of the negative feelings that have been going on throughout these proceedings, but she doesn't want to say that she'll never contact her mother again . . . there is an understanding of an intent for the parties to be civil to each other (Obj. Exh. E-5).

Dadakis had no knowledge that decedent was ever informed, understood, and knew that objectant could not contact decedent directly as a result of the settlement of the family

offense proceedings (311). Neither Dadakis nor anyone else in his presence informed decedent that objectant could not contact decedent directly while living with petitioner and Dadakis (312).

By notice dated November 9, 2009, Dadakis and petitioner learned that they owed federal taxes in the sum of $269,418.58 (Obj. Exh. T, X1, X2).

In December 2009, petitioner and Dadakis refinanced their home and received cash in the sum of $737,129.20 (442) which Dadakis testified cleared up his cash flow problems for 2009 (442; Obj. Exh. N), though there is no indication in the record that any of these funds were used to pay nearly $500,000.00 in tax liabilities that currently exist. Dadakis testified that the income of the Dadakis family in 2009 was approximately $800,000.00 (327).

Dadakis testified that he and petitioner did not have the funds to pay the monies demanded by the notice and jointly owed pursuant to the IRS notice dated December 22, 2009 (324). A Notice of Federal Tax Lien (Obj. Exh. T) for the tax period ending December 31, 2009, indicated that Dadakis and petitioner owed $329,249.64 in federal taxes.

Dadakis testified that he and petitioner were having financial problems in 2010 and for the tax year ending December 31, 2010, they had a federal tax assessment of $83,016.59 (Obj. Ex. T).

On April 15, 2010, decedent's Merrill Lynch account reflects a check to petitioner in the sum of $15,000.00 (Obj. Exh. R-2).

On September 16, 2010, the decedent's Merrill Lynch account reflects a check in

the sum of $20,000.00 to petitioner (454).

On October 12, 2010, decedent wrote a check to petitioner from her Chase account in the sum of $10,000 (Obj. Exh. S-1).

On January 17, 2011, decedent entered into an agreement with Richard D. O'Donnell (Obj. Exh. P), property tax consultant, with regard to a real property tax challenge. Dadakis is designated as the phone contact with day and evening numbers, and provides his email address as a method of communication (Obj. Exh. P).

Also in 2011, with regard to decedent's Merrill Lynch account, Dadakis testified that he discussed with the account executive at Merrill Lynch, Mr. Keckert, the methodology he wanted to use for investing decedent's funds (445).

On March 28, 2011, decedent wrote a check to petitioner in the sum of $10,000 endorsed by LV2BFIT[16] (Obj. Exh. S-4); and, on April 7, 2011 decedent wrote a check to petitioner in the sum of $10,000, endorsed by LV2BFIT (Obj. Exh. S-4)

Approximately one month before decedent's home at 32 Rolling Ridge Road was sold, Dadakis wrote a check to himself dated June 16, 2011 in the sum of $15,000.00, signed by decedent; and, Dadakis wrote a check to James Consaga on June 16, 2011 for $1,083.75 signed by decedent (Obj. S-5). Check number 4861 made payable to James Consaga is endorsed by "A Man With A Van and More" located in White Plains, New York. The memo portion of the check is written "1000 + 83.75 sales tax".

On June 17, 2011, decedent executed a deed pertaining to the sale of her home.

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[16]LV2BFIT (Love to Be Fit) is petitioner's retail business.

Decedent's signature on the deed is notarized by Dadakis (Obj. Exh. V).

On June 22, 2011, decedent wrote Dadakis another check for $15,000.00 dated June 22, 2011 that Dadakis testified was more than likely a repayment of monies he had advanced for movers inasmuch as he had used his credit card to pay the moving company (448). In addition, on decedent's Merrill Lynch account (Obj. R-2) a check was written to Dadakis on July 5, 2011, for the sum of $4,500.00 that Dadakis stated was again more than likely a reimbursement of monies he advanced to help decedent move (450).

In July 2011, decedent's home was sold. Dadakis testified that being decedent's son-in-law, he was involved in the sale of decedent's house (334). Dadakis found decedent an attorney to represent decedent in the sale, and he helped her clean out her house (444).

Decedent wrote the following checks from her Chase account to petitioner: (I) on July 14, 2011, $25,000.00 endorsed by petitioner LV2BFIT (Obj. Exh. S-7); (ii) on July 26, 2011, $25,000.00 endorsed by LV2BFIT (Obj. Exh. S-7); (iii) on August 8, 2011, $25,000.00 endorsed by LV2BFIT (Obj. Exh. S-7); and, (iv) on September 15, 2011, $50,000.00 endorsed by LV2BFIT, Inc. (Obj. Exh. S-8).

On August 11, 2011, Merrill Lynch cleared another check to Dadakis from decedent's account in the sum of $4,050.00 that Dadakis testified was for reimbursement of moving expenses including the cost of addressing a toilet overflowing in the basement of decedent's home (453) (Obj. Exh. R-2). According to Dadakis, the entirety of the checks issued personally to him by decedent in and around the time decedent sold her home in

the sum of $38,550.00 were more than likely repayment for advances he gave to decedent to move decedent from White Plains to the Dadakis home in Bedford, New York where decedent had a fully furnished room (352).

Decedent loaned Dadakis the sum of $300,000.00 a few weeks after decedent sold her house in 2011 (331-332). Dadakis stated that in 2010 his compensation radically changed and he needed cash and therefore asked his mother-in-law for a loan (332). By letter dated August 15, 2011, decedent requested Merrill Lynch to wire the sum of $300,000.00 to Dadakis (Obj. Exh. U), which letter is dated a little over one month after the sale of decedent's house (445). Although he made some payments on the loan, there is still an outstanding balance of $300,000.00 (332). Dadakis testified that he discussed the loan request with petitioner and then he discussed it with decedent (446).

From August 29, 2011 through September 20, 2011 and after the sale of decedent's home, decedent had written petitioner a series of checks on the Merrill Lynch account totaling $150,000.00 (R-2). Dadakis testified that these monies were given to petitioner from decedent to assist petitioner with establishing her business LV2BFIT (454). [17]

Counsel for petitioner also read certain portions of the deposition testimony of objectant into the record. Those portions reflect that objectant did not speak to decedent

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[17]In summary, decedent (i) wrote checks to petitioner for the period April 15, 2010 through September 20, 2011 from her Merrill Lynch account in the aggregate sum of $185,000.00 (454, 457); (ii) wrote checks to petitioner from decedent's Chase account for the period October 2010 through November 5, 2012 in the aggregate sum of $165,000.00; (iii) wrote checks to Dadakis in the sum of $38,550.00 in and around the time she moved in July 2011; and (iv) gave a loan to Dadakis a month after she moved in August 2011 the sum of $300,000 that was not repaid at the time of trial.

in 2010 and 2011 because she was pained by the family circumstances and barred from petitioner's and Dadakis' home. Objectant tried to contact decedent through her cousin Kathy and wanted to let decedent know what was going on because she believed decedent did not even know there was a restraining order (502) but to survive and to get a job and reorganize her life she "had to let it go" (503). Objectant testified that after the family court proceeding, it was her understanding that she was prohibited from contacting her mother (426; Obj. Exh. I).

Ms. Maniscalco testified that between 2011 and 2012, and after the propounded instrument was executed, decedent's health deteriorated, decedent was very alone, and Ms. Maniscalco would call her and talk about Ms. Maniscalco's granddaughter, which decedent enjoyed hearing about (138). During this time period, decedent told Ms. Maniscalco that she was so sorry she sold her house, and that objectant could be living there with decedent (138). Mrs. Maniscalco testified that at this time, decedent "was very alone" (138).

Decedent died on May 5, 2012. Dadakis assisted petitioner with the funeral arrangements (384). Neither objectant nor her children were informed of decedent's death. Dadakis testified that they did not inform them because objectant is disruptive, "makes waves", complains and causes problems, that is was petitioner's choice not to have objectant at the funeral, and that it was clear to him that decedent did not want her at the funeral inasmuch as they did not have communication for a number of years (384 - 385). According to Dadakis, petitioner decided not to have either of objectant's children at the

funeral because they would have notified objectant, and objectant's children were not around for decedent in that they did not send birthday cards, mother's day cards, or Christmas cards and never called decedent (386).

Upon being informed of decedent's death by Dadakis by email, Ms. Gaynor stated as follows:

> I am heading back from DC and am sorry to miss the service. I will get the Will out of the vault. Is there anything that needs probate. I know that Carole was putting Patty on many accounts Meg [sic] (Objectant's Exh. L).

In addition, an email communication from Ms. Gaynor to Dadakis dated January 17, 2012 states "I appreciate that you are busy but I would appreciate if you would review the attached and see if you can help Calvary [H]ospital Thanks Meg" (Obj. Exh. L).

In July 2012, just two months after decedent died, Dadakis left the marital home and is now separated from petitioner (283 - 284).

On February 22, 2013 a tax lien was filed in the office of the Westchester County Clerk against petitioner and Dadakis is the total sum of $412,266.23 (Obj. Exh. T), which tax lien existed at the time of trial. The federal taxes owed include those accrued at the time the propounded instrument was executed in 2009 (320). Although Dadakis and petitioner are no longer living together and are separated, there is no financial agreement between them and the tax liability is jointly owed by petitioner and Dadakis (330).

Applicable Law and Conclusions

Objectant asserts that the will should be denied admission to probate because it is

the product of undue influence and fraud. Undue influence has been defined as behavior which is "insidious, subtle and impalpable ...[and] subverts the intent or will of the testator, internalizes within the mind of the testator the desire to do that which is not his intent but the intent of another" *(Matter of Kaufman*, 20 AD2d 464 [1st Dept 1964], *affd*, 15 NY2d 285 [1965]; see also *Matter of Walther*, 6 NY2d 49 [1959]). Undue influence is seldom practiced openly, but 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 were it becomes the willing tool to be manipulated for the benefit of another (*Matter of Burke, 82 AD2d 260, 269)*. As a result, the actual exercise of undue influence usually can be shown only by circumstantial evidence of a substantial nature (see e.g. *Matter of Walther, 6 NY2d 49*; *Matter of Burke, 82 AD2d 260*).

To demonstrate undue influence, an objectant must show by a fair preponderance of the evidence that a motive, an opportunity, and the actual exercise of influence subverted the mind of the testator at the time of the execution to the extent that, but for the influence, the decedent would not have executed the instrument (*see Matter of Fiumara*, 47 NY2d 845 [1979]).

"Evidence of motive is generally present by virtue of the benefit conferred on the beneficiary of the bequest" (see *Matter of Moskowitz*, NYLJ, March 26, 2012, at 44 [Sur Ct Kings Co]). Evidence of opportunity and the actual exercise of influence may be demonstrated by the "facts and circumstances surrounding the testator, the nature of the

will, his family relations, the condition of his health and mind and the opportunity to exert such influence" (see *Matter of Elmore*, 42 AD2d 240 [3d Dept 1973], *quoting Matter of Anna*, 248 NY 421 [1928]).

When a confidential relationship exists between the testator and the beneficiary, an inference of undue influence may arise (*see Matter of Katz*, 15 Misc3d 1104[A] [2007]). Certain relationships, such as attorney and client, are considered confidential as a matter of law (see *Matter of Zirinsky*, 10 Misc3d 1052[A] Sur Ct Nassau Co 2005], *affd*, 43 AD3d 946 [2d Dept], *lv to appeal denied*, 9 NY3d 815 [2007]). Other relationships may be determined to be confidential as a matter of fact (see *Matter of Moskowitz*). The existence of a confidential relationship as a matter of fact may be shown by proof of a combination of facts such as the testator's mental, physical or emotional dependence on the beneficiary or the beneficiary's involvement in or control over the testator's financial affairs (see *Matter of Halsband*, NYLJ, Feb. 15, 1994, at p25 [Sur Ct NY Co]; see also *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]).

Although a confidential relationship between a testator and a beneficiary, combined with other factors, may create an inference of undue influence that the proponent must explain, the relationship does not create a presumption of undue influence as a matter of law (see 2 Harris, New York Estates, § 20:229). The burden never shifts from the objectant to prove undue influence (see *Matter of Collins*, 124 AD2d 48 [4th Dept 1987]). However, the existence of a confidential relationship calls for an explanation in regard to the largesse and whether the explanation is sufficient is a question for the trier of fact (see

Matter of Lynch, NYLJ, June 20, 2006, at 25 [Sur Ct Kings Co]).

The court finds based upon a fair preponderance of the evidence, that a confidential relationship existed between Dadakis and petitioner and decedent such that petitioner is required to explain the decedent's bequests to her *(Matter of Lynch*, NYLJ, June 20, 2006, at 25 [Sur Ct Kings Co]).

For numerous years, Dadakis, a prominent trusts and estates practitioner, acted as decedent's attorney and advisor, and the evidence adduced at trial demonstrates Dadakis was a person who decedent consistently and regularly trusted and relied upon. Dadakis acted as decedent's attorney throughout the time he was her son-in-law (335). Dadakis represented decedent when her first husband died, in a prenuptial agreement she signed when she married her second husband, and sometime prior to 1997 when she sold her house at 12 Reimer Road (337, 461).

Decedent contacted Ms. Gaynor at Dadakis's suggestion for the purposes of preparing the 1997 instrument (37). Dadakis asked Ms. Gaynor to "take care of" his mother-in-law (37). Decedent requested that Ms. Gaynor contact Dadakis regarding a bequest to the Dadakis's son Ryan in the 2007 instrument (25). Dadakis also directed Ms. Gaynor regarding what provisions the 2007 instrument should contain, and Ms. Gaynor communicated with Dadakis regarding its execution (Obj. Exh. L). Ms. Gaynor contacted Dadakis to use his influence to get decedent to sign the 2007 instrument requesting: "[c]an you use your influence so that I can close the file?" (Obj. Exh. L). Ms. Gaynor also revised the 2007 instrument based upon a conversation with Dadakis (Obj. Exh. K-8). Dadakis

was a point of contact when Ms. Gaynor had questions regarding the 2007 instrument provisions and its execution by decedent (Obj. Exh. L). Dadakis also discussed the mechanics of execution of the 2007 instrument with Ms. Gaynor. (Obj. Exh. L, K-9, K-5). In addition, regarding the propounded instrument, Ms. Gaynor's September 2009 letter to decedent enclosing a draft of the propounded instrument questioned *how Dadakis and petitioner wanted* a bequest to Ryan handled (Obj. Exh. K-5). Decedent also referred to Dadakis as her attorney in a communication to an account representative at Merrill Lynch (Obj. Exh. M-1).

In addition, Dadakis reviewed the propounded instrument for decedent at her request, although he states it was for "technical purposes" and he did not discuss the propounded instrument with decedent or Ms. Gaynor, but this testimony is contradicted by Ms. Gaynor's September 2009 letter to decedent, which specifically inquires of decedent about a bequest to Ryan and whether "Patty and John would . . . want to establish a trust for that gift" (314, Obj. Exh. K-5). Decedent referred to Dadakis as her attorney regarding an inquiry concerning her Merrill Lynch account in August 2009 (Obj. Exh. K-1). In January 2011, Dadakis was a contact person on a property tax grievance pertaining to decedent's real property, and he was involved in the sale of decedent's home in July 2011 inasmuch as he found her an attorney, notarized the deed conveying title, and helped her clean out her house (444, Obj. Exh. V). Dadakis also discussed with a Merrill Lynch executive in charge of decedent's bank account how Dadakis wanted decedent's funds invested (445). By virtue of all of the foregoing, its clear that Dadakis had a significant and active part in

decedent's finances and legal affairs.

In sum, the overwhelming proof adduced at trial evidences that Dadakis was a person in whom decedent reposed her trust and confidence and who she relied upon, thus a confidential relationship was established between Dadakis and decedent. Decedent reposed in Dadakis her trust and confidence with regard to her personal and financial affairs. The record is replete with evidence demonstrating that inasmuch as Dadakis was petitioner's spouse, and petitioner ultimately benefitted from decedent's testamentary plan, Dadakis benefitted as well, and the benefit to petitioner from the change in decedent's testamentary plan inured to Dadakis. Indeed, this conclusion is supported by the fact that to this very day the loan given by decedent to Dadakis remains unpaid and petitioner, as executrix of the propounded instrument, has done absolutely nothing to insure the estate is repaid the loan. Further, petitioner as the residuary beneficiary of decedent's estate could satisfy the tax liability in the sum of approximately $500,000.00 filed against the Dadakises, that is jointly owed by petitioner and Dadakis, which would ultimately benefit Dadakis. In sum, Dadakis was so enmeshed in decedent's financial transactions, life and affairs, and decedent reliant and dependent upon him, that the court finds a confidential relationship existed.

So too, a confidential relationship existed between decedent and petitioner. Decedent was under petitioner's control inasmuch as she lived in her home, and could not drive and petitioner was attorney-in-fact for decedent. In addition, the court credits the testimony of Mr. Bellinger who testified that petitioner told him that she controlled

decedent's will, was the executrix, and could "make [decedent] do whatever she wanted" (239-240). Decedent was also under petitioner's control inasmuch as petitioner obtained an order of protection barring objectant from her home where decedent was then living.[18] As a result, access to the decedent was limited by petitioner and Dadakis. Indeed, petitioner and Dadakis were successful in obtaining an order limiting objectant's contact with decedent, except through a third party, without decedent's participation in the family court proceedings, or her being represented by counsel; and, based upon a petition that did not allege that objectant had engaged in any harassing behavior towards decedent. The court notes that petitioner and Dadakis sought the order of protection four days after Dadakis and Jennifer Esposito personally and voluntarily went to where objectant staying, without police assistance, to retrieve petitioner's mobile phone. Petitioner's family offense petition was based in part upon the questionable threat that objectant would "steal" a 15 year old teenager. Moreover, the family offense proceeding was settled by stipulation a day after the propounded instrument was executed, which settlement Dadakis participated in.

The proof adduced at trial is that decedent was an elderly woman who could not drive who was living with and dependent upon petitioner and Dadakis. Indeed, the court credits the testimony of Mr. Cotrone who stated that decedent told him with regard to

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[18]On the day petitioner filed the family offense proceeding she asked the Judge "[a]nd what about my mother, my mother lives with me as well." To which the Judge responded "[w]ell [objectant] is to stay away from your home, so if that's the same, then it's – the same." (Obj. Exh., E-5).

petitioner: "Jerry she threatens me. She threatens not to come and pick me up, and she threatens me with her marriage" (192), and that objectant told decedent that she would visit her at petitioner's home, and *decedent stated that petitioner would not allow that* (192). It was also petitioner and Dadakis who wanted decedent to move as Ms. Maniscalco testified that decedent told her that petitioner and Dadakis thought it was time for her to sell her house, and that decedent did not want to move and did not want to kick objectant out of her house (135, 240). Indeed, the trial testimony from Ms. Maniscalco was that decedent was looking forward to continuing to live with objectant and Mr. Bellinger (139, 184, 186, 186). The totality of these facts adduced at trial establishes a confidential relationship between decedent and petitioner.

The court having found that a confidential relationship exists, petitioner is required to provide a satisfactory explanation for the bequest to her in the propounded instrument and that it was fair and free from undue influence (*see Matter of Bach*, 133 AD2d 455). Petitioner failed to provide this explanation at trial. Neither of the two witness called by petitioner nor the deposition testimony read into the record explained the decedent's testamentary bequests and her departure from her long-standing estate plan to have her daughters share equally in her estate. Nor did petitioner demonstrate this through any witness cross-examined on objectant's case-in-chief. Petitioner submitted documentary proof in the form of decedent's medical records after she recovered from her stroke and the bank records demonstrating that decedent wrote numerous checks while living with petitioner and Dadakis. The weight of these documents, however, is more relevant to the

issue of whether decedent had testamentary capacity, which is not an objection asserted here. In addition, petitioner's introduction of a photo of decedent with Newt Gingrich taken in June 2009 does not support her argument inasmuch as the photo is mere snapshot in time and taken at a time when decedent was still living in her own home, that is, in June 2009 (466).

Moreover, Ms. Maniscalco, Mr. Bellinger, Dadakis, and Ms. Vasquez all testified as to how religious a person decedent was (184- 186, 230, 294, 295, 355-356). She attended church regularly, and prayed everyday for one and a half hours, prayed for both daughters, and said novenas, or extensive prayers. A confidential relationship having been established by objectant, petitioner failed to offer a sufficient explanation as to why this religious woman who prayed for both of her daughters, whom she both loved and knew had an acrimonious relationship, would have in effect disinherited objectant and thereby cause even more acrimony between petitioner and objectant after decedent died. Nor did petitioner adequately explain or present evidence regarding why decedent chose to benefit petitioner, whose spouse earned nearly a million dollars per year in compensation, and at the same time leave a minimal bequest to a daughter who had nowhere to live, no employment, and lost all of her assets in the stock market crash of 2008.

The credible testimony and documents entered into evidence demonstrated that decedent's long-standing testamentary plan was to have petitioner and objectant share in her estate equally. Petitioner failed to explain at trial why decedent departed from this long-standing plan. In fact, during the summer of 2009, just two months before she executed

the propounded instrument, at least four people, Mr. Spaziani, Ms. Maniscalco, Mr. Bellinger, and Mr. Cotrone, testified that decedent said that petitioner and objectant would share her estate equally (108-109, 142 -144, 182, 191, 236-237). The record evidence is that decedent loved both her daughters, and objectant lived with decedent and took excellent care of her. Decedent also did not want to kick objectant out of her home because objectant was taking care of decedent and had nowhere to live (240) thus demonstrating she loved both petitioner and objectant. Petitioner has failed to explain why decedent completely changed her long-standing testamentary plan and contradicted the numerous statements she made to disinterested witnesses just before the execution of the propounded instrument.

Even in the absence of a confidential relationship, the court nonetheless finds that by a fair preponderance of the evidence, the objectant has sustained her burden of demonstrating the propounded instrument was the product of undue influence perpetrated upon decedent by petitioner and Dadakis. Objectant demonstrated by a fair preponderance of the trial evidence that there existed motive, opportunity, and the actual exercise of influence that subverted the mind of the testator at the time of the execution of the propounded instrument (*see Matter of Fiumara*, 47 NY2d 845 [1979]).

Dadakis and petitioner clearly had a motive in getting decedent to change her testamentary plan. Dadakis admitted at trial that he and petitioner were experiencing financial difficulties before and at the time the propounded instrument was executed. Dadakis's compensation had declined in the last quarter of 2009, and petitioner and

Dadakis owed significant liabilities to the IRS and New York State in the approximate sum of $500,000.00. Further evidence of motive adduced at trial is that after decedent sold her home in 2011, and even before that time, petitioner used her mother financially to start a business, LV2BFIT. Indeed, in and around the time, and just after decedent sold her house, petitioner and Dadakis received in excess of $650,000.00 in cash from decedent by virtue of the loan to Dadakis from decedent in the sum of $300,000.00, and the sums given to petitioner, some of which were used to establish her business LV2BFIT.[19] In sum, the totality of the evidence demonstrates petitioner and Dadakis had a significant and substantial motive with regard to the execution of the propounded instrument that benefitted petitioner to objectant's detriment.

The credible evidence also established an opportunity for the exercise of undue influence in that decedent went to live with petitioner and Dadakis at the end of July 2009, that it was the Dadakis' idea that she do so, and that the Dadakises commenced a family court proceeding that resulted in a negotiated settlement after the propounded instrument was executed barring objectant from contacting decedent except through a third party (135). The record evidence demonstrated that decedent was 82 years of age, could not drive, and was isolated at the Dadakis home from objectant. As detailed *supra*, soon after she moved into the Dadakis residence, petitioner and Dadakis sought an order of protection under what can only be described as questionable grounds, at best. The order

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[19]At this time, the court makes no determination regarding whether the funds "given" to petitioner were a valid inter vivos gift.

of protection was sought after Dadakis and Jennifer Esposito personally and voluntarily went to decedent's house where objectant was staying, without the police, to retrieve petitioner's mobile phone. The basis of the order of protection was petitioner's allegations that objectant threatened to "steal" Ryan, a 15 year old teenager, and that objectant stole petitioner's mobile phone, when in fact, the testimony adduced at trial demonstrates that the phone was retrieved by Sargent Hufnagle and inadvertently given to objectant (277-279; Pet. Exh. 13).

The transcript of the family court proceedings also evidences that petitioner specifically sought to bar objectant from contacting decedent without there being any allegations in the family offense petition that objectant had engaged in harassing behavior towards decedent. Indeed, petitioner asked the Judge on the day she sought the order of protection "[a]nd what about my mother, my mother lives with me as well", to which the Judge responded "[w]ell [objectant] is to stay away from your home, so if that's the same, then it's – the same." (Obj. Exh., E-5). Moreover, the family offense proceeding was settled a day after the propounded instrument was executed, which settlement Dadakis participated in. The propounded instrument being a fait accompli, petitioner and Dadakis were at liberty to settle the Family Court proceedings on their own terms.

Furthermore, the circumstances surrounding the execution of the propounded instrument, the nature of the propounded instrument, the decedent's family relations, her living arrangement, and her age also support the conclusion that there was the actual exercise of undue influence (see *Matter of Elmore*, 42 AD2d 240 [3d Dept 1973], *quoting*

Matter of Anna, 248 NY 421 [1928]). As stated, undue influence is seldom, if ever, practiced openly and the actual exercise of undue influence is usually demonstrated only through circumstantial evidence (*Matter of Walther, 6 NY2d 49, supra*). The court finds here that the circumstantial evidence is of a substantial nature sufficient to demonstrate the actual exercise of undue influence.

The propounded instrument deviates from the decedent's long-standing estate plan and contradicts the trial testimony that decedent wanted to divide her estate equally between her two daughters thus giving rise to an inference of the actual exercise of undue influence. The credible testimony elicited at trial demonstrates that just up to the execution of the will decedent expressed an intent to divide her estate equally between her two daughters. Ms. Maniscalco, Mr. Spaziani, Mr. Bellinger, and Mr. Cotrone testified that during that summer and late into the summer decedent expressed the intent to divide her estate equally (108-109, 142 -144, 182, 191, 236-237). The testimony of these disinterested witnesses trumps any contrary testimony at trial. Indeed, there was nothing but Dadakis's self-serving testimony that the decedent's feelings had changed towards the objectant.

In addition, the 1997 and the 2007 instruments divided her estate equally, and if either daughter predeceased the testator that daughter's share would go to that daughter's children, insuring that the estate was split equally. In the propounded instrument, petitioner is the residuary beneficiary and if she predeceases decedent, the estate goes solely to petitioner's son, Ryan. The record evidence, however, demonstrates that decedent also

loved objectant's son Ricky and there is no explanation as to why she would not treat Ricky in the same manner that she treated petitioner's son thus giving rise to a strong inference of undue influence. Mr. Bellinger and Kimberly each receive only $50,000.00 whereas Ryan received $100,000.00. Again, there is nothing in the record other than Dadakis's self-serving testimony that Mr. Bellinger and Kimberly failed to send cards to the decedent. According to Ms. Maniscalco, a disinterested witness who was like a daughter to the decedent, the decedent was thrilled at the possibility of living with Mr. Bellinger.

Moreover, the two prior instruments did not contain *in terrorem* clauses. There is no evidence that it was decedent's idea to make a will contest by objectant more difficult. In fact, Ms. Gaynor testified she does not ordinarily use *in terrorem* clauses and could not remember why she inserted such a broad in terrorem clause that provides a beneficiary would be deemed to have predeceased the testator if they were to challenge a fiduciary's management of estate property (55-58; Obj. Exh. K-4).

Furthermore, the trial testimony supports the conclusion that decedent was unaware that there was an order of protection barring objectant from visiting decedent at petitioner's residence. Decedent told Ms. Gaynor that the reason for changing her will was that objectant was not taking care of decedent, but decedent never mentioned the order of protection to Ms. Gaynor. Nor did decedent mention the order of protection to Ms. Maniscalco, the niece she raised as a child and spoke to all the time (180). In addition, the settlement of the family offense proceeding involved objectant agreeing to not contact decedent except through a third party. Decedent, however, was not a party to that

proceeding and was not represented by counsel in that proceeding. These circumstances demonstrate that at the time she executed the propounded instrument, decedent was unaware of the existence of the order of protection and the ensuing settlement prohibiting objectant from contacting decedent, except through a third party, thus giving rise to the actual exercise of undue influence.

The trial testimony and evidence also support the conclusion that petitioner and Dadakis wanted to have decedent live with them so that they could convince her to sell her house, and then Dadakis and petitioner could obtain the monies from the sale of decedent's home, and make petitioner the sole residuary beneficiary of decedent's estate to the detriment of objectant. Indeed, in this regard the court credits the testimony of Ms. Maniscalco, who stated that decedent told her that she moved because petitioner and Dadakis thought it was time for her to sell her house, and that she was resigned to selling her house, but that she did not want to and preferred to stay with objectant and Mr. Bellinger. Ms. Maniscalco's testimony trumps the testimony of Dadakis regarding the reasons for her moving to the Dadakis's home inasmuch as Ms. Maniscalco is a disinterested witness. Ms. Maniscalco also testified that decedent later told her that she regretted moving and selling her home and that objectant could be living there with her (138).

The record evidence also demonstrates that after the sale of her house, petitioner and Dadakis siphoned decedent's cash assets inasmuch as decedent wrote checks to petitioner to start her business, LV2BFIT, and loaned Dadakis $300,000.00, which loan has

not been repaid. Moreover, the court finds it unlikely that the checks written to Dadakis in an around the time decedent's house was sold in the aggregate sum of $38,550.00 were to reimburse Dadakis for moving decedent, an 82 year old woman, from White Plains to the Dadakis home in Bedford where she had a fully furnished room. No documents were submitted at trial to prove Dadakis's assertion that the $38,550.00 in checks decedent wrote to him were for moving expenses. Indeed, petitioner having failed to substantiate these purported moving expenses, the only credible view of the evidence is that it cost approximately $1,083.75 to move decedent as evidenced by the check to James Consaga, and endorsed by "A Man With A Van and More", written at the time of the move, and to which Dadakis testified was for the move as well.

The court also finds that petitioner threatened decedent in order to have decedent live with her so that she, and her finances, would be under the Dadakis's control. In this regard the court credits the testimony of those witnesses who stated that petitioner threatened decedent by telling her that unless she came to live with petitioner and Dadakis, petitioner would leave Dadakis, and that decedent did not want that to happen because she loved Ryan, petitioner's son, and did not want Ryan to grow up in a single parent home (136-139; 354). The court notes that the decedent was an 82 year old religious woman, and the court credits Ms. Maniscalco's testimony that the decedent did not want the Dadakis's son Ryan to suffer by a divorce the way decedent believed objectant's children had suffered (136-139). The court also credits the testimony of Mr. Cotrone who stated that decedent told him in Spring 2009: "Jerry [petitioner] threatens me. [Petitioner]

threatens not to come and pick me up, and [petitioner] threatens me with her marriage" (192). Indeed, the fact that petitioner threatened decedent with the statement is corroborated by Dadakis's own admission that he moved out of the marital residence just two months after decedent died (284), and that decedent told Ms. Maniscalco, the niece she raised, that she did not want to leave her home and that it was the Dadakis's idea that she do so (138).

Petitioner's threats to decedent and her relationship with objectant, which sunk to the level of not even having notified her of their mother's death so that she could attend the funeral and objectant pay her last respects, suggest that petitioner's disposition and financial need were so substantial that she would be capable of exerting undue influence upon decedent. The threats were not idle upon decedent, and she viewed them as potent as testified to by the witnesses. In sum, all of the foregoing circumstances in their totality demonstrate the actual exercise of undue influence upon decedent.

Accordingly, the court sustains the objectant's undue influence objection and hereby denies probate to the propounded instrument.

With regard to the fraud objection, the objectants bear the burden of proof on the issue of fraud (see *Matter of Bianco*, 195 AD2d 457 [2d Dept 1993]). Actual fraud is the objection typically asserted in a probate contest. As to actual fraud, an objectant must demonstrate, by clear and convincing evidence, that a false statement was made which caused the testator to execute a will disposing of his property in a manner different than he would have if the statement had not been made to him (see *Matter of Beneway*, 272

App Div 463 [1st Dept 1947]).

Constructive fraud is defined as a "breach of duty, which irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence or injure public or private interests which the law deems worthy of special protection" (see *Brown v Lockwood*, 76 AD2d 721 [2d Dept 1980]; *Matter of Klenk*, 151 Misc2d 863 [Sur Ct Suffolk Co 1991]). "Unlike actual fraud, which requires knowledge on the part of the perpetrator of his false representation, constructive fraud emanates form the existence of a fiduciary or confidential relationship whereby the trusting party reposes a confidence in the guilty party and therefore the trusting party does not exercise the care and vigilance that ordinarily would be exercised in a given situation" (*Matter of Klenk).*

Constructive fraud has been applied in probate proceedings where the party has pleaded the necessity of the imposition of a constructive trust (see *Matter of Artope*, 144 Misc2d 1090 [Sur Ct Nassau Co 1989]; see also *Matter of Reede* [jury was correct in finding constructive fraud where an in terrorem clause which was improperly explained to the testator worked a forfeiture for the decedent's son and his children]).

Based upon a review of the evidence adduced at trial, the court finds that the objectant has failed to prove the existence of actual fraud or constructive fraud. Accordingly, the fraud objection is dismissed.

Settle decree.

The post-trial submissions reviewed by the court include:

(1) Petitioner's Post-Trial Memorandum of Law dated October 24, 2016; and

MATTER OF CAROLE PALMIERI
File No. 2012–1154

(2) Objectant's Post-Trial memorandum of Law dated October 25, 2016.

Dated: White Plains, New York
December, 28 2016

HON. THOMAS E. WALSH
Acting Surrogate – Westchester County

MATTER OF CAROLE PALMIERI
File No. 2012-1154

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